CASE REVIEW

Using the 'Political Question Doctrine' in Adjudicating the Right to Health: A Review of Centre for Health Human Rights & Development and 3 Others v Attorney General (2011)

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In Centre for Health Human Rights & Development and 3 Others v Attorney General (CEHURD) (2011), the petitioner questioned the constitutionality of the Ugandan government's failure to provide basic maternal health services in the context of the right to health. While the Constitutional Court qualified the use of the 'political question doctrine' (PQD) in the CEHURD case, the Supreme Court indicated why the doctrine cannot be used. The case is thus back at the Constitutional Court for consideration of the constitutionality of the right to health, yet there is no clear test that follows the application of the PQD. Scholars disagree about the scope of the PQD. Some contend that it does not apply to human rights violations and that any attempt to do so is a judicial intrusion into the realm of the executive or legislature (ISER 2012; Dennison 2014). Others argue that the PQD's applicability depends on which organ of government is best suited to offer a viable solution to a problem, or that it comes into effect where a court is ill-equipped to deal with the matter before it (Juma & Okpaluba 2012).

In the course of applying a legal principle or doctrine, the courts are required to consider its origin and context as well as the facts that require its application (Hertogen 2015). As such, an evaluation of a legal principle should have recourse to its factual or legal context as a way of illuminating clarity to the parties (Davis 2003; Roth 2004; Weil 1998). It follows that applying a principle without reflecting on the facts or the reasons for its adoption may affect the decision, given that the judicial officer risks applying a principle without appreciating its context.

In addition, the courts have to relate the nature of the right and the alleged violation. For instance, the Committee on the Economic, Social and Cultural Rights (CESCR) requires that the fulfilment of a right should show progressive realisation by the state. A specific right, such as the right to health, has to be referred to as the highest attainable standard of health, with its minimum core as the basis (Forman, Caraoshi, Chapman & Lamprea 2016; O'Connell 2015). An application of a legal principle to the enjoyment of a right has to be tagged to the interpretation of the right from an international perspective (General Comment 14, 2000; General Comment 24, 2017).

While there is a move from a stringent application of the minimum core to the reasonableness test, it does not tarnish the fact that the minimum core still forms a basis of the interpretation of the right to the highest attainable standard of health (Forman et al. 2016). On this foundation, it is prudent to revisit the CEHURD case.

The CEHURD case in summary

In 2011 the Center for Health, Human Rights and Development and three others petitioned the Constitutional Court of Uganda, alleging that the state's failure to provide basic maternal health services in government health facilities, coupled with health workers' unethical behaviour towards expectant mothers, was unconstitutional (CEHURD 2011). The basis of these allegations was that relatives of the third and fourth petitioners had died as a result of negligence by staff in government health units (CEHURD 2011).

The state sought to have the petition dismissed on the grounds that it was speculative and had no bearing on questions of constitutional interpretation. This position was reiterated in a preliminary objection to the effect that the acts the petitioners complained of were beyond the mandate of the Constitutional Court. It was contended, furthermore, that this issue would require the Court to intrude into the sphere of the executive and the legislature in disregard of the principle of separation of powers.

The Constitutional Court's judgment

The Constitutional Court dismissed the petition on the basis that it concerned the way in which the executive and the legislature conduct their affairs, which is a matter left to their discretion *(Marbury v Madison).* The Court formed the opinion that to avoid breaching the doctrine of separation of powers, it was barred from determining questions of a political nature (CEHURD 2011; Black's 1990).

It is significant to note that in arriving at this decision, the Constitutional Court defined a political question, qualified its application and indicated where it had been relevant in Uganda's past (Black's 1990). The Court's qualification of this doctrine, however, did not speak to the doctrine's origin or context. An engagement of the principle without appreciating its context may be misleading. It should be recalled that an evaluation of a legal principle should have recourse to its factual or legal context as a way of bringing clarity to the parties (Hertogen 2015; Roth 2004; Weil 1998). As such, the application of this principle without relating the facts or the reasons leading to its adoption may affect the conclusion insofar as the judicial officer risks applying a principle without appreciating its context.

This decision by the Constitutional Court confirmed the position in *Attorney General v Major David Tinyenfuza* and *Uganda v Commissioner of Prisons Ex Parte Matovu,* in which the Court of Appeal upheld the application of the PQD. The point of departure was the failure by the Constitutional Court to evaluate the context and the application of the principle in CEHURD.

The appeal in the Supreme Court

The petitioners appealed against the decision of the Constitutional Court. The main issue for the appeal was whether the PQD was applicable in Uganda, and if so, whether it was applicable in this case. The Supreme Court held that although the PQD had limited application in Uganda, it was misapplied by the Constitutional Court (CEHURD 2013). The Supreme Court indicated that the PQD was of limited application insofar as the Constitutional Court had a duty to tow the thin line between ensuring separation of powers and upholding the Constitution of the Republic of Uganda (CEHURD 2013).

The misapplication of the PQD was evident in the Constitutional's Court decision not to act on its mandate to hold the state accountable for the failure to provide maternal services for the general population (CEHURD 2013). The Supreme Court departed from the Constitutional Court's use of *Tinyefuza* as far as it distinguished it with regard to its context other than the fact that it applied the PQD. As such, the Supreme Court held that the Court in *Tinyefuza* agreed to the existence of a duty to review legislative measures or administrative decisions that violated the rights of individuals.

Furthermore, it drew on persuasive jurisprudence from South Africa's *Minister of Health and others v Treatment Action Campaign*, in which the South African Constitutional Court gave detailed orders to ensure that the state took steps to ensure the progressive realisation of socio-economic rights.

Evaluating the Supreme Court's approach

The Supreme Court's distinction of *Tinyefuza and Ex parte Matovu* was a departure from the Constitutional Court's confirmation of the two decisions insofar as the Supreme Court engaged the origins and context of the PQD. First, in the context of *Marbury v Madison, Baker v Carr and Ex parte Matovu*, the PQD was to be applied on the basis of the appropriateness or inappropriateness of the Court's deciding on the subject matter, not on the basis of its lack of jurisdiction. Secondly, cases within the scope of the PQD included cases of a political nature that were the preserve of other organs of state by virtue of their constitutional mandates. Citing *Tinyefuza,* the Supreme Court noted that the exception to this position was where there was a violation of human rights or a lack of constitutional mandate for the respective organs to remedy the issues before the Court.

The discussion above shows that the Supreme Court correctly appreciated the context of the PQD before applying it to the facts. However, the second part of the application was not adequately addressed. In its decision, the Supreme Court hinted at the nature of the right to health by basing its argument on the requirement that the state had to ensure equal enjoyment of the right to medical services (CEHURD 2013). Further engagements with regard to the right to health were evident in the recognition of the rights of women and children under articles 33 and 34 of the Constitution.

In the light of the correct application of the PQD, the Court ought to appreciate the nature of the right and the alleged violation. In this case, it has to appreciate the interpretation of the right to health. It should be stated at the outset that the Supreme Court had no obligation to engage the second aspect as the matter was not substantively brought before it for adjudication. Nevertheless, the fact that the case was referred back to the Constitutional Court for determination on its merits is an indication that the latter court will have to address this issue in its judgment. It is in the fact that the two courts have dealt with the nature of the right to health that this comment seeks to propose a framework for the adjudication of the rights in the wake of the PQD.

The political question doctrine and the right to health

The decisions by the Supreme Court and the Constitutional Court in *CEHURD* show that the PQD is still applicable in Uganda. It is true that, according to the Supreme Court, it application is limited. While the ruling distinguishes between various decisions to conclude that the doctrine is not applicable, this position is based on the constitutional questions that arise. The trend is for the PQD to be applied unevenly: whereas it was not applied in *Ex parte Matovu*, it took centre-stage in *Tinyefuza*, was imputed in *Severino Twinobusingye v AG*, and arose in CEHURD before the Supreme Court quashed the judgment of the applicant.

The cumulative effect of the decisions in the two cases by *CEHURD* questions that mode of application of the PQD. This trend suggests that despite its limited application, the PQD is bound to rear its head again, as will be illustrated shortly.

First, the reasoning of the Supreme Court shows that in the absence of a de facto human rights violation, and with the possibility of appropriate relief from executive or legislative organs other than the judiciary, the PQD may be applied. This position poses further interpretational challenges, given that the Supreme Court does not indicate whether the court that seeks to apply this doctrine should use a subjective or objective test. A subjective test would require that the court make a decision based on the facts and merits of the case (Bassiouni 2011). An objective test, on the other hand, requires that the court hears any matter that requires a constitutional interpretation and then subjects it to the Supreme Court's principle in CEHURD as the basis (Apio 2012). It is correct to say that the uneven application of the PQD in Uganda's jurisprudence shows a lack of judicial consensus.

Secondly, determining the standard to use requires that one consider the obligations that arise from the state's duty to promote, protect and provide an enabling environment for the enjoyment of socio-economic rights. As such, there is a need to interpret the right to health in the light of the international and regional instruments to which Uganda is a party: because it is a party to them, the country is obliged

to follow their jurisprudence. An appreciation of these obligations will inform the development of any given standard.

The Constitution does not provide for the right to health. However, it has provisions that speak to the rights of women and children within the context of this right. For instance, the national objectives and principles of state policy require the government to ensure that all Ugandans enjoy equal rights to health. Also, women are entitled to rights under the Constitution on account of their maternal functions in society. As for children, they are not supposed to be deprived of medical treatment on any discriminatory grounds.

Furthermore, Uganda is a signatory to the International Covenant on Economic, Social and Cultural Rights (ICESCR), the African Charter on Human and Peoples, Rights (ACHPR), and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), as well as being a member of the United Nation's World Health Organisation. All these bodies interpret the right to health as the right to the highest attainable standard of health. In this regard, the state has a duty to ensure the progressive realisation of this right (Fact Sheet 31, 2008) by respecting, protecting, fulfilling and promoting it (Forman 2016). The latter four obligations are instructive in identifying the minimum core of the right to health.

From a general socio-economic perspective, the nature of the right to health shows the application of a minimum core concept. This concept refers to the obligation on states to ensure that no significant number of individuals are deprived of the minimum essential levels of socio-economic rights (African Commission 2010). In its General Comment 3, the CESCR refers to the minimum core obligations as the basic minimum level of subsistence which is required for the enjoyment of a dignified human existence with regard to a particular right (General Comment 3, 1990). Furthermore, it is clear that the CESCR and the African Commission recognise the existence of the minimum core obligation without regard to the availability of resources (African Commission 2010; CECSR 1990). It should be noted that the various provisions that provide for the right to health create a rich context for its realisation in Uganda. This is evident in the numerous policy documents that underpin the right to health as an amalgamation of various rights.

So, although Uganda is resource-constrained, it still has the obligation to implement the minimum essential levels of each right for vulnerable and disadvantaged groups through the prioritisation of their welfare in legislative and policy interventions (Mbazira 2009). Insights can be drawn from the 1986 Limburg Principles on the Implementation of the ICESCR. They require state parties to ensure respect for minimum subsistence rights by using available resources to accord everyone the satisfaction of subsistence requirements and the provision of essential services (Limburg Principles 1986). The requirement is in disregard of the state's level of socio-economic development. It follows that the failure of the state to meet a generally accepted international minimum standard of achievement, which is within its powers to meet, is a violation of the minimum core requirement.

Tasioulas (2017) argues that to arrive at the minimum core of any right, one has to follow five steps. The first is to identify the right in a covenant, then the scope or appropriate subject matter of that right. The third step involves identifying the content of the obligations associated with a given right in view of considerations such as feasibility and burden. This is followed by the identification of the sub-set of obligations associated with the right that must be fully complied with immediately by all states as the 'minimum core obligations'. The evaluation of these minimum core obligations is evident in the identification of the consequences of their non-fulfilment by the state party. It should be recalled that the introduction this article advocated for the need to appreciate the nature of the right and its violation as an aspect that informs the adjudication of socio-economic rights.

It is submitted that such an engagement amounts to the judicial interpretation and application of a minimum core of a socio-economic right. In this regard, at the consideration of the preliminary objection on the issues that lacked the need for constitutional interpretation, the Constitutional Court did not follow the five steps. It chose to dismiss the petition on the basis of the PQD. The Supreme Court, on the other hand, went to great lengths to re-engage the PQD within its origins and context before applying its principle.

Conclusion

Since the matter is due for hearing before the Constitutional Court, two cardinal issues inform the

various issues that need to be decided. The first is the question of whether the right to the highest attainable standard of health is a constitutional right in terms of article 45 of the Constitution. The second issue is whether the inadequacy of human resources for maternal health and the lack of essential drugs are an infringement of the right of health.

The Constitution contains provisions that provide an environment that speaks to the need for the progressive realisation of the right to the highest attainable standard of health. These include the provision of the right to life, the right to welfare of women and children, the right to human dignity, and the corresponding duty of the state to promote, respect and uphold these rights. In addition, the national objectives of state policy implore the state to ensure the fulfilment of all fundamental rights to ensure the enjoyment of the rights and access to the right to health services.

Furthermore, according to the Constitution, this respect extends to the need to respect international law and treaty obligations. An examination of these provisions in the course of the constitutional interpretation will open the way to the creation of a hybrid standard in the application of the PQD, insofar as the Constitutional Court will deal with the questions of constitutionality which arise, giving regard to the minimum core of the right to health. As such, it will evaluate the applicability of doctrine on the basis of the minimum core.

Post-script: At the time this article was written, the Constitutional Court had not delivered its judgment on the merits of the petition in CEHURD.

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