

**THE DOCTRINE OF POLITICAL QUESTION AND THE JUDICIAL PROTECTION
OF THE RIGHT TO HEALTH IN UGANDA**

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Plagiarism declaration

I, Joyce Freda Apio, declare that this dissertation is my own, original work and has never been presented to any other university or institution. Where other people's work have been used, due acknowledgement has been given and reference made.

Signature: JFA

Date: 30 October, 2012.

Dedication

To my late brother Patrick Okodi, nephews Stephen Odongo and Douglas Omedi, all who departed from this world in my absence while pursuing this programme. Your demise at tender ages motivated me to write on this subject. Rest in peace!

To my mother Mary Odongo, for giving birth to me and making me the woman I am today. You are a heroine! The best mother in the whole world!

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And to all those who contributed in one way or the other to this work, *Asante sana!*

List of abbreviations

ACHPR	African Charter on Human and People's Rights
ALP	AIDS Law Project
ARV	Antiretroviral
AU	African Union
AIDS	Acquired Immuno-Deficiency Syndrome
CEDAW	Convention on the Elimination of All forms of Discrimination Against Women
CEHURD	Centre for Health Rights and Development
CESCR	Committee on Economic Social and Cultural Rights
CLC	Community Law Centre
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
GC	General Comment
HIV	Human Immuno-Deficiency Virus
ICESCR	International Covenant on Economic, Social and Cultural Rights
MDG	Millennium Development Goal
PMTCT	Prevention of Mother-To-Child Transmission
PIL	Public Interest Litigation
RHU	Right to health Unit
SERAC	Social and Economic Rights Action Centre
TAC	Treatment Action Campaign
UN	United Nations
UDHR	Universal Declaration of Human Rights
WHO	World Health Organization

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Chapter One

General Introduction

1.1 Background

On 5 June 2012, the Constitutional Court (the Court) of Uganda dismissed a petition that sought to find whether the non provision of basic minimum maternal health care, non attendance and unethical conduct of health workers towards expectant mothers constituted a violation of the constitutional rights to health and life.¹ The petition *Centre for Health Rights and Development & 3 others v the Attorney General (maternal mortality case)*, argued that these acts and omissions were responsible for unacceptable high maternal mortality rates which are contrary to the Constitution to the extent that they infringe several rights guaranteed.² The Court however held that the issues raised in the petition constitute a political question, not a legal question for the Court to adjudicate.³ It advised the petitioners to pursue other remedies available in law such as compensation for damages under article 50 of the Constitution.⁴

This decision adopted the six-pronged *Baker v Carr*⁵ (*Baker's case*) test in which justiciability concept sieves out political questions from the legal questions for court's adjudication. According to *Baker's case*, a non-justiciable political question exists when there is:⁶

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 to 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.

Some activists have criticized the Courts' reliance on the political question doctrine, stating that, it is an antiquated doctrine, which should not impair the Court's

¹ *Centre for Health Rights and Development & 3 others v the Attorney General*, Constitutional Petition No.16 of 2011 (*Maternal Mortality case*).

² As above.

³ As above.

⁴ The Constitution, art 50(1), provides 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 which may include compensation'..

⁵ *Baker v Carr*, 369 US (1962)186, 82 S Ct 691, 710.

⁶ As above.

protection of constitutional rights, values and principles.⁷ Considering the fact that, over the years there has been an increasing international recognition of justiciability of the right to health among other socio-economic rights, the opinions of such activists may hold true. Further, as adopted by International Commission of Jurists' (ICJ) rule of law conference, courts have powers to exercise control over executive and legislative actions to an extent that:⁸

whenever the rights, interests or status of any person are infringed or threatened by executive action, such person shall have an inviolable right of access to the courts and unless the court be satisfied that such action was legal, free from bias and not unreasonable, be entitled to appropriate protection'.

Accordingly, courts can make orders that hold the executive accountable to its constitutional duties even if they would generate budgetary implications.⁹

The Ugandan case presents a fresh, yet an old debate on the justiciability of the right to health, a fundamental human right indispensable for the realization of other constitutionally guaranteed human rights and for living a life in dignity. More so, for a state that is party to the International Covenant on Economic Social and Cultural Rights,¹⁰ the decision leaves a lot to be desired.¹¹

As early as the 1970s, the Indian courts adopted a strategy to balance directive principles and fundamental rights both as salient features of the Constitution, making socio-economic rights including the right to health justiciable by giving them equal importance.¹² The Indian Courts have reasoned that to offer

⁷ Statement by M Mulumba, Executive Director Centre for Health, Human Rights and Development, 15 June 2012, <http://www.irinnews.org/Report/95659/UGANDA-Activists-to-pursue-maternal-health-case-against-government> (accessed 28 August 2012); Nakibuuka Noor Musisi, Coalition to stop maternal mortality <http://www.cehurd.org/2012/06/advocates-reject-constitutional-courts-ruling-that-it-has-no-competence-to-address-the-crisis-of-preventable-maternal-mortality-in-uganda-appeal-to-supreme-court-planned/> (accessed 29 August, 2012).

⁸ See International Commission of Jurists (ICJ) report, 'Control by the courts and the legislature over executive action, Judicial control', adopted in the Congress of Rio, 1962, Committee II A, in International Commission of Jurists, *The Rule of Law and Human Rights: Principles and Definitions* (Geneva: International Commission of Jurists, 1966) 15.

⁹ This was the position adopted in the *Minister of Health v Treatment Action Campaign and Others*, (2002) Case CCT 08/02 [TAC Case].

¹⁰ International Covenant on Economic, Social and Cultural Rights (1966), [The ESCR Convention] Uganda, ratified the ESCR Convention on 21 January, 1987.

¹¹ ICJ Congress of Delhi, in 1959, adopted a statement that 'Every legislature in a free society under the Rule of Law should endeavour to give full effect to the principles enunciated in the Universal Declaration of Human Rights'.

¹² *Minerva Mills v Union of India*, (1980) 6 SCC 325 [*Minerva Mills* case]; socio-economic rights were incorporated into fundamental rights to life, equality and liberty; See also, H Potts, 'Accountability and the Right to the Highest Attainable Standard of Health', Open Society Institute, Public Health

primacy of one over the other would be to disturb the harmony of the Constitution.¹³ Thus the directive principles are considered to complement and supplement fundamental rights in the Constitution.¹⁴ In 1997, following the promulgation of the 1996 Constitution, South African courts started enforcing the right to health.¹⁵ The most recent state to climb this ladder of progressive jurisprudence is Kenya following promulgation of a new constitution in 2010 and institution of comprehensive judicial reform.¹⁶ The jurisprudence of the courts in these countries has been guided by judicial control over executive and legislative functions. If the law provides for rights or benefits, and the executive fails to deliver them, judicial enforcement of rights could be seen as a means to reinforce the democratic decision of the legislature, rather than an invasion in the political sphere.¹⁷

However, countries such as Uganda appear to remain eclipsed to the doctrine of political question as a bar to justiciability of socio-economic rights for fear of overstepping their constitutional powers and breaching the doctrine of separation of powers.¹⁸ This has left the protection of the right to health frail, while preventable mortalities occur on a daily basis.¹⁹ Yet, in India, for example, the Courts have successfully adjudicated over the right to health among other socio-economic rights, by relying on provisions in its Directive Principles of State Policy (DPSP)

Programme, University of Essex, Human Rights Centre, 2008, Appendix I, case studies 3 and 4 – India, at 33–35.

¹³ As above (*Minerva Mills*) case.

¹⁴ Jagadish, 'Relation Between Part III And Part IV Of Constitution Of India-Changing Trends' (2012) <http://legalservicesindia.com/article/pdf/Relation-Between-Part-III-And-Part-IV-Of-Constitution-Of-India-Changing-Trends.pdf> (accessed 22 October, 2012)

¹⁵ The case on the right to health was *Soobramoney v Minister of Health* (Kwazulu-Natal) (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997).

¹⁶ The 2010 Kenyan Constitution; see the case of *Patricia Ochero & 2 others v Attorney General & Another*, Petition No.409 of 2009, Court found that intellectual property rights do not override the right to health and life.

¹⁷ Courts and the legal enforcement of economic, social and cultural rights: Comparative experiences of justiciability, International Commission of Jurist, *Human rights and rule of law series n.2* (2008) 80 ; This was the argument adopted in the *TAC* case.

¹⁸ Although one could argue that this is a lone case, these were the arguments advanced by the Constitutional Court (the second highest court in hierarchy, charged with constitutional interpretation) in the maternal mortality case, n2 above.

¹⁹ As above; 16 (sixteen) women die daily in childbirth in Uganda, according to Civil Society (CSOs) available at [http://www.healthy-action.org/fileadmin/user_upload/Studies_and_reports/Uganda/RHU - Health Action Papers - Saving Mothers.pdf](http://www.healthy-action.org/fileadmin/user_upload/Studies_and_reports/Uganda/RHU_-_Health_Action_Papers_-_Saving_Mothers.pdf) (accessed 22 October, 2012) and WHO reports.

embedded in the Constitution, without any fears of breaching the separation of powers doctrine.²⁰

The constitutional architecture of India is similar to Uganda in respect to the provisions of socio-economic rights. Uganda's Constitution dedicates a whole Chapter to the Bill of Rights, but, gives minimal attention to socio-economic rights.²¹ It provides for 'protection from deprivation of property, the right to work and participate in trade union activity, the right to education and the right to a clean and healthy environment.'²²

The right to health is included with other socio-economic rights that should typically be under the Bill of Rights in the Constitution's preamble under the National Objectives and Directive Principles of State Policy (NODPSP). These sets of objectives and principles are intended to provide guidance to all state's organs particularly the executive and non-state actors in interpreting the constitution and other laws and policy implementation.²³ The following are specifically provided for:²⁴

protection of the aged; provision of adequate resources for the various organs of government; prioritising the right to development; recognition of the rights of persons with disabilities; promotion of free and compulsory basic education; ensuring the provision of basic medical services; promotion of a good water management system; and encouraging and promoting proper nutrition and food security.

The right to health is arguably inferred from the provision of basic medical services read together with article 45²⁵ of the Constitution.²⁶

The object of relegating these rights in the NODPSP and not the Bill of Rights is questionable. It places these rights within the vicissitudes of political

²⁰ E Riedel, 'The human right to health: Conceptual foundations, in A Clapham & M Robinson *Realizing the right to health* (2009)26.

²¹ See chapter four.

²² Adjudication of these rights have not provoked a lot of controversy as their justiciability is more certain save that the decisions have in most cases left a lot to be desired, See L Sewanyana and T Awori, 'Uganda: The Long and Uncertain Road to Democracy' in Abdu Allah Ahmed Naim (ed), *Human Rights Under African Constitutions* (2003) 390.

²³ F Viljoen, *International human rights law in Africa* (2012) 551.

²⁴ National Objectives and Directive Principles of State Policy, Preamble to the 1995 Constitution, No.VII, VIII,IX, XVI, XIX, XX,XXI and XXII .

²⁵ Article 45 of the Constitution provides that, 'rights duties, declarations and guarantees relating to the fundamental and other human rights and freedoms specifically mentioned in this Chapter shall not be regarded as excluding others not specifically mentioned'.

²⁶ JC Mubangizi, 'The Constitutional Protection of Socio-economic rights in selected African Countries: A comparative study' (2006)2 *The Africa Journal of Legal Studies* 1-19.

controversy.²⁷ Other scholars have stated, this presents such rights as aspirational principles rather than enforceable rights and exacerbates the compromise to meaningful realization.²⁸ However, article 8A of the Constitution has been interpreted to give full legal effect to the NODPSD, implying enforceability of these rights.²⁹ Despite this, the Ugandan judiciary has proved disinclined to adjudicate over alleged violations of the right to health for fear of yielding to political questions as earlier mentioned.

The Ugandan position manifests a dire state of human rights protection in the hands of its own custodians and guardians – the judiciary. Elsewhere, scholars have described this as a situation of judicial imperialism³⁰ and other pro-activists have coined the political question into legal questions³¹ for purposes of protecting fundamental human rights. Roux, argues that an assumption that adjudication must always be legal is unnecessary and defeats the Constitutional Court's role in the maintaining the rule of law.³²

The political question obviously underpins the justiciability debate. The question of justiciability is one of the conventionally neglected issues in some states, that is, 'the ability to claim a remedy before an independent and impartial body when a violation of a right has occurred or is likely to occur'.³³ There exists two pronged debates on the question of justiciability of the socio-economic rights. While some contend that socio-economic rights are not justiciable at all,³⁴ others opine that, their justiciability is not feasible.³⁵ It has also been stated that, the right to health, in particular, is needs-based and requires adequate resources for it to be fulfilled. This brings in the notion of progressive realization, which some states have

²⁷ Above (n12).

²⁸ E Wiles, 'Aspirational principles or enforceable rights? The future for socio-economic rights in national laws' (2006-2007)22 *American University International Law Review* 35, 58; See also GV Bueren, 'Including the excluded: the case for social, economic and cultural human rights' (2002)1 *Public Law*, 456-472.

²⁹ Article 8A(1), 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.

³⁰ MR Geannette, 'Judicial Imperialism? The South African litigation, Political question doctrine and whether courts should refuse to yield to executive difference in alien tort claims, (2009)82 *Southern California Law Review*, 1001

³¹ T Roux, 'How political questions become legal questions', Presentation on law, language and politics in South Africa: The Impact of the Constitution (1 July 2006) 1.

³² As above.

³³ International Commission of Jurists 'Courts and the legal enforcement of economic social and cultural rights: Comparative experience of justiciability' (2008) 6.

³⁴ EC Christiansen, 'Adjudicating non justiciable rights: Socio-economic rights' (2007)38, *Columbia Human Rights Law Review* 464.

³⁵ As above.

interpreted to imply that, unlike civil and political rights, socio-economic merely represent programmes, or ‘promotional obligations, non-self-executing norms’, which leaves states with the discretion to operationalise international rights at national levels.³⁶ However, this misconception is considered archaic and rhetoric after the clarity provided in General Comment No.9, that states must use the minimum resources they have to address all health issues.³⁷

The modern debate on the subject of justiciability resolves around the question of institutional capacity and not legitimacy.³⁸ This path, asserts that judges do not have the technical capacity to decide on matters of education, health, food among other socio-economic rights. According to Sachs, the question of technical capacity is unfounded since respect for human right is a constitutional requirement for judges, which they have to fulfill.³⁹

A significant reality is that Uganda’s health care system is less than adequate,⁴⁰ yet the country’s nascent jurisprudence in protection of the right to health precedents retrogressive doctrinaire approach. This informs the focus of the study on Uganda and its overlapping significance to jurisdictions with analogous approach to explore stronger protection for the right to health.

1.2 Problem statement and research questions

One of the most conspicuous socio-economic challenges in Uganda is realization of basic health care. The health sector is one of the most underfunded sectors in Uganda in breach of minimum requirements under various instruments. This has resulted into despicable health services and incalculable preventable mortalities.⁴¹ Yet health as a right has gained minimal advancement towards its judicial

³⁶ Riedel, (above 20)29.

³⁷ As above; Convention on ESCR, General Comment N° 9, 19th sess, 1998, UN Doc. E/C.12/1998/24 (1998), para. 2 on domestic application of the Covenant.

³⁸ C Mbazira, *Litigating Socio-Economic rights in South Africa: A choice between corrective and retributive justice* (2009)28.

³⁹ A Sachs, Judicial enforcement of socio-economic rights: the Grootboom case in P Jones & S Kristin, *Democratizing Development: The Politics of socio-economic rights in South Africa* (2005) 140.

⁴⁰ This has resulted into high rate of preventable mortality, in reproductive health section alone, 80% of maternal deaths are caused by severe bleeding, infections, unsafe abortion, high blood pressure and obstructed labor. An untreated HIV contributes to about one in four maternal deaths; See also, ‘The Tragedy of Uganda’s health care system, ACODE (2010) http://www.acode-u.org/documents/infosheet_9.pdf (accessed 29 August 2012).

⁴¹ WHO and NGOs’ Statistics (above n 19).

protection.⁴² An attempt to seek judicial protection by victims has been futile.⁴³ Since the promulgation of the 1995 Constitution, only a single case involving the right to health has come before the Ugandan courts.⁴⁴ The major impediment to adjudication of the right to health is the fear of yielding to the political questions, a terrain envisioned an executive reserve.⁴⁵

This study seeks to answer the question: Whether the political question doctrine is an absolute bar to the judicial protection of the right to health in Uganda? In responding to the above question four sub questions will be addressed:

1. What is the framework for the protection of the right to health?
2. What is the theoretical scope for justiciability of the right to health in Uganda?
3. What is the effect of the political question doctrine on the justiciability of socio-economic rights?
4. What role does the judiciary play in the protection of the right to health?
5. What lessons can Ugandan judiciary learn from other jurisprudence where socio-economic rights have been adjudicated?

1.3 Major assumptions underlying the study

The following assumptions underline this study:

- i. That the framework for the protection of the right to health exist both internationally and domestically;
- ii. The theoretical scope for the justiciability of the right to health in Uganda is narrow and for that matter, a lot of doubts is casted on its justiciability;
- iii. The political question doctrine is one of the bars to judicial enforcement of the right to health in Uganda;
- iv. The role of the judiciary in the protection of the right to health has been less than adequate and;

⁴² Save for the national human rights commission that established the right to health unit to offer quasi judicial protection to victims of violations of the right, the courts have not enforced the right to health since the 1995 constitution order was ushered.

⁴³ *Maternal Mortality Case* (above n1), see Court's findings.

⁴⁴ As above; the current Constitution came into force in 1995.

⁴⁵ As above.

- v. The proactive approach from progressive jurisprudences has enormous potential to influence the judicial protection of the right to health in Uganda.

1.4 Objectives of the study

The overall objective of this study is to challenge the political question doctrine and evaluate the role of the judiciary in the protection of the right health in Uganda. To offer in-depth study, the overall study has divided into the following specific objectives:

- i. To ascertain the constitutional status for protection of the right to health in Uganda;
- ii. To evaluate the extent to which the judiciary exercise control over executive and legislative power;
- iii. To identify and critique the approach adopted by the judiciary if any in the enforcement of the right to health in Uganda.
- iv. To explore judicial progressive approaches to ensure enforcement of the right to health in Uganda.
- v. To identify the roles other stakeholders can play to support and enhance the protection of the right to health by the judiciary.

1.5 Literature review

A myriad of scholarship has been expended on the subject of socio-economic rights in Africa though only minimal work has been directed specifically on the right to health in Uganda. Mubangizi,⁴⁶ in a comparative study in selected African countries⁴⁷ argues that the inclusion of the right to health in the NODPSP, accounts for the judicial reluctance in the protection of the socio-economic rights. He correctly observes that the National Human Rights Commission has been more active in the protection of the socio-economic rights than the courts of judicature in Uganda.⁴⁸ However, his writing does not deal with the doctrine of political question and how the how the judiciary can accord protection to the right to health in

⁴⁶ Mubangizi, (above n26) 1-19.

⁴⁷ South Africa, Zambia, Namibia, Uganda inclusive.

⁴⁸ In 2008, the Uganda Human Rights Commission established the Right to Health Unit.

Uganda. Twinomugisha,⁴⁹ emphasizes the immense role of the judiciary in the protection of human rights including socio-economic rights such as the right to health, dispelling the notion that such rights are non justiciable. His view is shared by Mbazira,⁵⁰ who recognises socio-economic rights as justiciable dispelling the monopoly initially enjoyed exclusively by civil and political rights. Both their works do not focus on the doctrine of political question and how courts can deal with this dilemma to protect the right to health.

Roux,⁵¹ presents an inspiring approach of 'how political questions become legal questions' he however focuses on South Africa and based his analysis on the impact of the Constitution. Geannette,⁵² questions why Judges should refuse to yield to the executive difference and the political question doctrine. He however limits his writing to alien tort claims focusing on South Africa. Riedel⁵³ presents a broad foundational concept of the right to health and issues of justiciability. His writing is not directed on the political question doctrine neither focuses specifically on Uganda. Scott and Macklem observes that, 'courts create their own competence...the courage to be creative depends on a conviction that the values at stake are legitimate concerns for the judiciary.'⁵⁴ Considering the fact judicial pronouncements give full effect to the rights guaranteed in domestic and international instruments, Scott and Macklem views are of significant importance. Like other scholars mentioned above, their focus is not on Uganda.

Otim,⁵⁵ argues that enforcement of socio-economic rights is dependent on the state's political will however good and realistic the policies and laws are. Otim's focus like Mubangizi's is general on all socio-economic rights. The literature that comes close to the subject of this study is that authored by Sachs,⁵⁶ who distinctively discusses how the boundaries can be drawn to preserve separation of

⁴⁹ BK Twinomugisha, 'The role of the judiciary in the promotion of democracy in Uganda' (2001) 9 *African Human Rights Law Journal* 3.

⁵⁰ C Mbazira, *Litigating Social Economic Rights and Judicial activism in Uganda*, HURIPEC Working Paper (2009) 79.

⁵¹ Roux, (above n31)1.

⁵² Geannette, (above n30) 1002.

⁵³ Riedel, (above 20) 29-30.

⁵⁴ C Scott & P Macklem, 'Constitutional Ropes of Sand or Justiciable Guarantees?' (1992)141 *University of Pennsylvania Law Review*, 35-36, cited in Aoife Nolan, 'The Justiciability of Social and Economic Rights: An Updated Appraisal, (2007).

⁵⁵ DB Otim, 'The state and the protection of economic and social rights: A case of Uganda' <http://www.freeonlineresearchpapers.com/protection-economic-rights-uganda> (accessed 10 August 2012).

⁵⁶ Sachs, (above n39).

powers while enforcing socio-economic rights. He exclusively discusses South Africa's approach generally to the judicial protection of socio-economic rights. Sachs' work is very significant but since enforcement of socio-economic rights is not 'a one size fit all', the study on Uganda remains germane.

In view of the above, this study specifically addresses the political question doctrine as a bar to the judicial protection of the right to health in Uganda. It contributes to the justiciability debate. Its' focus on the political question doctrine is an attempt to explore how different jurisprudence have responded to this apparent challenge to the judicial protection of the right to health in Uganda. No research has been undertaken specifically on the political question doctrine and the role of the judiciary in Uganda. Accordingly, some original thinking will be generated.

1.6 Significance of the study

The judiciary is constitutionally tasked as custodians of human rights. The focus of this study on Uganda is crucial considering the glaring concerns in the realization of the right to health and the momentum to achieve judicial enforcements in situations of breach. Further still, the anachronism that, the right to health enforcement is a political question and hence a preserve of the executive exists as a bar to the judicial protection.

The study therefore, explores the potential of judicial protection of the right to health as a fundamental human right in Uganda. It examines the Constitution in respect of international human rights instruments which binds Uganda. It draws inspirations by way of comparison with progressive jurisprudence. It explores different roles required to be played by different institutions to support the judiciary in the protection of the right to health. It makes a case for the judiciary to adopt a proactive approach to attain protection of the right to health in Uganda. The study will be a reference for different stakeholders in the performance of their work especially the civil society while undertaking further research and advocacy on the subject.

1.7 Research methodology

The study will be based on desk research and use of internet. Specific provisions and principles will be looked at in the Ugandan Constitution together with the

relevant government policies. The study will involve a review of judicial decisions, relevant international and regional human rights instruments, treaty body recommendations, NGO reports, media, and academic journals among others. Comparative data analysis will be employed on the existing literature to ensure consistency and complementarity in some instances.

1.8 Limitations of the study

This study is limited to the role of the judiciary in the protection of the right to health in Uganda. However, since there is hardly any jurisprudence on the right to health in Uganda, references will be made to other jurisdictions and instruments to shed light and draw inspirations on the subject under discussion. However, the analysis does not include extra-judicial factors necessary for the enforcement of the right to health since this is a purely judicial debate. The study also limits its references to only maternal health cases to illustrate the serious health concerns affecting the health sector

1.9 Overview of chapters

In addition to an introductory chapter, the study has three main chapters and a concluding chapter. Chapter two examines the theoretical concept of political question doctrine versus the concept of indivisibility of human rights as a premise for justiciability of the right to health. It also contains the international human rights framework governing the right to health. It evaluates UN treaties body and regional systems, treaties bodies' recommendations and special mechanisms. It highlights the scope of the right health in the Ugandan Constitution.

Chapter three addresses the subject of the doctrine of political question and its effect on the judicial enforcement of the right to health. It reviews the origin, scope and purpose of the doctrine. It gives a reflection of the courts duty to adjudicate and evaluates the doctrine of political question amongst other concerns as a bar to justiciability of the right to health and its impact on human rights adjudication.

Chapter four looks at the role of the Ugandan judiciary to ensure the protection of the right to health. It looks at human rights and review cases on protection of the right to health where judicial reviews have been considered. It also explores potential avenues for judicial protection of human rights in the absence of direct constitutional provisions in the bill of rights. It looks at the different roles other stakeholders can play to support the judiciary to accord protection to the right to health.

Chapter five is the concluding chapter. It proposes constitutional amendment to include an explicit provision of the right to health in the Bill of Rights and a proactive approach through peer learning to attain a solid protection of the right to health in Uganda.

Chapter Two

Theoretical and legal framework for protection of the right to health

2.1 Introduction

The right to health constitutes one of the fundamental human rights inevitably crucial for the enjoyment of all other human rights and for living a life in dignity.⁵⁷ This significant recognition led to the inclusion of this right in a number of international and regional human rights instruments, explicitly providing for the right to health and imposing obligations on states to fulfill. Categorized as a socio-economic right, the realization of the right to health is largely progressive in nature;⁵⁸ however, other immediate obligations are incumbent upon states.⁵⁹ But unlike their counter-parts the civil and political rights, only a few states have expressly included the right to health in their bill of rights. The trend in progressive jurisprudence has been that the right to health is read-in the rights directly protected under the bill of rights in the constitution.⁶⁰ This trend emanates from the fundamental principle that all human rights are indivisible, interrelated and interdependent. Consequently, state parties are obliged to respect, protect and fulfill all rights. However, in respect to the right to health, a chasm exists between ratification⁶¹ and observance, an issue abetted by the persistent tension between indivisibility and political question doctrine.

This chapter explores arguments for justiciability of all human rights on the premise of indivisibility concept of human rights against the political question doctrine. It reviews the protection of the right to health under international human rights framework; the UN system, especially the Universal Declaration of Human Rights (Universal Declaration), the Covenant on ESCR and other relevant UN conventions. It also reviews protection under the African regional human rights system. It then explores the scope of protection of the right to health under the Ugandan Constitution. The chapter concludes by drawing inspirations from international and regional systems to enhance protection of the right to health in

⁵⁷ ESCR General Comment No14, para 1, <http://www.unhchr.ch/tbs/doc.nsf/%28symbol%29/E.C.12.2000.4.En> (accessed 15 September 2012); See also Preamble, World Health Organisation (WHO) Constitution.

⁵⁸ ICESCR, art 12(2).

⁵⁹ The state is to develop policies and programs of promotion, prevention, treatment and rehabilitation as meet the minimum core obligation.

⁶⁰ India, is an example of this practice.

⁶¹ In some cases and extent domestication, when provided in the national laws.

Uganda. The chapter assumes that the legal framework for protection the right to health in Uganda exists.

2.2 Political doctrine question *versus* justiciability and indivisibility concepts

All human rights are universal, indivisible and interdependent and related. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.⁶²

To date, the position that protection of socio-economic rights is a policy reserve for the executive arm of government persists in some jurisprudence. While this position is conceived as antiquated, perennial tension continues to exist between the political question doctrine and justiciability of socio-economic rights. While the former holds that, determination of socio-economic rights are a reserve of the executive and any judicial enforcement would infringe on the doctrine of separation of powers; the latter holds that human rights are indivisible, interrelated and interdependent and should be accorded equal protection, intrinsically implying all human rights are justiciable. The concept of indivisibility of human rights originates from the Universal Declaration of Human Rights.⁶³ This is premised on the argument that:⁶⁴

...without civil and political rights the public cannot assert their economic, social and cultural rights. Similarly, without livelihoods and a working society, the public cannot assert or make use of civil or political rights.

Some states have only enforced civil and political rights as rights legally enforceable, arguing that socio-economic rights are vague and ideologically divisive. As the UN Special Rapporteur, El Hadji Guisse noted, ‘the fear and hypocrisy of former have rapidly become a source of grave violations of socio-economic and cultural rights’.⁶⁵

⁶² Vienna Declaration and Programme of Action, World Conference on Human Rights, (1993), later endorsed at the World Summit in New York, (2005) para 121.

⁶³ This is demonstrated by the mere inclusion of both civil and political rights and socio-economic and cultural rights as universal rights.

⁶⁴ Howard-Hassmann, Rhoda E ‘The Full-Belly Thesis: Should Economics Rights Take Priority Over Civil and Political Rights? Evidence from Sub-Saharan Africa’ (1983). *Political Science Faculty Publications*, Paper 17.

⁶⁵ El Hadji Guisse, ‘The realisation of economic social and cultural rights: final report on the question of impunity of perpetrators of human rights violations’, 49th Sess, UN Doc E/CN.4/Sub.2/1997/8 (1997), <http://www.derechos.org/nizkor/impu/guisse.html> (accessed 13 September 2012).

A majority of the African states are eclipsed to this rhetoric idea towards the implementation of socio-economic rights, yet it is acknowledged that, ‘socio-economic rights are the only defence to millions of impoverished people and groups all over the world’.⁶⁶ It is therefore essential to awake courts to their roles as guardians of human rights and custodians of justice and not ‘timorous souls’ who cannot defend the Constitution. This would require that courts refrain from antiquated doctrinaire position that only shields the executive from accountability on their obligations and perpetuates abuses.

2.3 Protection of the right to health under international human rights systems

More often, domestic systems have offered less adequate protection to the right to health and human rights generally. As a result, international human rights systems have made more impact on the domestic sphere of human rights. Both the United Nations (UN) and the African Union (AU) have developed a myriad of instruments that reinforce domestic observance of human rights. By development of these instruments the systems have each established various mechanisms to further entrench the protection of human rights on the globe.

2.3.1 UN human rights system

Protection of the right to health has been given enormous recognition under the UN system. The initial step was its inclusion in the international bill of rights drafted by the UN Human Rights Commission (now replaced by the Human Rights Council). The bills of rights include the Universal Declaration of Human Rights (Universal Declaration)⁶⁷ and the International Covenant on Economic, Social and Cultural Rights (the Covenant or Covenant on ESCR).⁶⁸ The Universal Declaration enumerates main guidelines for international human rights principles while the Covenant on ESCR transforms these rights into legally binding document setting parameters for implementation by states parties. This part looks at provisions

⁶⁶ R Kunnemann, ‘A coherent approach to human rights’ (1995) 17 *Human Rights Quarterly* 323, 332 cited in SC Agbakwa, Reclaiming humanity: Economic Social and Cultural Rights as the cornerstone of African human rights, (1995) 5 *Yale Human Rights and Development Law Journal* 178.

⁶⁷ Universal Declaration, GA Res 217A UN GAOR, 3rd sess, 1st plen mtg, U.N. Doc A/180 (12 Dec 1948) <http://www.unhcr.ch/udhr/lang/eng.pdf> (accessed 18 September 2012).

⁶⁸ The Covenant on ESCR, GA Res 2200A (XXI) UN GAOR supp (no 16) UN Doc A/6316 (16 December 1966), <http://www2.ohchr.org/english/law/cescr.htm> (accessed 18 September 2012).

recognizing the right to health in the Universal Declaration and consequently in the Covenant on ESCR as well as other relevant UN conventions and the treaty monitoring mechanisms.

Universal Declaration of Human Rights

The Universal Declaration avers that ‘the recognition of inherent dignity...of the equal and inalienable rights...of human family is the foundation of freedom, justice and peace in the world’.⁶⁹ Despite being a non binding resolution, the Universal Declaration is considered to have attained customary international law force⁷⁰ and as a result its principles are being used in numerous courts both at national and international levels. The provisions in the Universal Declaration have also been embraced in a number of treaties and national legislations.⁷¹

The Universal Declaration includes both socio-economic rights and civil and political rights, re-affirming their indivisibility. Distinctively, the right to health features as one of the socio-economic rights in its article 25.⁷² This article gives an inclusive recognition of the right to health underscoring not only the indivisibility concept but also the indispensable importance of the right to health as a basis for the enjoyment of other human rights. Further, the preamble to the Universal Declaration states that:⁷³

...if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.

This evidences the foreseeability of recourse to judicial protection by the Universal Declaration as an ultimate defense for all human rights.⁷⁴ Moreover article 30 clearly states that the interpretation of the Declaration should not be done in a way that divests the enjoyment of the rights provided, making a firm ground for protection of all human rights.

⁶⁹ As above, preamble.

⁷⁰ O Ball & P Gready, *The no-nonsense guide to human rights*, Oxford: New Internationalist, (2006) 42.

⁷¹ As above.

⁷² Universal Declaration, art 25 provides that, ‘everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care...’

⁷³ Preamble to the Universal Declaration of Human Rights (1948) clause 3.

⁷⁴ MA Glendon, ‘The rule of law in the Universal Declaration of Human Rights’ (2004)2 *Northwestern University Journal of International Human Rights* 2.

International Covenant on Economic Social and Cultural Rights

The Covenant on ESCR is the principal international instrument providing for the protection of the right to health. Upon entry into force in 1976, it commits states parties⁷⁵ to work towards realization of other rights ally to the right to health, such as the right to work, housing, education and adequate standard of living since the right to health cannot be realized in a vacuum.

In respect to the economic demands of such rights, the Covenant on ESCR incorporates the principle of progressive realization in its article 2. It which obliges states parties to:⁷⁶

take steps... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

This principle imposes a continuous obligation on states parties to work towards full realization of the right to health amongst other rights in the treaty.⁷⁷

The Covenant is monitored by the UN Committee on ESCR.⁷⁸ The Committee has issued a number of general comments, but most significant, it has been hailed for its groundbreaking and compelling interpretation of the normative content of the right to health in its General Comment No14 (GC 14)⁷⁹ as a milestone. The right to attainable health standard includes:⁸⁰

medical care, access to safe drinking water, adequate sanitation, education, health-related information, and other underlying determinants of health; it includes freedoms, such as the right to be free from discrimination and involuntary medical treatment, and entitlements, such as the right to essential primary health care.

⁷⁵ The Covenant on ESCR has been ratified by 160 states as of August 2012, Uganda is a party to the Covenant since 1987.

⁷⁶ Covenant on ESCR Art 2(1).

⁷⁷ Covenant on ESCR General Comment No.3, para 9, UN OHCHR. 14 December 1990, [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CESCR+General+comment+3.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CESCR+General+comment+3.En?OpenDocument). Retrieved (14 September 2012).

⁷⁸ It was established by the Economic and Social Council (ECOSOC Council) following the failure of two previous monitoring bodies, Res 1985/17.

⁷⁹ Covenant on ESCR General Comment No.14 (CESCR General Comment 14), highest attainable standard of health 11 August 2000 <http://www.unhchr.ch/tbs/doc.nsf/%28symbol%29/E.C.12.2000.4.En> (accessed 18 September 2012).

⁸⁰ Health systems and the right to health: an assessment of 194 countries, LANCET Vol.372 (2008) 2049.

Accordingly, a meaningful realization of this right encompasses accessibility, availability, affordability and culturally acceptable health facilities and services.⁸¹ The clarity of definitions provided by GC 14 is important for drawing parameters for 'states obligations, identifying violations and establishing criteria for enforcements'.⁸² The ESCR Committee has also expounded a more liberal approach in interpreting the right to life to entail critical health concerns. In its General Comment No 6, the Committee stated that:⁸³

The expression "inherent right to life" cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.

The Committee also receives and examines reports from states on how rights are being implemented and provides recommendations in the form of 'concluding observations'.⁸⁴ However, the Committee is yet to hear complaints upon entry into force of its Optional Protocol.⁸⁵

One of the significant challenges faced by the Committee is delayed reporting by States. Uganda is one state at reporting default, with now a backlog of 6 reports over 25 years.⁸⁶ Some states have complained of the over burdensomely reporting requirements by the different treaty bodies, however, these seem to have been addressed by the expanded time interval for reporting. The Covenant on ESCR requires states to report first after two years upon ratification or accession and thereafter in an interval of 4 years periodically.⁸⁷ The reporting burdensome claim cannot be a justification for persistent default in submission of reports by states such as Uganda.

⁸¹ Covenant on ESCR General Comment No14, Pannel 1 summaries.

⁸² LO Gostin, 'The human right to health: a right to the "highest attainable standard of health'. *Hastings Cent Rep* (2001) 31(2).

⁸³ Covenant on ESCR Committee's General Comment No 6 para 5

⁸⁴ <http://www2.ohchr.org/english/bodies/cescr/> (accessed 15 September 2012).

⁸⁵ Optional Protocol (GA resolution A/RES/63/117), The Optional Protocol will enter into fore when 10 states have ratified or acceded to it. Currently 40 States have so far signed but only 8 have ratified.

⁸⁶ UPR Stakeholders' Report, Uganda 2011, www.hurinet.org (accessed 28 October, 2012).

⁸⁷ Covenant on ESCR, art 2(2).

2.3.2 Other Conventions and Resolutions

Under the UN framework, several other instruments have been developed that emphasize the provision of the right to health for special groups. They include the Convention on the Right of the Child (CRC); Convention on the Rights of Persons with Disabilities (CRPWD) and Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Also highlighted in this section are some of the treaty body resolutions or recommendations and special mechanisms employed by the UN system for monitoring compliance.

The CRC guarantees the highest attainable standard of health for children and provision of facilities for the treatment.⁸⁸ It requires states parties also to initiate measures to reduce infant and child mortality, and to ensure that all children have access to health care services.⁸⁹

The CRPWD is yet another instrument which specifically guarantees that people with disabilities enjoy the right to the highest attainable standard of health without discrimination on the basis of disability, and requires states to take all appropriate measures to ensure access for persons with disabilities to health services that are gender sensitive, including health-related rehabilitation.⁹⁰ The CEDAW obliges states parties to take appropriate measures to eliminate discrimination more specifically against women on health issues.⁹¹

The UN has also issued a number of resolutions calling upon states to undertake efforts to address crucial health concerns and improvement of health services in their countries. These array of efforts are geared towards protection of the right to health in the most meaningful and realistic manner to ensure human dignity for all.⁹²

The UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health serves a thematic mandate on the subject. The Special Rapporteur has submitted a number of reports to the HRC, calling for enhanced protection of the right to health in many states.

⁸⁸ Convention on the Rights of the Child (CRC), art 24(1).

⁸⁹ CRC, art 24(2).

⁹⁰ Convention on the Rights of Persons with Disabilities (CRPWD), art 25.

⁹¹ The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), art 12.

⁹² Includes, Resolution on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health 2005/24, 15 April 2005, UN Doc. E/CN.4/RES/2005/24; 58/173, 10 March 2004, UN Doc A/RES/58/173; 2004/27, 16 April 2004, UN Doc. E/CN.4/RES/2004/27.

On a recent visit to Uganda, the Special Rapporteur - Anand Grover undertook a study on challenges of accessing medicine in Uganda⁹³ and is yet to release the report.

2.3.3 International standards for the protection of right to health

The protection of the right to health is premised on the concept of human values and dignity that motivate it; the minimum core values, equality (non-discrimination), freedoms among others forming an integral part of human dignity.⁹⁴ States parties are obliged to comply with these set standards in the process of interpretation and enforcement of human rights. Below is an explanation of what these standards imply in terms of the right to health.

Equality and non discrimination

States parties are obliged individually to guarantee that ‘the rights enunciated in the present Covenant will be exercised without discrimination of any kind.’⁹⁵ Accordingly, equality and non discrimination constitute salient elements underlying fulfillment of international human rights law and realization of fundamental human rights. As pointed out by the Committee on ECSCR General Comment No 20, ‘entrenched historical and contemporary form of discrimination’ undermines fulfillment of socio-economic rights.⁹⁶ This includes enjoyment of the right to health.

Minimum core obligations

The minimum core obligation principle is qualified as a yardstick to ensure immediate actions by states parties to the Covenant on ECSCR to guarantee respect for minimum survival of all human beings irrespective of the available resources.⁹⁷ Indeed the ESCR Committee General Comment No 3 adopted this minimum threshold approach whereby certain standards have to be met by states irrespective

⁹³ <http://www.afronets.org/archive/201208/msg00038.php>

⁹⁴ See preamble, objectives and purpose of ICESCR, giving full legal status to all socio-economic rights, borne of a legally binding treaty; See also J Moreno ‘The International Covenant on Economic, Social, and Cultural Rights’ in F Isa and K Feyter (eds) International protection of human rights: Achievements and challenges (2006) 159.

⁹⁵ Covenant on ESCR art 2(2).

⁹⁶ ESCR Committee General Comment No 20.

⁹⁷ First articulated by the Limburg Principle No 25.

of availability of resources to ensure realization of rights.⁹⁸ In respect to the right to health for instance, policies and programs of ‘promotion, prevention, treatment and rehabilitation’, have to be developed to meet obligations.⁹⁹ In extreme cases of economic crisis, states have to demonstrate that its failure was beyond its control.¹⁰⁰ The minimum core obligations also require that courts intervene in situations where individual’s life fell beneath the minimum core standards compatible with the values of human dignity.¹⁰¹

2.3.4 Special mechanisms

The Universal Periodic Review

The Universal Periodic Review (UPR) is the most recent mechanism initiated by the UN the under Human Rights Council (HRC) to review human rights records of all UN member states.¹⁰² Designed to ‘prompt, support, expand promotion and protection of human rights’,¹⁰³ the UPR provides a unique avenue for peer review based on equality of states to evaluate compliance with treaty obligations. The observance of the right to health has often featured in the evaluation process at interval. At Uganda’s last review in October 2011, it was questioned on its appalling state of the health system. In response, Uganda pledged to address the concerns and report back during its next review.¹⁰⁴ Despite these recommendations bearing a non binding force, they serve to articulate protection of rights in international framework and exert pressure on states to improve their human rights record.

⁹⁸ ESCR Committee General Comment No3 p174-177.

⁹⁹ As above.

¹⁰⁰ MCR Craven, ‘The International Covenant on Economic, Social and Cultural Rights: A perspective on its development’, *Oxford: Clarendon Press* (1995) 141-43.

¹⁰¹ Sachs, (above n39) 148.

¹⁰² The UPR was established by the Human Rights Council in 2007 after the GA Resolution 60/251 in 2006.

¹⁰³ See facts about the UPR, <http://www.ohchr.org/en/hrbodies/upr/pages/BasicFacts.aspx> (accessed 4 October, 2012).

¹⁰⁴ See report on Informal discussions and recommendations, UPR, Oct 11-12th 2012, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/150/15/PDF/G1115015.pdf?OpenElement> & http://reproductiverights.org/sites/crr.civicaactions.net/files/documents/crr_Uganda_UPRrecs.PDF (accessed 4 October 2012).

2.4 African regional human rights systems

The adoption of the African Charter on Human and Peoples Rights (the African Charter) in 1981 by the Organisation of African Unity (OAU) ushered the regional human rights system for the protection and promotion of human rights. The Charter established the African Commission on Human and Peoples' Rights (the African Commission or the Commission) with a dual mandate of promoting and protecting rights enshrined in the Charter. In its protective mandate, the Commission receives and considers communications from individuals or groups. It also receives both state and NGO reports to check compliance with obligations under the African Charter.

The Charter has been commended for its inclusion of socio-economic rights alongside civil and political rights.¹⁰⁵ This unique feature of the African Charter underscores yet again the indivisibility of all human rights protected under the various treaties. However, its explicit inclusion of socio-economic rights has been minimal. The right to health is one of the few rights explicitly recognized in the Charter in article 16.¹⁰⁶

Before the African Commission, the protection of socio-economic rights has received inadequate attention except in the *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria (SERAC case)*,¹⁰⁷ where it widely addressed the issue, giving recognition to rights not expressly included in the African Charter. The *SERAC* case involved the destruction of Ogoni land by Shell in collaboration with the Nigerian government. The Commission found that the right to health implicitly included the right to 'housing or shelter'. In reaching the decision, the Commission reasoned that the Ogoni constituted a 'people'. While this approach could be criticized for compromising legal certainty, the Commission is commended for its creativity and pro-activeness, giving full effect to the Charter provisions.¹⁰⁸ In adopting this approach, the Commission accentuates and values the indivisibility of all human rights.

¹⁰⁵ M Killander and C Heyns, 'The African human rights system' in Felipe Gomez Isa and Koen de Feyter (ed) *International human rights law in a global context* (2009) 516.

¹⁰⁶ Others are the right to work (art 15) and the right to education (art 17); Some prominent rights are not expressly provided such as the right to housing, food, water and social security.

¹⁰⁷ *Social and Economic Rights Action Centre (SERAC and Another) v Nigeria (2001) AHRLR 60 (ACHPR 2001)*.

¹⁰⁸ M Killander & C Heyns, (above n105).

The Commission has also made special resolutions in regards to the socio-economic rights and specific health concerns in the region. This includes the Pretoria Declaration on Economic, Social and Cultural Rights in Africa,¹⁰⁹ which recognized the indivisibility, interdependence and universality of human rights, calling for urgent judicial and administrative protection and promotion.¹¹⁰ It also re-stated the normative content of the right to health as provided under article 16 of the Charter, which includes ‘availability of accessible and affordable health facilities, goods and services of reasonable quality for’.¹¹¹

The Commission also made a resolution on maternal mortality in Africa¹¹² (the Abuja Declaration) declaring that preventable maternal mortality is a violation of women’s right to life, dignity and equality as provided for under the African Charter and the Protocol to the Charter on the rights of Women in Africa. The Declaration requires that states allocate 15% of their national budgets to the health sector amidst other recommendations.¹¹³ Resolution on access to health and needed medicines in Africa has also been made by the Commission. Access to medicines forms an essential element of the right to health. The resolution calls for fulfillment of states duties in respect to access to medicines.

These resolutions offer clarity on fulfillment of human rights obligations and draw parameters indicating when states are in violations. A distinct element in the language of the Commission in the Abuja Declaration is the express assertion that preventable maternal mortality is a violation of women’s right to life, dignity and equality. This clarification is of fundamental importance to support judicial enforcement of the right to health and its nexus with other rights.

¹⁰⁹ The Declaration was adopted in 2004 and endorsed by Commission at its 36th Session in December 2004, reproduced in Heyns & Killander, ‘Compendium of key human rights documents of the African Union’ (2010) 397-399.

¹¹⁰ As above, preamble.

¹¹¹ As above, para 7.

¹¹² The Abuja Declaration, November 2008.

¹¹³ See argument of counsel for CEHURD (above 1), ‘The Ugandan Government presently spends only on US\$ 0.50 per capita on maternal and newborn health care instead of the minimum US\$1.40 per capital set in the mother-baby package, and the funds allocated to the Health Sector are too inadequate to fund the Uganda National Minimum Health Care Package. This contravenes objective Xiv and Article 8A of the constitution’

2.5 The protection of the right to health in the Ugandan Constitution

The discussions under this section will be limited to provisions relating to protection of the right to health as more in-depth discussion, analysis and proposals will be made in chapter four.

The Constitution is the supreme legal statute of Uganda, with a binding force on all social, political, legal and economic authorities and systems in the nation.¹¹⁴ It designs benchmarks for good governance, freedoms, liberties, socio-economic welfare and protection of rights in Uganda.

The right to health is provided for as a social and economic objective under the NODPSP, framed ‘access to medical services’ in objective principle xiv. A combined reading of this provision together with article 45 and 8A acknowledges the right to health as a justiciable right. Article 45 recognizes other rights not expressly provided for under the Bill of Rights in Chapter four and 8A gives full legal force to the objectives and principles listed in the NODPSP.

Despite the manner in which the right to health is provided for in the Constitution, it is the duty of the courts to give contextual and purposive interpretation, conferring full effect to it as a living instrument. More so, in its article 50, the Constitution provides an avenue for recourse to courts if one claims his or her fundamental or other rights and freedoms have been infringed.¹¹⁵

The right to health is thus justiciable under this existing framework. The arguably narrow and vague scope in the NODPSP is enhanced by the inclusion of article 8A as illustrated above.

2.6 The relevance of international human rights law for the realization of the right to health in Uganda

A meaningful and effective implementation and enforcement of human rights law can only be achieved at domestic level.¹¹⁶ Judicial protection before international and regional mechanisms is strictly entertained upon exhaustion of local remedies. This makes international human rights system supplementary to national systems.

The international human rights system continues to shape the observance of the right to health by designing and adopting measures for states to comply with.

¹¹⁴ The Ugandan Constitution, art 2(1).

¹¹⁵ The Constitution, art 50(1).

¹¹⁶ F Viljoen *International human rights law in Africa* (2007)10.

Even when realization of the right to health is considered progressive, states are obliged to undertake certain immediate obligations. These include developing legal and policy frameworks to give full effect to the treaty.¹¹⁷ This effort has served to surmount the prejudice about the non justiciability of the right to health. These systems also demonstrate the indivisibility of human rights and indispensable importance of the right to health as a basis for the enjoyment of other rights. Governance structures have been able to embrace human rights and cultivate a culture of dignity at domestic levels as a result of the intrusion of the international human rights systems.¹¹⁸ This gives legitimacy to claims and should encourage domestic judicial protection of the right to health.

2.7 Conclusion

This chapter has illustrated the existing legal framework for protection of the right to health. The different international and regional instruments mechanisms affirm the indivisibility of all human rights and the need for their equal protection before all arms of government especially the judiciary. The meaningful realization of the right to health depends on the ‘effective’ judicial enforcement and oversight over governments’ commitment to international and national laws.

¹¹⁷ Viljoen (as above)32.

¹¹⁸ Nhampossa, ‘Challenges of implementation and enforcement of socio-economic rights in Mozambique’ (2009)19.

Chapter Three

The effect of the political question doctrine on the enforcement of the right to health

3.1 Introduction

The realization of the right to health amidst other socio-economic rights remains a huge challenge for a multitude of developing and least developed states across the globe. However, the era of rhetoric debate on the justiciability of these rights is otherwise ending due to the ever increasing global demand for effective enforcement of universal rights at equal pace. While this optimism may sound rhetoric in itself, poor health care systems continue to cause numerous preventable mortalities,¹¹⁹ due to low budgetary allocations and general minimal attention paid to the health sector by the state despite constitutional and treaty obligations. This situation may paint a picture that states like Uganda have failed to fulfill their obligations to provide the highest attainable health care to its citizenry as the system offers inadequate 'basic' health care.¹²⁰

In the wake of this apparent government failure to fulfill its obligations, complainants in quest for protection have filed a suit seeking redress through judicial enforcement. This is the case of *Centre for Health Rights and Development & 3 others v the Attorney General*,¹²¹ a suit filed against the government for non provision of basic minimum maternal health care, non attendance and maltreatment of expectant mothers by the health workers. The suit sought to determine whether this scenario constituted a violation of the rights to health and life as enshrined in the Constitution. Unfortunately, this case was dismissed at a preliminary stage before the Constitutional Court upon the flawed invocation of political question doctrine.¹²²

This chapter looks at the effect of the political question doctrine on the enforcement of the right to health. It traces the origin, context and purpose of the doctrine and reviews records of its application by the Ugandan judiciary. It also highlights courts' duty to adjudicate on complaints of human rights violations. It examines the implication of the doctrine on enforcement of the right to health in

¹¹⁹ Above (n19).

¹²⁰ As above.

¹²¹ As above (n1).

¹²² See judgment of the *Maternal Mortality* case (above n1).

Uganda. It concludes that, the uncertain origin and vague scope of the doctrine has led to its erroneous application reaping fundamental rights off judicial protection. The chapter rides on the assumption that, the political question doctrine has a huge negative impact on the justiciability of the right to health.

3.2 The origin, scope and purpose of the political question doctrine

Immense uncertainty surrounds the origin and scope of application of the political question doctrine. This has had the impact of ill-defining the purpose of this doctrine also known as judicial avoidance. Its first pronouncement dates back to 1803 by Justice Marshall in the case of *Marbury v Madison*, when he articulated that if ‘the Constitution’s text, structure and theory’ denotes that an issue be decided by the legislative or executive branch of government, it should be dismissed by courts.¹²³ Justice Marshall’s pronouncement was solely premised on the concerns for the separation of powers doctrine.¹²⁴

This judicial episode is said to have aggravated the tension between avoiding ‘judicial review of political questions and ensuring judicial review of constitutionally challenged actions’.¹²⁵ Scholarly work attempted to shape the prudential value of doctrine. Perhaps the most influential of this scholarly work was that of Alexander Bickel,¹²⁶ a renowned professor and proponent of the prudential strand of the doctrine. He vehemently argues for embodiment of tripartite types of prudential concerns in the doctrine to embrace innate courts limitations:¹²⁷

- a. the strangeness of the issue and its intractability to principled resolutions;
- b. the sheer momentousness of it, which tend to unbalance judicial review;
- c. the anxiety, not so much that the judicial judgment will be ignored, as that perhaps it should but will not be;
- d. ...the inner vulnerability and self doubt of an institution which is electorally irresponsible and has no earth to draw strength from.

¹²³ *Marbury v Madison*, 5 US (1 Cranch) (1803) 137,170 [Marbury]; See also, RJ Pushaw, *Judicial Review and the Political Question Doctrine*: ‘Reviving the Federalist “Rebuttable Presumption”’, Analysis’, (2002) 80 *North Carolina Law Review* 1165,1192-93.

¹²⁴ *Marbury* (above 123) 164-170.

¹²⁵ J Jaffe, ‘The Political Question Doctrine: An Update in the response to the recent case’ (2011)38 *Ecology Law Quarterly* 1033-34.

¹²⁶ A Bickel, *The Least Dangerous Branch* (1962) 184; See also M Tushnet, *Law and Jurisprudence in the Law of Justiciability: The Transformation and disappearance of Political Question Doctrine*, (2002) 80 *North Carolina Law Review* 1203 & 1232.

¹²⁷ Bickel (as above 126) 184.

However, one hundred and fifty nine years later, the much commended influential Bickel's writing was not directly applied in the *Baker v Carr case*,¹²⁸ a decision popularly termed 'the most influential modern political question doctrine'.¹²⁹ In *Baker's case*, the Court adopted the six-pronged test for a finding of a political question doctrine, earlier quoted in the general introduction of this study.¹³⁰ The six-pronged formulations have been criticized for its broadness. However they seem to propose the typical purpose and prudential standard of the doctrine.¹³¹ In an attempt to limit the scope, the Court cautioned that its application should be 'used sparingly in the context of demonstrable 'political questions' devoted to elective branches not simply cases that involve political issues'.¹³²

Although the *Baker case* thoroughly reviewed the previous application of the doctrine, the decision ignored the scholarly effort on the subject.¹³³ It is also criticized for not explaining how it filtered the six-pronged formulations from the earlier case law. Except for the preserve of the separation of powers doctrine, the Court did not offer other explanations on the importance of each formulation.¹³⁴

Since the *Baker's* episode in 1962, a few cases in the United States have been dismissed on the basis of a political question. The case of *Gilligan v Morgan*¹³⁵ and that of *Nixson v United States*,¹³⁶ are some of the cases both of which the courts seem to have a chequered approach. While in both cases the Courts seem to rely on the text of the statutes, its reliance in the *Gilligan's case* is unsatisfactory and confusing. The *Gilligan* case involved alleged violation of the right and freedom of speech and assembly by the national guards' actions that injured and killed students at Kent University. The issue was whether the use of fatal force in suppressing civilians was inevitable, even where nonlethal force would be sufficient. The Court dismissed the case on the basis that adjudicating on the case would

¹²⁸ See *Baker case* generally, no reference was made to Bickel's work.

¹²⁹ Jaffe, (above n125) 1038.

¹³⁰ Refer to earlier quotes (above n5).

¹³¹ Jaffe, (above n125) 1039.

¹³² *Baker case*, see Justice Brennan judgments cautioning on the over reliance on the political question doctrine; See also K Breedon, 'Remedial Problem at the Intersection of the Political Question Doctrine, the standing doctrine and the doctrine of equitable discretion' (2008)43 *OHIO Northwestern University Law Review* 523-528.

¹³³ This includes the work of Prof Bickel (above n125) and A Hamilton, The Federalist No78 in JE Cooke (1961) which gained a lot of popularity and debate.

¹³⁴ Breedon (above n124) 528, the language of the Court throughout the *Baker's case* shows its intension to limit the application of the doctrine.

¹³⁵ *Gilligan v Morgan*, US 413 (1973) 11-12.

¹³⁶ *Nixson v United States*, US 506 (1993) 224.

‘invade critical areas of responsibility vested in the legislative and executive branches of government’.¹³⁷ In the latter case, the Court instead of dismissing the case on the basis that senate impeachment is not judicially manageable, rather made a decision that it should be determined by the Senate itself.¹³⁸

Indeed, the courts’ practices present immense confusion masking the scope of application of the doctrine. It is not clear in what particular cases, why and when the doctrine applies. Some scholars have argued that there is no such a thing as the political question doctrine, asserting that when courts are faced with political issues they have to make a finding whether or not the executive was acting within the constitution.¹³⁹ Others suggest a more flexible application of the doctrine premised on prudential values.¹⁴⁰ It is also not clear whether the scope of application is constitutionally rooted or a judicial construct. However, its common application has been based on an express constitutional provision committing a particular duty to the exclusive powers of the executive branch as the final arbiter of the matter. The sole purpose of the doctrine is to confine the judiciary to its constitutional boundaries and avoid infringing on separation of powers.¹⁴¹ It is how courts interpret the constitution and how far they stretch the application of the doctrine that draws discrepancy in adjudication.

3.3 Court’s duty to adjudicate

The relevant text of the Uganda’s Constitution in respect to exercise of judicial function is found in article 126 and it states that:

Judicial power is derived from the people and shall be exercised by the Courts established under the Constitution in the name of the people and in conformity with the law and with the values, norms and aspirations of the people.

The description of this text offers little in terms of when it is proper for a court to hear a case or not. It however, creates a strong message vesting constitutional values in the in the people.¹⁴² It can thus be argued that, health is a concern of the people and judicial enforcement must therefore underlie the people’s concerns,

¹³⁷ As above *Gilligan* case (above n135).

¹³⁸ As above at 230.

¹³⁹ L Henkins, ‘Is there a “Political Question” Doctrine?’ (1976) 85 *Yale Law Journal* 597.

¹⁴⁰ Bickel (above n126).

¹⁴¹ ‘*Doe v Exxon Mobil Corp*’ (2007) 189 *Harvard Law Review* 121.

¹⁴² Going by the South African example, any modern democratic constitution underscores the values of human dignity, equality and freedom as expressed in its art 1 of the 1996 Constitution.

values and aspirations, whether or not decisions and policies on health is a prerogative of the executive or legislature because the duty of courts is to uphold the constitution. Accordingly, whenever people are subjected to prejudice ‘it is a reason for the court to intervene’.¹⁴³ Indeed in the *Marbury* case, the Court ‘repeatedly emphasized the necessity for judicial protection of legal rights’.¹⁴⁴ The Court’s argument was premised on the design of the judiciary as an intermediary between the people and the legislature. The interpretation of the law remains a peculiar duty of the judiciary.¹⁴⁵ This implies that, courts are not only tasked with interpretation of the law but also provides checks on the other organs of government.

This dual role of the court as the guardian of rights and interpreter of the law makes it indispensable for it to adjudicate on a case presented before it. Indeed, in *Cohens v Virginia*,¹⁴⁶ the Court stated that:¹⁴⁷

With whatever doubts, with whatever difficulties a case may be attended, we must decide it, if it be brought before us. We have no other right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.

Accordingly, a judicial review is an inherent right underlying the principles and values of a constitutional democracy. Preserving the separation of powers doctrine should not impair the court from executing its constitutional responsibilities. The six-pronged *Baker* test does not heed to the requirement that individual rights should not be usurped into the ‘executive obsession’ without an avenue for recourse to courts for an effective redress.¹⁴⁸

3.4 Beyond the US: The *Marbury* legacy in Uganda

Beyond the United States, the application of political question doctrine has seen limited under the pretext of preserving the concerns for separation of powers. The most common area that has suffered this blockade to judicial enforcement is socio-

¹⁴³ Sachs (above n 39)148.

¹⁴⁴ *Marbury case* (above n 123) 1266, in Jaffe, (above n 125) Justice Marshall’s judgment.

¹⁴⁵ Hamilton (above n 132) 524.

¹⁴⁶ *Cohens V Virginia*, 19 US (6 Wheat) (1821) 264.

¹⁴⁷ As above.

¹⁴⁸ Jaffe (above n125).

economic rights.¹⁴⁹ These scenarios reminisce the intense discussions states held prior to the adoption of the ESCR Covenant in 1966.¹⁵⁰ It was perhaps an early indication that states were indisposed to be held accountable to their obligations under the treaty.

In Uganda, the doctrine had never been invoked on the right to health case or any other socio-economic right but on other cases. The maternal mortality case filed by the Centre for Health Rights and Development (CEHURD) becomes the first right to health case where the doctrine was invoked. The case of *Attorney General V Major General David Tinyenfunza*,¹⁵¹ is one case where the doctrine was previously applied. Justice Kanyeihamba articulated that, courts should desist from reviewing military affairs related decisions unless they ought to. He reiterated that, ‘exercise of judicial power must be within proper bounds...falling short might be considered an intrusion in the powers of the coordinate branches...’ He argued that the Constitution vested supervisory powers over the executive to the legislature and not the judiciary.

In the maternal mortality case, the Court heavily relied on the provision of article 111(2) which provides that:

The functions of the Cabinet shall be to determine, formulate and implement the policy of the Government and to perform such other functions as may be conferred by this Constitution or any other law.

According to the Court, this text commits maternal mortality and other prevailing health concerns in Uganda to the executive branch of government. The Court also referred to both the precedent set by *Marbury* and *Baker*, without making any reference to various influential scholarly works on the scope of the doctrine to avoid erroneous application.¹⁵² Neither did the judicial heroism of their South African and Indian peers lend a lesson to them. The Court simply dismissed the petition on the ground that determination of health concerns is a political question and not the business of the judiciary. Better still; the Court admitted that, judges do not know

¹⁴⁹ Even in progressive jurisprudence like South Africa have had to deal with the concern for separation of powers when raised by the state in the both the case of *Soobramoney v Minister for Health & TAC case*.

¹⁵⁰ W Vandenhoe, An Optional Protocol on Economic Social and Cultural Rights, Institute for Human Rights K.U Leuven, <http://www.escr-net.org/docs/i/431276> (accessed 4 October 2012).

¹⁵¹ *Attorney General V Major General David Tinyenfunza*, Supreme Court Constitutional Appeal No1 of 1997.

¹⁵² See Jaffe (above n125) generally.

how to deliver expectant mothers. This is true. But perhaps they know about human life and dignity and particularly when they are oppressed and how to protect them. This petition sought a declaration to establish the obligation owed by the state in this particular issue and not how the executive should implement this obligation neither where the financial resources would be found.¹⁵³ Consequently, the Courts argument that deciding on the matter would infringe on the constitutional powers of the executive branch of the government is therefore erroneous.

3.5 Implications of the political question doctrine on enforcement of the right to health in Uganda

The far reaching implication of the political question doctrine on the enforcement of human rights cannot be overstated. Indeed, its' over stretched application renders an absurdity of a constitution without constitutionalism since the executive would operate without checks.¹⁵⁴ This section discusses the implications of a court's finding and dismissal on the basis of a political question on enforcement of the right to health.

3.5.1 *Stare decisis* principle debars future suits on the right to health

The principle of *stare decisis* asserts that judicial decisions create precedent which is heavily persuasive for other courts when deciding on similar matters. The principle is practiced across common law legal systems, which includes Uganda. It obliges judges to respect prior decisions on settled matters as a mechanism for developing rule of law.

The overarching implication of a political question finding is that, it creates a precedent on the issue or subject matter before court rather than the parties involved. Its' precedent impairs future suits on a similar subject irrespective of the circumstances since it is considered a settled matter. The courts ought to be more cautious considering the potential overarching implications of applying the doctrine. Indeed, the thrust of the doctrine is premised on precedents as evidenced in other jurisprudence, which could have been a flawed judicial construction.

¹⁵³ Sachs (above n39) 147.

¹⁵⁴ H Kwasi, 'Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa' (2006) 80, *Tulane Law Review* 40.

Therefore, a wholesome application of the doctrine based on precedents may erroneously bar future suits on the right to health and reap citizens of realization of their fundamental individual rights. It is only the Supreme Court's reversal of the Constitutional Court's¹⁵⁵ decision that will place back the guardianship of the right to health in the hands of the judiciary. Otherwise, Ugandans may have to wait for a judicial revolution or a constitutional amendment to awaken courts to their constitutional obligations.

3.5.2 Dismissal based on political question doctrine thwarts complainants' access to effective redress

It is not enough that there is a law or a treaty providing for a right, but a state should fulfill its obligation and most importantly, be held accountable for its actions. In this respect, complainants should receive adequate and effective redress when violations are committed. As a result a dismissal of a suit without dealing with the substantive issues raised thwart the complainants' access to effective remedy and leaves the protection of constitutionally guaranteed rights in a vacuum.

Even though the Constitutional Court in the Uganda's case advised the complainants to seek compensation under article 50,¹⁵⁶ this does not amount to effective remedy since a suit pursued under this article, merely gives the specific complainant, a remedy in form of compensation when violations are found. It could be argued that this would deter future violations, but the Constitutional Courts' pronouncements would not only establish the nature of obligations owed but also entrench enjoyment of human rights for all,¹⁵⁷ which is the focus of this study. Otherwise, dismissal of such a widely shared human rights concern, indirectly limits the likelihood of the executive branch correcting it.¹⁵⁸ Therefore, there is no more effective remedy than providing an interpretational clarity on a constitutionally challenged right. Leaving complainants of the right to health violations without an effective redress contravenes the trust vested in the judiciary

¹⁵⁵ The Constitutional Court sits as the Court of Appeal and so, appeals from the Constitutional Court go to the Supreme Court as the final appellate Court.

¹⁵⁶ See above n4.

¹⁵⁷ Not only for the Petitioners of a particular case and this is the duty of the Court under article 137 to interpret the law for the executives to abide by.

¹⁵⁸ JH Chopper, 'The Political Question Doctrine: Suggested Criteria' (2005)54 *Duke Law Journal* 1457.

as guardians of human rights, yet the right to seek effective redress lies at the heart of Uganda's Constitution.¹⁵⁹

3.6 Conclusion

This chapter has illustrated that for Ugandans to enjoy the right to health the courts will have to revisit their application of the political question doctrine as well as their duty to protect human rights. The apparent blatant application of the doctrine is an impediment to the judicial enforcement of human rights.

The birth of the doctrine dates back to 1803 in the United States before the adoption of the international bills of rights and its subsequent codification into national legislations.¹⁶⁰ With the evolvement of human rights' concept and modern constitutionalism over the years, the ensuing impact ought to further bolster the protection of human rights rather than application of the doctrine to undermine protection of fundamental rights.

This can be achieved if the judiciary adopts a purposive rather than a restrictive, narrow and traditional approach when interpreting the Constitution. In the absence of such an approach, the host of rights enshrined in the constitution will remain an illusion. There is no better way to crown this, except by adopting the statement of the Exparte Chairperson of the Constitutional Assembly of South Africa that:¹⁶¹

It cannot be said that by including socio-economic rights within the 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 separation of powers.

¹⁵⁹ The Constitution, art 50.

¹⁶⁰ But, even then, the importance of protection of legal rights was emphasized by Justice Marshall in the *Marbury* case, See the arguments of Justice Marshall in *Marbury* case (above n122).

¹⁶¹ In *Re Certification of the Republic of South Africa 1996*, BCLR(1996) para 76-78 cited in G Mhone & O Edigheji, *Governance in the new South Africa: The Challenges of Globalisation* (2003) 149.

Chapter Four

Peer learning in quest for protection: The role of the Ugandan judiciary in ensuring the protection of the right to health

4.1 Introduction

We are institutionally completely unsuited to take decisions on houses, hospitals, schools and electricity. We just do not have the know-how and capacity to handle those questions. But we do know about human dignity, we do know about oppression and we do know about things that reduce a human being to a status below that which a democratic society would regard as intolerable – Justice Albie Sachs.¹⁶²

The tussle for realizing rights and justice requires more than a legal framework but conditions which permit respect for human dignity and values guaranteed under the constitution. Under these conditions, the right to health must be accorded equal safeguards as other rights. The tripartite construct of the state places the judiciary as the most suited organ to ensure this safeguard.

This chapter assumes that the role of the judiciary in protecting the right to health in Uganda has been less than adequate. It also assumes that the progressive jurisprudence of South Africa, India and Kenya have a potential of lending lessons to the Ugandan judiciary to protect the right to health. The chapter evaluates the judicial role in the protection of human rights, specifically the right to health in a constitutional paradox of non-justiciability of most socio-economic rights. The chapter also evaluates why the judiciary is best suited to safeguard the right to health. It highlights a few selected cases where judicial review has been considered. It explores a multitude of options on how the judiciary can protect the right to health in Uganda. It concludes with a discussion on how other stakeholders can support the drive to enhanced protection to the right to health.

4.2 The role of the judiciary in the protection of the right to health in Uganda

The idea of constitutional supremacy and judicial custodianship of the constitution vests extensive powers in the judiciary more than any other organ to protect human rights.¹⁶³ This places the judiciary in a position to check executive and legislative's compliance with constitutional obligations.¹⁶⁴ The exercise of judicial power grants

¹⁶² Statement by Justice Albie Sachs in Sachs (above n39) 140.

¹⁶³ Twinomugisha, 'The role of the judiciary in the promotion of democracy in Uganda' (2001)3 *African Human Rights Law Journal* 3.

¹⁶⁴ As above, page 7.

courts the authority to interpret laws to establish obligations owed to the state in particular issues.¹⁶⁵ This power must be employed to stop oppression and safeguard human life and dignity as a premise of democratic societies.¹⁶⁶ This can only be achieved through judicial review by evaluating executive compliance with constitutional and treaty obligations. Therefore, the extreme importance of judicial review in the protection of socio-economic rights cannot be overstated since it is the only safeguard for millions of impoverished people across the globe.

Maternal and infant mortalities in many African countries may appear as an accepted natural phenomenon, yet a majority could be preventable had states fulfilled their obligations. The situation is reinforced by judicial avoidance to accord protection to the right to health in fear of breaching the separation of powers doctrine. Like other rights under the civil and political cluster, the right to health must be accorded equal protection. The judiciary can protect the right to health by clearly defining what the state ought to do in respect to their obligations through adopting a purposive approach to interpretation of bills of rights to underscore indivisibility of human rights. Human rights can then be protected from being trampled over by other state organs. The judiciary has not only the power but also the liberty to execute this mandate under the shield of independence without being hostage to any reaction.

Judicial review is authorized in many legal systems across the globe. Interpretation of constitutional bill of rights is an area that enjoys the power of judicial review. Therefore, enforcement of the right to health stands as one classic option of judicial review. Indeed, socio-economic rights have been enforced through a judicial review in other jurisprudence. The next section illustrates the approach adopted by India, South Africa and Kenya to confer protection to the right to health through judicial review without infringing on the doctrine of separation of powers.

4.3 Judicial activism and innovation: review of cases in selected jurisprudence

Despite codification of human rights in international treaties and domestic laws, it takes a pro-active and innovative judiciary to transform this apparent myth into a

¹⁶⁵ As above; See also art 137 of the Constitution on the powers of the Constitutional Court to interpret laws and deal with other constitutional matters as a Court of first instance.

¹⁶⁶ J Dugard, 'Judging the Judges: Towards an appropriate role of the judiciary in South Africa's transformation' (2007) 20 *Leiden Journal of International Law* 967.

reality.¹⁶⁷ Following, the adoption of international human rights instruments, a multitude of states codified human rights into their domestic statutes. However, only a few states included both civil and political rights and socio-economic rights into their bill of rights. The majority of states reserved the bill of rights for only civil and political rights and clustered socio-economic rights under the DPSP. Over the years, the difference in this architecture was hardly felt, since progressive jurisprudence like India demonstrated an exceptional innovative approach to enforce rights under the DPSP. In Africa, South Africa has been at the forefront of enforcing socio-economic rights post apartheid constitutional order. Following the adoption of the 2010 Constitution, Kenyan judiciary climbed the ladder emerging as the ‘new kid on block’.

This section looks at the right to health cases in India, South Africa and Kenya. It particularly exposes how the judiciary in those countries approached the cases without infringing on the separation of powers doctrine. Most importantly, the cases exemplify the purposive interpretation of rights exhibiting their indivisibility and universal nature.

4.3.1 India

The Indian Constitution promulgated in 1949, is the longest written Constitution in the world with 448 articles. However, like several other states, what would have been included as rights are clustered as social and economic directives and objectives of state policy.¹⁶⁸ This architecture has however not inhibited the courts from protecting socio-economic rights such as the right to health as it is inferred from the right to life. The following illustrates the Indian Supreme Court approach in enforcing the right to health.

Paschim Banag Khet Samity v State of West Bengal

To date, the case of *Paschim Banag Khet Samity v State of West Bengal*¹⁶⁹ remains one of the landmark decisions on the right to health in the realm of human rights protection. The Indian Supreme Court interpreted the right to life to include the

¹⁶⁷ I Byrne ‘Making the Right to health a reality: Legal Strategies for Effective Implementation’ (2005) 1-25, Common wealth Conference, London.

¹⁶⁸ See Part IV of the Indian Constitution, while the civil and political rights are provided under Part III.

¹⁶⁹ *Paschim Banag Khet Samity v State of West Bengal* (1996)4 SCC 37.

right to emergency medical care.¹⁷⁰ The Court reasoned that resource constraints could not prejudice an essential obligation of providing emergency medical care.¹⁷¹ This is a technique described as a read-in approach. The petitioner in this case roamed eight medical institutions unsuccessfully to access treatment due to either lack of technical capacity or unavailability of beds. He was eventually admitted and treated at a private hospital at a cost of 17,000 Rands. The Court, in finding that this was a violation of the right to life under Article 21 of the Indian Constitution and awarding compensation, held that ‘the right to emergency medical care formed a core component of the right to health which...is recognised as forming an integral part of the right to life’.¹⁷² In arriving at this decision, the Court reconceived the positive obligation imposed the state under the right to health to safeguard everyone’s life. It stated that ‘preservation of human life was of utmost importance’, adding that:¹⁷³

The Constitution envisages the establishment of a welfare state...Providing adequate medical facilities for the people is an essential part of the obligations undertaken by the government in this respect and discharges this obligation by running hospitals and health centres.

The Court’s effort went beyond simply awarding compensation for the victim, to laying down the policy and administrative framework that the government ought to abide by in public interest as its general approach to offer comprehensive and effective remedies. It made reference to the state’s public health obligations under article 47 of the Indian Constitution which included health centres and emergency handling facilities such as ambulances. The Court finally ordered that its ruling should apply to all other states.

Consumer Education and Research Centre v Union of India

The case of *Consumer Education and Research Centre v Union of India*¹⁷⁴ dealt with the issue of limited resources as a plea for the state failure to fulfil its obligation. It rejected the argument stating that:

¹⁷⁰ As above.

¹⁷¹ As above.

¹⁷² As above.

¹⁷³ As above.

¹⁷⁴ *Consumer Education and Research Centre v Union of India* (1995) 3 SCC 42.

No State or country can have unlimited resources to spend on any of its projects. That is why it only approves its projects to the extent it is feasible. The same holds good for providing medical facilities to its citizens including its employees. Provision on facilities cannot be unlimited. It has to be to the extent finances permit. If no scale or rate is fixed then in case private clinics or hospitals increase their rate to exorbitant scales, the State would be bound to reimburse the same.

Mehta v Union of India

The case of *Mehta v Union of India*¹⁷⁵ (*Mehta case*) demonstrates yet another effort by the Indian Supreme Court to safeguard the right to health. The Court appointed an expert committee to develop a detailed policy to guide conversion of petrol to clean fuels for vehicles use in Delhi. It also went further to issue a number of time-bound directives for the conversion process.

The *Mehta* case presented another occasion for the Supreme Court to challenge the allegation that, its orders were illegitimately prodding to an executive reserved terrain. It reasoned that the orders and directives were more than necessary to safeguard people's right to health and therefore should trump statutory provisions. Indeed, the Court heeded to its constitutional mandate as a guardian of human rights, asserting that public health considerations were more significant to justify than the strict application of separation of powers doctrine.

4.3.2 South Africa

The post apartheid reform efforts ushered a new wave of constitutional order based on democratic principles freedom, equality, dignity and respect for human rights in South Africa.¹⁷⁶ The 1996 South African Constitution includes a host of socio-economic rights in its Bill of Rights.¹⁷⁷ Since then, the South African jurisprudence especially the area of socio-economic rights is one of the most celebrated globally. The following cases demonstrate the courts' approach in the protection of the right to health.

Soobramoney v Minister of Health

The case of *Soobramoney v Minister of Health KwaZulu Natal (Soobramoney)*,¹⁷⁸ became the first major and most challenging questions for the Constitutional Court

¹⁷⁵ *Mehta v Union of India* (1999) 6 SCC 9.

¹⁷⁶ South Africa (SA) Constitution, sec1(a).

¹⁷⁷ As above, Chapter 2.

¹⁷⁸ *Soobramoney v Minister of Health KwaZulu Natal* (1997) 12 BCLR 1696 [*Soobramoney*].

to consider. The Complainant (Soobramoney) had an advanced chronic kidney failure which required costly dialysis treatment to prolong his life. However, the health authority refused to offer the treatment on grounds of insufficient resources. In its analysis, the Court directly applied the provisions of section 27(1) which guarantees the right of access to health care services,¹⁷⁹ disagreeing with Complainant's reliance on section 27(3).¹⁸⁰ It proceeded to find that there was no violation of section 27(1), since the health authorities acted reasonably and rationally within the context of limited resources.¹⁸¹ It also alluded to the fact that, the treatment could only prolong the Complainant's life for a short period of time.

The approach adopted by the Court in *Soobramoney case* is a classic demonstration of how the Court refrained from assuming the executive role of deciding resource allocations. It carefully simply acted as 'an impartial arbiter' in the matter.¹⁸² The configuration of this process is analogous to judicial review except that, it stretches further to examine executive actions. In *Soobramoney*, the Court indeed expressed the wide discretion it has to order the executive to set budgetary priorities. It stated that the courts 'will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities'.¹⁸³ Otherwise, admission of *Soobramoney case*, would unbearably strain medical resources since several claimants in similar position would flock the courts.¹⁸⁴

Minister of Health v Treatment Action Campaign

The *Minister of Health v Treatment Action Campaign (TAC)*¹⁸⁵ case is perhaps the most popular case celebrated in South Africa and beyond in the human rights sphere.¹⁸⁶ This time, the Court was tasked to determine whether the state's decision of providing anti-retroviral drugs for Prevention of Mother-Child HIV Transmission (PMCT) to only a few pilot sites constituted a violation of section 27(1) of the

¹⁷⁹ Read together with sec 27(2) that provides for 'progressive realization within available resources'.

¹⁸⁰ The Complainant sought to rely on sec 27(3) to advance an argument that his medical condition constituted a right to emergency medical treatment which is an integral part of the right to life. This could only be the approach where the Bill of Rights offered no direct provision like in the Indian case.

¹⁸¹ *Soobramoney* (above n178) para 52.

¹⁸² Byrne (above n 167) 8.

¹⁸³ *TAC* (below n185) para 29.

¹⁸⁴ See *Shortland v Northland Health* [1998] 1 NZLR 433.

¹⁸⁵ *Minister of Health v Treatment Action Campaign (TAC case)*, (2002) 5 SA 721 (CC).

¹⁸⁶ This was the second most significant case after *Soobramoney* that the Court was faced with and its popularity is drawn from the issues involved in this case, that makes it of interest.

Constitution.¹⁸⁷ The state's argument that only a few designated centres with a capacity to provide complementary services would be availed the drugs for purposes of research was rejected by the Court. It acknowledged the importance of research but held this was not a sufficient reason to delay extending the programme throughout the country's medical institutions:

This does not mean....that until the best programme has been formulated and the necessary funds and infrastructure provided for the implementation...the drug must be withheld from mothers and children who do not have access to the research and training sites. Nor can it reasonably be withheld until medical research has been completed.¹⁸⁸

Contrary to the *Soobramoney* case where the dialysis treatment required a lot of resources, the provision of nevirapine in this case was offered free to the government and therefore the states argument on lack of resources carried no weight. The Court further ordered the inclusion of counseling and testing services to the programme which expressly had financial implications. It however refrained from specifying the modes of implementation.¹⁸⁹

The Court's restraint not to order directives for implementation is arguably blamed for the subsequent delay in enforcement since the judgment.¹⁹⁰ The authorities took several months to roll-out the programme to other centres and this only achieved after intense lobbying by TAC and other human rights organizations forcing the state to comply with the Court's order.

B & Ors v Minister of Correctional Services

The case of *B & Ors v Minister of Correctional Services*,¹⁹¹ is not typical case brought under section 27, but under section 35(2) of the Constitution which provides specifically for the right to adequate medical care to prisoners; albeit, it still touches on the broader scope of the right to health. This like *TAC* case concerned the provision of anti-retroviral drugs to prisoners living HIV at the state's expense. The Court, found that the state's failure to provide prisoner's with anti-retroviral drugs

¹⁸⁷ South Africa Constitution, s27 provides that 'everyone has a right of access to health care services'.

¹⁸⁸ *TAC* case (above n 185) para 68.

¹⁸⁹ It therefore departed from the approach of the Indian Supreme Court and the Inter-American Court of Human Rights, where modes of implementation would be directed by the Court.

¹⁹⁰ M Heywood, 'Contempt or Compliance: The *TAC* Case after the Constitutional Court Judgment', (2003) 4 *ESR Review* 2.

¹⁹¹ *B & Ors v Minister of Correctional Services* [1997] ICHRL 37.

constituted a violation of the right to adequate medical care under section 35(2) of the Constitution. It reasoned that right is not accorded to people outside prison; there should be an absolute standard for what is adequate for prisoners who do not have free access to resources and not free to move outside to access drugs in other health facilities or buy drugs in open market. Accordingly, where anti-viral drugs have been prescribed to a prisoner it is an obligation on the state to provide it at its expense and failure to provide would constitute an infringement of section 35(2).

The Court however acknowledged that it was not the duty of the judiciary to indicate when it was proper to prescribe for a particular patient the anti-retroviral drug since this was an a medical question with competence and discretion vested in the medics. This is how the courts have managed to strike the balance between the executive constitutional roles while protecting fundamental rights and dignity on one hand.¹⁹²

4.3.3 Kenya

Reform initiatives post 2007 election violence in the neighboring state of Kenya has seen it scale-up to a ‘new dawn’ of constitutionalism and enforcement of human rights. It begun by ushering in a new Constitution in 2010 that uniquely includes both civil and political rights and the socio-economic rights in its bill of rights.

Since then, the nascent jurisprudence has signaled a progressive approach towards to the protection to fundamental rights. The following are some of the few cases that the courts have so far considered under the new constitutional order.

Patricia A Ochieng and 2 others v Attorney General

The case of *Patricia A Ochieng and 2 others v Attorney General*¹⁹³ is the first case that dealt with the right to health in Kenya. The Kenya High Court was faced with the challenge to determine whether the Anti-Counterfeit Act of 2008 (the Act) infringes on the right to health, human dignity and life as guaranteed by the Kenyan Constitution.¹⁹⁴ The Petitioners contended that, Anti-Counterfeit Act particularly sections 2, 32 and 34, limits ‘access to affordable and essential drugs and medicines including generic drugs and medicines’ which directly infringes on

¹⁹² Sachs (above n39) 147.

¹⁹³ *Patricia A Ochieng and 2 others v Attorney General*, Petition No 409 of 2009 [*Patricia Ochieng*].

¹⁹⁴ As above, para 1; See the Constitution of the Republic of Kenya, 2010, art 43, 28 and 26(1) providing for those rights respectively.

the enjoyment of fundamental rights raised above.¹⁹⁵ The Special Rapporteur on the right to health, Anan Grover,¹⁹⁶ averred that even if the Act is well intentioned to curb trade in counterfeit goods, its current framework will endanger the right to health and life guaranteed under articles 43 and 26 of the Constitution. The contested definition of counterfeit drugs provided that:¹⁹⁷

manufacture, production...or making, whether in Kenya or elsewhere, of any goods, whereby those protected are imitated in such a manner and such a degree that those goods are identical or substantially similar copies of the protected goods.

Justice Mumbi agreed with the Petitioners' argument and ordered that the Act be amended to avoid infringing on fundamental rights protected under the Constitution. She noted that the current state of the Act, leaves thousands of people living with HIV epidemic in jeopardy, since its enforcement seriously affects 'accessibility, affordability and availability' of essential drugs and medicines including generic medicines for HIV and AIDS.¹⁹⁸

It is interesting that, the Respondent (Attorney General) did not raise any argument contending the powers of the Court to determine this matter, which would otherwise if traditionally conceived, seem a reserve of the legislature and the executive branch of government. Further still, there was no appeal lodged on matter. This trend may indicate the apparent general consensus on the justiciability of socio-economic rights in the Kenya,¹⁹⁹ but most significantly, the values and respect for fundamental rights in the new Constitution. Even though it could be expressly noted that the state's reaction in the case roots to the explicit provisions of the right to health in the Kenyan Constitution just as in the South African, the state counsel in *Soobramoney*, advanced the argument that, health concern was a terrain for the executive and not the judiciary.²⁰⁰

¹⁹⁵ As above, para 1.

¹⁹⁶ The Special Rapporteur on the right to health, Anan Grover, joined as an amicus curiae pursuant to his mandate outlined in the Human Rights Council Resolution 6/29, available at http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_6_29.pdf (accessed 3 October 2012).

¹⁹⁷ The Anti-Counterfeit Act of 2008, Kenya, sec 2.

¹⁹⁸ *Patricia Ochieng* (above n193) para 87.

¹⁹⁹ This perhaps could be as a result of active public participation of citizens during the constitutional reform process, which makes the issues generally acceptable across Kenya.

²⁰⁰ See discussion on South Africa above.

Nathan Muhangani Simwenyi v Attorney General & 2 others

In the case of *Nathan Muhangani Simwenyi v Attorney General & 2 others*,²⁰¹ the High Court ordered for the release and full discharge of the Petitioner to enable him access emergency medical treatment from another medical facility. The Petitioner was detained and his treatment discontinued at Kenyatta National Hospital for failure to meet medical bills. The decision demonstrates yet another situation where the Court prevailed to safeguard human dignity and protect the right to health without any objection questioning the judicial power coming to the fore.²⁰²

4.4 Relevance of the progressive jurisprudence and the framework for protection of the right to health in Uganda

The practice of the Indian courts more than South Africa and Kenya lends a lot of lesson to the Ugandan judiciary. This is because unlike South Africa and Kenya where the right to health is explicitly provided in the Bills of Rights, India and Uganda's Constitutions include the right to health under the DPSD.

As illustrated above, the Indian courts have adopted a broad, inclusive and assertive stance in the interpretation of the rights in the Bills of Rights to give effect to the right to health. They have been more than willing to intervene into policy and administrative terrain usually considered a reserve of the executive branch of government. It frequently handed down detailed specific orders with significant financial implications. Some critics have argued that the Indian Supreme Court approach has prompted lack of cooperation and on some occasions required initiation of contempt of Court proceedings against state officials.²⁰³

The South African courts have adopted a more cautious approach compared to their Indian peers. It often refrained from giving directives on how the state should implement the orders issued, except it established the obligation owed to the state in a particular case.²⁰⁴ However, the response of the state in *TAC* case illustrates the Court's reliance on the goodwill of the authorities to implement its orders may not be adequate to realise effective implementation.²⁰⁵ It therefore

²⁰¹ *Nathan Muhangani Simwenyi v Attorney General & 2 others*, Petition 282 of 2012.

²⁰² See judgment generally of the above case.

²⁰³ As reported by I Byrne, 'Inter-regional conference on human rights and the Judiciary systems' (18-20 September, 2006) Brasillia, Working group IV: the right to health.

²⁰⁴ Sachs (above n39)147.

²⁰⁵ See generally Heywood (above 190).

demands that a more proactive effort is unearth to carefully monitor enforcement while preserving the boundaries for separation of powers doctrine.

The following discussion illustrates the framework for protection of the right to health under the current constitutional architecture.

4.4.1 International human rights law

Uganda is a party to all major international and regional human rights instruments reviewed in chapter two above.²⁰⁶ However, the dualist system requires that these instruments are domesticated to have a force of law. A majority of rights in these instruments are included in the bill of rights. In addition article 45 recognizes other rights not expressly provided for under the bill of rights as part of the Constitution. This recognition directly imports other all rights under the international bill of rights to have a force of law in Uganda.

With or without domestication, the accession or ratification of the major human rights instruments imposes an obligation on Uganda to respect, promote, fulfill and protect fundamental rights and freedoms. In this regard, the state can be held accountable for its acts or omissions.

4.4.2 The Constitution

The exercise of judicial power warrants courts to weigh the constitutionality of executive actions and legislations. While the right to health may be vaguely included in the Constitution under the NODPSP, judicial enforcement avails itself to test. The indivisible nature of human rights and the inclusiveness of the right to health inevitably implicate other rights such as the right to life, respect for human dignity, equality and non-discrimination. These rights are discussed below which directly expands the framework for protection of the right to health.

The right to equality and freedom from discrimination

The principles of equality and non-discrimination in ‘all spheres of political, economic, social and cultural life’ are the foundation upon which the Bill of Rights

²⁰⁶ See, <http://www.ohchr.org/Documents/Countries/PublicationUgandaUNHRMechanisms.pdf> (accessed 3 October 2012) for all international instruments ratified or acceded to Uganda.

in the Constitution is built alongside other principles.²⁰⁷ Accordingly, these principles and values should guide the interpretation of laws, policy developments and implementations. Equality before the law means equal protection for all rights including the right to health.²⁰⁸ Of significant importance is the language of the drafters to mention ‘economic’ and ‘social’ sphere of life. Moreover, the Constitution recognizes the inherent nature of fundamental rights and freedoms and commits the protection and promotion to all organs of the state. More so, it acknowledges that rights in the Bill of Rights are not exclusive of other rights.²⁰⁹ Further still, article 8A gives the NODPSP full legal force.²¹⁰ The provision on equality offers an avenue for protection to the right to health like other rights in the Constitution.

The right to life

The Constitution provides for right to life under article 22(1). As stated elsewhere in this study, the right to health forms an integral part of the right to life. In the absence of an express provision providing for the right to health, it can be read in the right to life. This is the purposive innovative approach adopted by the Indian jurisprudence to enforce the right to health as discussed above. This approach can lend a lesson to the Ugandan judiciary.

Respect for human dignity

Article 24 guarantees respect for human dignity and protection from other inhumane treatment. The abysmal mortality due to inability to access medical facilities and services is a classical case of an assault on human dignity. Ill-treatment of expectant mothers and other patients in need of medical treatment by medical personnel is inhumane. Enforcement of the right to health will ensure that people live a life in dignity.

4.4.3 Limitation of socio-economic rights

In constitutional democracies, limitations on human rights and freedoms must be ‘reasonable and justifiable’ based on the principles of ‘human dignity, equality and

²⁰⁷ The Ugandan Constitution, art 21.

²⁰⁸ The Ugandan Constitution, art 21(1).

²⁰⁹ The Ugandan Constitution, art 45.

²¹⁰ See above (n29).

freedom'.²¹¹ Article 43 of the Ugandan Constitution lays down the criterion for limitation of enjoyment of rights. The limitation includes a prejudice to enjoyment of others' rights or in public interest. Of significant interest is its emphasis on limitations to be within 'what is acceptable and demonstrably justifiable in a free and democratic society'.²¹² However, this scope of limitation is quite narrow to clearly sieve out what would be a justifiable limitation to the right to health. The common yet unpopular limitation is that of resource constraints advanced by some states which is considered unjustifiable and unreasonable.²¹³

Perhaps the most sarcastic yet real hint to limitation is that alluded to by Justice Sachs in the *TAC* case, that, 'the right to health does not include the right to evade death'.²¹⁴ However, 'life prolonging resources is an integral' part of 'human rights approach to health care' in a free and democratic society.²¹⁵

4.5 The factors necessary for ensuring judicial protection of the right to health

4.5.1 Independence of the judiciary

An independent judiciary is crucial in sustaining democratic governance in any country. The idea of judicial independence is also intrinsically linked to the doctrine of separation of powers. Article 128 of the Uganda Constitution guarantees the independence of the judiciary. Of particular significance is the language of the drafters, that the 'courts...shall not be subject to the control or direction of "any" person or authority' in exercise of judicial power.²¹⁶ This provision gives absolute powers to courts independently without regard to the opinion and reaction of any authorities including the executive. This constitutional guarantee provides another opportunity for the judiciary to check the executive compliance with its obligation in the protection of the right to health.

The independence of the judiciary in Uganda has been tested in other cases of civil and political rights not socio-economic rights. It is perhaps a fair observation to assert that the judiciary in Uganda has an independent record except a few

²¹¹ See the South African Constitution, s36, as a model Constitution that this study seeks to learn from, also mirrored in the Uganda's Constitution, see below (n211).

²¹² Ugandan Constitution, art 43(2)(c).

²¹³ See the decision in *Consumer v Union of India* (above n157).

²¹⁴ *TAC* case (above n 185) para 57.

²¹⁵ As above, para 52.

²¹⁶ The Ugandan Constitution, art 128(1).

concerns continue to challenge the credibility of the institution such as corruption. This is however, largely experienced in the lower courts which falls below the jurisdiction of the issues this study seek to address. The Supreme Court level, the highest appellate court, there has been discontent in respect to presidential election petitions. Both the 2001 and 2006 petitions of Rtd Col *Kizza Besigye v Electoral Commission and Yoweri Kaguta Museveni*,²¹⁷ decisions were criticized by the public for being subservient to the incumbent president YK Museveni, since the Court acknowledged massive irregularities and intimidation but declined to nullify the election results.²¹⁸ This may point to a subservience and lack of independence tendencies which damages the trust vested in the judiciary.²¹⁹

Although, there have also been a few allegations of a flawed appointment procedure by the executive to the bench; by and large, this has not influenced their decisions as the judiciary has strongly resisted interference from the executive while handling cases. One of those heated moments is the invasion of the high court by the '*black mambas*' a paramilitary group who siege the High Court in Kampala to re-arrest the Peoples' Redemption Army (PRA) suspects²²⁰ once released on bail. The Court proceeded to grant them bail under the circumstance in what Justice Ogoola, the Principal Judge of the High Court then described as 'the rape of the judiciary'²²¹ and 'a very grave and heinous violation of the twin principles of the Rule of Law and Judicial Independence'.²²² While there have been attempted interferences with the exercise of power, the judges have largely been firm to resist influence.

It is therefore not a comprehensive judicial reform that the Ugandan courts require to ensure protection of fundamental rights such as the right to health but a refocus and rebuilt of more bold spirits. The Constitution provides a framework for this and it should be utilized to accord protection to the right to health.

²¹⁷ Rtd Col Dr *Kizza Besigye v Electoral Commission and Yoweri Kaguta Museveni*, Election Petition No 1 Of 2001 and 2006.

²¹⁸ The public criticisms *per se* do not imply that the judiciary was not independent in its decisions but perhaps the controversial ruling is what left a lot to be desired, acknowledging massive fault but declining to nullify the results in the 2001 petition.

²¹⁹ This is argued as the reason why in the 2011 Presidential Election, Kiiza Besigye refused to challenge the results because, the ruling is predictive and this demonstrate some level of lost of trust in the judiciary.

²²⁰ The Peoples' Redemption Army (PRA) were arrested and charged with treason together with Kiiza Besigye.

²²¹ Justice James Ogoola, 'The Rape of the Temple,' *New Vision*, 6 October, 2006. <http://www.newvision.co.ug/PA/8/13/525279> (accessed 3 October, 2012).

²²² As above.

4.5.2 Participation of civil society

The euphoria shared in this progressive jurisprudence did not come on a ‘silver plate’. It took a number of players incessantly involved and engaged. Their active roles could be said to have ignited the activism in the judiciary through Public Interest Litigation (PIL) strategy. PIL is one of the successful strategies which have been adopted in India, South Africa and Kenya. Some of these active players include NGOs, the media, the academia, lawyers who in this study are referred to as the society with the support of development partners. This section looks at roles these stakeholders can play to support judicial protection of the right to health and other socio-economic rights in Uganda.

NGOs and the media

The role of NGOs is very crucial in the protection of the right to health. In South Africa, India and Kenya, NGOs activities incredibly championed the campaign for realization of human rights. In the *TAC* case, TAC (the NGO) mobilized thousands of people living with HIV epidemics to rally behind their course.²²³ Kenyan NGOs equally conducted massive mobilization of people to ensure participation in the courts process.²²⁴ Despite the vibrancy of the Ugandan NGOs, the focus on socio-economic rights has been minimal.²²⁵ Human rights NGOs should defend the course for all human rights to ensure that people are not oppressed. The media involvement is equally important to raise awareness and sensitize the public on the importance of the right to health and the obligation owed to the state to ensure enjoyment.

4.5.2 The academia and lawyers

Scholarly literature has immense contribution in enriching conceptualization and interpretation of laws. Multitude of jurisprudence have heavily benefited from the work of scholars in ensuring the protection of rights. While some literature exists on this subject, the academicians in Uganda need to engage more on this area. This

²²³ On the hearing day, 5000 people all dressed in T-shirts with the writing ‘I am HIV Positive’ matched to the Court to support their course. TAC was joined by other NGOs included Save Our Babies (SOB), Children’s Rights Centres, Institute for Democracy in South Africa and Community Law Centre.

²²⁴ Under the leadership of AIDS Law Centre.

²²⁵ In South Africa, the struggle for civil and political rights were always inseparable from socio-economic rights; See Sachs (above n39) 150.

will also encourage informed debate on the subject. Creative and innovative lawyers also play a serious role in supporting the enforcement of the right to health by conducting proper research, citing relevant authorities and strong arguments before Courts.

4.5.3 The development partners

The role of development partners in supporting the campaign for the right to health is inevitably crucial as most NGOs work require finances. Compared to civil and political rights, fewer development partners in Uganda have demonstrated interested in supporting socio-economic rights. It is perhaps sensible that the struggle is inseparable to ensure that people can be both free and healthy.²²⁶

4.6 Conclusion

This chapter has demonstrated that a lot of lessons can be drawn from the approaches employed by India, South Africa and Kenya jurisprudence to enable the judiciary accord protection to the right to health in Uganda. It has also identified rights in the Constitution which if broadly interpreted should render the framework for stronger protection for the right to health. To achieve this, it requires a different strategy departing from the archaic, conservative and restrictive approach which has for long defined constitutional interpretation in Uganda.

It is left to the Ugandan judiciary to ‘get out of their shells,’ be dynamic and active enough to use their powers to safeguard the right to health. However, since protection of socio-economic rights is not, ‘a one size fit all’, the judiciary will have to carefully adopt what is practical in the circumstances. But protection for the right to health and ensuring that people live a life in dignity is paramount and should prevail.

The journey to the protection of the right is a tough one and has never been easy elsewhere and so, the role of civil society is decisive and should actively get involved and committed.

²²⁶ Sachs (above n39)140 on the idea of ‘freedom and bread’.

Chapter Five

Conclusion and recommendations

5.1 Conclusion

The world needs a global health guardian, a custodian of values, a protector and a defender of health, including the right to health - Dr Margret Chan.²²⁷

This study sought to among others, investigate the implication of the doctrine of political question on the judicial enforcement of the right to health and the role the judiciary can play in ensuring protection of the right to health in Uganda. In this regard, it sought to vividly explore the potential avenues of dealing with the doctrine when adjudicating on the right to health in Uganda. In the process of engaging with these questions the study reviewed the legal framework of the right to health, appreciating its normative content, discussed areas of tension and the relevance of international human rights instrument to the domestic enforcement of the right to health. It also probed the effect of a dismissal based on the doctrine of political question to future suits on the same subject and the right to effective remedies for complainants. Further the study explored the potential areas of learning from the Indian, South African and Kenyan jurisprudence for the Ugandan judiciary to make the right to health a reality and not an illusion.

The study assumed among others, that the application of the political question doctrine has a huge negative impact on right to health. However, it also assumed that while the framework for the protection of the right health exists, the role of the judiciary in the protection of the right to health in Uganda has been less than adequate. However, it further assumes that an innovative judiciary can make this right a reality.

Pursuant to these assumptions; the reviews, discussions and analyses, the study concludes that the political question doctrine has a profound negative impact on the enforcement of the right to health. Its application is inimical the last recourse for millions of impoverished people from living a life in dignity, since the judiciary will not intervene under the excuse of preserving the separation of powers doctrine. Further, a finding or dismissal based on the political question doctrine is

²²⁷ Dr M Chan, Director General, World Health Organisation (WHO), <http://www.who.int/hhr/en/> (accessed 28 August, 2012).

detrimental to future suits on the same subject and leaves complainants with less effective remedy.

This study also proves that, however vaguely the right to health is provided under the NODPSP, a broad interpretation fortifies to form part of regime fundamental rights in the Bill of Rights. The profound reason for this is the indivisible nature of human rights and inclusiveness of the right to health. In this respect, the Indian approach of inferring rights would lend lessons to Ugandan judiciary. The South African approach of carefully declaring what the state ought to have done in a particular matter without ordering how it should be done is important to work within the confines and respect for separation of powers doctrine.

The study observes that judicial interpretation in Uganda has been conservative and less innovative. The protection of the right to health, will albeit require judicial activism and adoption of a broad liberal interpretation of constitutional rights. Equally important are other factors such as an independent judiciary and active participation of civil society to shape and advance the course for protection of the right to health. The study also observes that there is a thin line between judicial activism and separation of powers doctrine will call for cautiousness in enforcement of the right to health.

5.2 Recommendations

5.2.1 To Uganda's judiciary

As emphasized in this study, the guardianship of the human rights is constitutionally vested in the judiciary with the power to review legislations and executive actions. It is long overdue that the judiciary in Ugandan wakes up to unequivocally demonstrate this task and accord protection to the right to health. While effectuating this, the judiciary must act independently and should not be restraint to any 'perceived' restriction in the Constitution. A constant reminder of the living nature of the Constitution is crucial to enable a purposive interpretation that underscores its values and principles.

The judiciary is encouraged to take into account the implications of omnibus application of the doctrine of political question on health as a right in the process of adjudication. This is because, judicial protection is the last resort of hope for millions of mothers wailing in pain and other patients dying without accessing basic

medical care. Judicial proclamation will clear doubts on the executive obligations in this particular area.

Following the appeal of the maternal mortality case to the Supreme Court, the Court should set aside the decision of Constitutional Court and hear the substantive issues raised in the case to develop this area of the law. In this regard, the abundant jurisprudence on the subject from elsewhere including the African Commission can be used to enrich the Uganda's own jurisprudence.

5.2.2 To the Ugandan government

A constitutional amendment must be considered in the near future, to directly include all socio-economic rights under the Bill of Rights, to clear doubts on their justiciability. Indeed, the government must recognize that they cannot give people 'freedom without health care', because of the indivisible nature of the human rights. They are also encouraged to demonstrate their commitment to treaty obligations which they willfully ratified or acceded to.

5.2.3 To the Uganda Human Rights Commission

Following the commendable work of the Uganda Human Rights Commission in the area of the right to health with the establishment of the Right to Health Unit (RHU) in 2008, it is encouraged to do more to accord protection.²²⁸ The Commission should enter into a constitutional dialogue with the courts to lend appreciation and digest of the normative content of the right to health and draw parameters for states obligation.

5.2.4 To Uganda's civil society

The civil society in Uganda is encouraged to undertake an active role with impetus to support realization of the right to health. As noted above, civil society activism through mobilization, research, trainings, awareness raising, dissemination of information and PIL strategy has made a significant impact in the protection of socio-economic rights. The experiences from *TAC*, *Patricia Ochieng* and the Indian cases, all demonstrate civil society and public participation in the protection of the right to

²²⁸ The Commission has been issuing quasi judicial orders for violations of the right but the decisions of the Commission is not binding, this makes it legal force and compliance weak.

health. More so, the experiences show that more lobbying is required beyond obtaining a positive judgment in socio-economic rights, since the judgment is only considered ‘midway’ success. Ensuring effective implementation of the judgment presents a much greater challenge which requires follow-up and lobbying.

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Bibliography

Books

Ball, O & Gready, P (2006) *The no-nonsense guide to human rights* Oxford: New Internationalist

Bickel, A (1962) *The Least Dangerous Branch: the Supreme Court at the bar of politics* New Haven: Yale University Press

Craven, MCR (1995) *The International Covenant on Economic, Social and Cultural Rights: A perspective on its development* Oxford: Clarendon Press

Mbazira, C (2009) *Litigating Socio-Economic rights in South Africa: A choice between corrective and retributive justice* Pretoria: Pretoria University Law Press

Mhone, G & Edigheji, O (2003) *Governance in the new South Africa: The Challenges of Globalisation* Cape Town: University of Cape Town Press and University of Witwaterands Press

Pushaw, RJ (2002) *Judicial Review and the Political Question Doctrine*: 'Reviving the Federalist "Rebuttable Presumption", Analysis' North Carolina: North Carolina Law Review

Viljoen, F (2007) *International human rights law in Africa* Oxford: Oxford University Press

Viljoen, F (2012) *International human rights law in Africa* Oxford: Oxford University Press

Chapters in books

Killander, M and Heyns, C 'The African human rights system' in Felipe Gomez Isa and Koen de Feyter (ed) (2009) *International human rights law in a global context* Deusto: University of Deusto

Moreno, J 'The International Covenant on Economic, Social, and Cultural Rights' in F Isa and K Feyter (eds) (2006) *International protection of human rights: Achievements and challenges* Deusto: Univeristy of Deusto

Riedel, E 'The human right to health: Conceptual foundations, in A Clapham & M Robinson (2009) *Realizing the right to health: Swiss Human Rights Handbook Vol3* Geneva: Ruffer & Rub

Sachs, A 'Judicial enforcement of socio-economic rights: the Grootboom case in P Jones & S Kristin (2005) *Democratising Development: The Politics of socio-economic rights in South Africa* Leiden: Martinus Nijhoff Publishers

Sewanyana, L and Awori, T 'Uganda: The Long and Uncertain Road to Democracy' in Abdu Allah Ahmed Naim (eds) (2003) *Human Rights Under African Constitutions* Philadelphia: University of Pennsylvania Press

Articles

Breedon, K 'Remedial Problem at the Intersection of the Political Question Doctrine, the standing doctrine and the doctrine of equitable discretion' (2008) 34 *OHIO Northwestern University Law Review* 43

Bueren, GV 'Including the excluded: the case for social, economic and cultural human rights' (2002)1 *Public Law* 464

Christiansen, EC 'Adjudicating non justiciable rights: Socio-economic rights and the South African Constitutional Court' (2007)38 *Columbia Human Rights Law Review* 321

Chopper, JH 'The Political Question Doctrine: Suggested Criteria' (2005) 54 *Duke Law Journal*, 1457

Dugard, J 'Judging the Judges: Towards an appropriate role for the judiciary in South Africa's transformation' (2007)20 *Leiden Journal of international Law* 965

Geannette, MR 'Judicial Imperialism? The South African litigation, Political question doctrine and whether courts should refuse to yield to executive difference in alien tort claims' (2009)2, *Southern California Law Review* 82

Glendon, MA 'The rule of law in the Universal Declaration of Human Rights' (2004) 2 *Northwestern University Journal of International Human Rights* 2

Heywood, M 'Contempt or Compliance: The TAC Case after the Constitutional Court Judgment', (2003) 4 *ESR Review* 2

International Commission of Jurist, 'Courts and the legal enforcement of socio-economic rights' (2008)2 *Human rights and rule of law series* 34

Jaffe, J 'The Political Question Doctrine: An Update in the response to the recent case,' (2011) 38 *Ecology Law Quarterly* 1033

Mubangizi, JC 'The Constitutional Protection of Socio-economic rights in selected African Countries: A comparative study' (2006) 2 *The Africa Journal of Legal Studies* 1

Kunnemann, R, 'A coherent approach to human rights' Report (1995)17, *Human Rights Quarterly*, cited in Agbakwa, SC 'Reclaiming humanity: Economic Social and Cultural Rights as the cornerstone of African human rights' (1995)5 *Yale Human Rights and Development Law Journal* 178

Kwasi, H 'Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa' (2006) 80, *Tulane Law Review* 40

Scott, C & Macklem, P 'Constitutional Ropes of Sand or Justiciable Guarantees?' (1992)141 *University of Pennsylvania Law Review* 1

Tushnet, M, 'Law and Jurisprudence in the Law of Justiciability: The Transformation and disappearance of Political Question Doctrine' (2002)80 *North Carolina Law Review* 1203

Twinomugisha, BK 'The role of the judiciary in the promotion of democracy in Uganda' (2001) 9 *African Human Rights Law Journal* 3

Wiles, E 'Aspirational principles or enforceable rights? The future for socio-economic rights in national laws' (2006-2007)22 *American University International Law Review* 35

Reports, dissertations and other materials

Byrne, I 'Making the Right to health a reality: Legal Strategies for Effective Implementation' (2005) 1-25, Common wealth Conference, London

Byrne, I 'Inter-regional conference on human rights and the Judiciary systems', 18-20 September (2006), Brasillia, Working group IV: the right to health

El Hadji Guisse, the realisation of economic social and cultural rights: final report on the question of impunity of perpetrators of human rights violations, 49th Sess, UN Doc E/CN.4/Sub.2/1997/8 (1997)

Gostin, LO (2001), 'The human right to health: a right to the "highest attainable standard of health'. Hastings Cent Report

Mbazira C (2009), 'Public Interest Litigation and judicial activism in Uganda: improving the enforcement of economic, social and cultural rights' HURIPPEC Working Paper: Makerere University

H Potts, 'Accountability and the Right to the Highest Attainable Standard of Health', Open Society Institute, Public Health Programme, University of Essex, Human Rights Centre, 2008

Howard-Hassmann, Rhoda E, (1983) 'The Full-Belly Thesis: Should Economics Rights Take Priority Over Civil and Political Rights? Evidence from Sub-Saharan Africa', *Political Science Faculty Publications*, Paper 17

'Health systems and the right to health: an assessment of 194 countries', *LANCET* Vol.372 (2008) 2049

International Commission of Jurists, 'Control by the courts and the legislature over executive action, Judicial control', adopted in the Congress of Rio, 1962, Committee II A, in International Commission of Jurists, *The Rule of Law and Human Rights: Principles and Definitions* (Geneva: International Commission of Jurists, 1966)

'International Commission of Jurists Courts and the legal enforcement of economic social and cultural rights: Comparative experience of justiciability' (2008)

Nolan, A (2007) The Justiciability of Social and Economic Rights: An Updated Appraisal

Nhampossa, Challenges of implementation and enforcement of socio-economic rights in Mozambique (2009)

Oloka Onyango, J (2004), 'Economic and social human rights in the aftermath of Uganda's fourth constitution: a critical reconceptualisation', HURIPPEC Working paper: Makerere University

'Report of the International Commission of Jurists' Rule of law Congress' of Delhi, (1959)

T Roux, 'How political questions become legal questions', Presentation on law, language and politics in South Africa: The Impact of the Constitution (July 2006)

'The Tragedy of Uganda's health care system', ACODE (2010)

International and regional human rights instruments and other laws

International Covenant on Economic, Social and Cultural Rights (1966), GA Res 2200A (XXI) UN GAOR supp (no 16) UN Doc A/6316 (16 December 1966)

Vienna Declaration and Programme of Action, World Conference on Human Rights, (1993), endorsed world Summit, New York, (2005)

The African Charter on Human and People's Rights

The Abuja Declaration, November 2008

The Convention on the Rights of the Child (CRC)

The Convention on the Rights of Persons with Disabilities (CRPWD)

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

Limburg Principle No 25

Universal Declaration, GA Res 217A UN GAOR, 3rd sess, 1st plen mtg, U.N. Doc A/180 (12 Dec 1948)

World Health Organisation (WHO) Constitution

Document of International and regional bodies

Economic Social and Cultural Rights Committee's General Comment No9, 19th sess, 1998, UN Doc E/C.12/1998/24 (1998)

Economic Social and Cultural Rights Committee's General Comment No14

Economic Social and Cultural Rights Committee's General Comment No20

Economic Social and Cultural Rights Committee's General Comment No3

Economic Social and Cultural Rights Committee's General Comment No6 Res 1985/17

Decision

a) African Commission

Social and Economic Rights Action Centre (SERAC) and Another v Nigeria (2001) AHRLR 60 (ACHPR 2001)

b) Domestic courts

United States of America

Baker v Carr, 369 US (1962)186, 217, 82 S Ct 691, 710

Marbury v Madison, 5 US (1 Cranch) (1803) 137,170

Gilligan v Morgan, US 413 (1973) 11-12

Nixson v United States, US 506 (1993) 224

Cohens v Virginia, 19 US (6 Wheat) (1821) 264

South Africa

Minister of Health v Treatment Action Campaign and Others, (2002) Case CCT 08/02

Soobramoney v Minister of Health (Kwazulu-Natal) (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997)

Re Certification of the Republic of South Africa 1996, BCLR (1996)

B & Ors v Minister of Correctional Services [1997] ICHRL

India

Minerva Mills v Union of India, (1980) 6 SCC 325

Paschim Banag Khet Samity v State of West Bengal, (1996)4 SCC 37

Consumer Education and Research Centre v Union of India (1995) 3 SCC 42

Mehta v Union of India (1999) 6 SCC 9

Kenya

Patricia Ochero & 2 others v Attorney General & Another, Petition No.409 of 2009

Nathan Muhangani Simwenyi v Attorney General & 2 others, Petition 282 of 2012

Uganda

Centre for Health Rights and Development & 3 others v the Attorney General, Constitutional Petition No.16 of 2011

Attorney General V Major General David Tinyenfunza, Supreme Court Constitutional Appeal No1 of 1997

Rtd Col Dr Kizza Besigye v Electoral Commission and Yoweri Kaguta Museveni, Election Petition No 1 of 2001 and 2006

Other cases

Shortland v Northland Health [1998] 1 NZLR 433

National laws

Uganda Constitution, 1995

Kenya Constitution, 2010

South Africa Constitution, 1996

India Constitution, 1949

The Anti-Counterfeit Act of 2008, Kenya

Websites

Statement by M Mulumba, Executive Director Centre for Health, Human Rights and Development, 15 June 2012, <http://www.irinnews.org/Report/95659/UGANDA-Activists-to-pursue-maternal-health-case-against-government> (accessed 28 August 2012)

Nakibuuka Noor Musisi, Coalition to stop maternal mortality <http://www.cehurd.org/2012/06/advocates-reject-constitutional-courts-ruling-that-it-has-no-competence-to-address-the-crisis-of-preventable-maternal-mortality-in-uganda-appeal-to-supreme-court-planned/> (accessed 29 August, 2012).

Tragedy of Uganda Health care system, http://www.acode-u.org/documents/infosheet_9.pdf (accessed 30 August 2012)

DB Otim, 'The state and the protection of economic and social rights: A case of Uganda' <http://www.freeonlineresearchpapers.com/protection-economic-rights-uganda> (accessed 10 August 2012)

ESCR General Comment No.14, para 1, <http://www.unhchr.ch/tbs/doc.nsf/%28symbol%29/E.C.12.2000.4.En> (accessed 15 September 2012)

UPR Stakeholders' Report- Uganda 2011, available at <http://www.hurinet.or.ug/downloads/Universal%20Periodic%20Review%20HURINET-U%202012.pdf> (accessed 20 October, 2012)

Covenant on ESCR General Comment No.3, UN OHCHR, 14 December 1990, [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CESCR+General+comment+3.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CESCR+General+comment+3.En?OpenDocument). (accessed 14 September, 2012)

W Vandenhoele, An Optional Protocol on Economic Social and Cultural Rights, Institute for Human Rights K.U Leuven, <http://www.escr-net.org/docs/i/431276> (accessed 4 October, 2012)

ESCR Covenant, <http://www2.ohchr.org/english/bodies/cescr/> (accessed 15 September 2012)

<http://www.derechos.org/nizkor/impu/guise.html> (accessed 13 September 2012)

The UDHR, <http://www.unhchr.ch/udhr/lang/eng.pdf> (accessed 18 September 2012)

The Covenant on ESCR, GA Res 2200A (XXI) UN GAOR supp (no 16) UN Doc A/6316 (16 December 1966), <http://www2.ohchr.org/english/law/cescr.htm> (accessed 18 September 2012)

Resolution on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health 2005/24, 15 April 2005, UN Doc. E/CN.4/RES/2005/24; 58/173, 10 March 2004, UN Doc A/RES/58/173; 2004/27, 16 April 2004, UN Doc. E/CN.4/RES/2004/27 (accessed 18 September 2012)

Informal discussions and recommendations, UPR, Oct 11-12th 2012, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/150/15/PDF/G1115015.pdf?OpenElement> & http://reproductiverights.org/sites/crr.civicaactions.net/files/documents/crr_Uganda_UPRrecs.PDF (accessed 4 October 2012)

Facts about the UPR, available at <http://www.ohchr.org/en/hrbodies/upr/pages/BasicFacts.aspx> (accessed 4 October, 2012)

The Special Rapporteur on the right to health, Anan Grover, joined as an amicus curiae pursuant to his mandate outlined in the Human Rights Council Resolution 6/29, available at http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_6_29.pdf (accessed 3 October 2012)

For all international instruments ratified or acceded to Uganda <http://www.ohchr.org/Documents/Countries/PublicationUgandaUNHRMechanism.s.pdf> (accessed 3 October 2012)

Dr M Chan, Director General, World Health Organisation (WHO),
<http://www.who.int/hhr/en/> (accessed 28 August, 2012)

Justice James Ogoola, 'The Rape of the Temple,' *New Vision*, 6 October, 2006
<http://www.newvision.co.ug/PA/8/13/525279> (accessed 3 October, 2012)

Law reports

African Human Rights Law Report