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REALISING THE RIGHT TO HEALTHCARE SERVICES IN SOUTH AFRICA

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Declaration

I, MONYAI WANGA EZEKIEL, at this moment declare that this research proposal for a Master of Laws in human rights titled **REALISING THE RIGHT TO HEALTHCARE SERVICES IN SOUTH AFRICA** at this moment submitted by me at the University of Venda, has not been submitted previously for a degree at this or any other institution and that it is my work in design and execution, and that all reference material contained therein has been duly acknowledged.

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Signed in my presence on this the …….. day of ……..……..2024

Commissioner of Oaths

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Abstract

This study examines the ongoing problems faced in an attempt to enforce the provision of the entitlement to hospital facilities. It outlines the legal and constitutional frameworks that makes provision for the entitlement for having to access healthcare services for all people in the Republic. The need for such provision is a central part of the national vision for healthcare transformation. Therefore, our constitution provides that: “everyone has the right to have access to health care service.” In this regard it is important to note that “ This constitution is the supreme law of the Republic ;law or conduct that is in consistent with it is invalid and obligations imposed by it must be fulfilled”. The study draws on evidence from a range of sources, including published literature, policy, and existing healthcare reforms in South Africa, evaluates their efficiency and the current state of healthcare in the country, and discusses the socio-economic and political issues, including poverty, inequity and inadequate public healthcare infrastructure. Particularly, this study accesses the legal initiatives in South Africa, such as the statutory Health Insurance (NHI), and their potential to improve enforceability of the said right.

The conclusions drawn from this paper suggests that South Africa faces ongoing problems in achieving the objectives of providing for the right to healthcare, including a shortage of healthcare providers, low levels of public financing for health, and inadequate supplies. We are further burdened by the country's limited human resources and infrastructure, inadequate health systems governance, and weak public-private partnerships have all contributed to the slow progress in achieving universal healthcare coverage in the country.

The study concludes by proposing specific recommendations to safeguard the provision of the said right. These strategies include increasing public investment in health, strengthening public-private partnerships, and improving the management of the health system. It also highlights the importance of developing innovative strategies that can engage stakeholders in understanding and addressing these ongoing problems.

The evidence presented throughout this study suggests that substantial effort will be required to overcome the different challenges and ensure universal healthcare coverage in the country.

Keywords: healthcare, rights, realisation, South Africa, Constitution, national health insurance

CHAPTER ONE: INTRODUCTION

1.1 Background to the study

This dissertation focusses on section 27 of the Constitution of South Africa that establishes that every citizen is entitled to access to healthcare services , including reproductive health.[1] To achieve this, our government has implemented policies and strategies , as the said right has been prioritised. The government thus bears the burden to enact measures that promote access to necessary services for everyone in a manner that does not have a negative impact on the economy.[2]

The purpose of this research is to explore this entitlement that is granted to everyone. The dissertation specifically makes an enquiry on the application of the constitutional provision of the said entitlement. Thus, this research focusses on how the said right can be enforced. This paper will contribute to the existing scholarly views in upholding the provision and enforcement of the human right envisaged in section 27(1).

1.2 Problem Statement

Considering what transpired before the advent of democracy in our country, the current government inherited the inequalities found in the health department. As a result, this has necessitated significant spending in a bid to address crucial shortages within the health department.[3] This action was prompted by the establishment of the current democratic government that guaranteed everyone the right to have access to- "(a) health care services, including reproductive health care; (b) sufficient food and water; and (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance…"[4] As a consequence, our government is required to take the initiative of ensuring that the guaranteed access is granted to everyone residing within the republic.

However, South Africa just as any other transforming democratic state is still struggling and facing challenges with adopting the policies and measures to transform the health

[1] The Constitution of the Republic of South Africa, Act 108 of 1996.
[2] Toyana HM 'A National Health Insurance Management Model to Promote Universal Healthcare in South Africa' (2013) Master of Arts Thesis University of Johannesburg.
[3] Rispel L and Setswe G "Stewardship: Protecting the Public's Health: Oversight: Principles and Policy" (2007) South African Health Review 4.
[4] Section 27 of the Constitution (note 1 above).

care system.[5] One of the issues that has not been dealt with is the discussion about the disparities and integration of the fragmented healthcare system to deal with the rampant inequality in the country. The two-fold system emanating in the difference in public and private sectors has generally created a division in the health sector[6] that subsequently limits the standard of health care provided to the people.

1.3 Purpose of the study

The aim of the study is to analysis the practicability of section 27(1) of the Constitution to improve the right to access healthcare services and the management of the healthcare system in South Africa. This purpose is encapsulated in the objectives below.

I. Analysing and examining the key role played by the state in discharging its obligation to achieve and or realise the said right.
II. Exploring barriers currently impeding the enforcement of the provision of the said right.
III. To highlight the importance of developing innovative strategies that can engage stakeholders and improve the management of the health systems.

1.4 Research Questions

The main question answered in this study is whether there is any potential for the provision of the said right or not.

These subsequent queries are also asked and answered:

1) What are the implications of the said entitlement?
2) What legal initiatives or measures have been employed by the state in order to discharge its duty to achieve the said right?
3) Are these measures or initiatives improving the provision of the said right?
4) Are there any barriers to achieving the provision of the said right?
5) Are there any recommendations on how to improve the likelihood of enforcing the said right ?

1.5 Methodology

This is desktop research. This research will adopt a methodology that will comprise the evaluation of various literatures. Literature consideration will be made towards various sources such as international and South African laws, legislations, bills,

[5] Mayosi BM and Benatar RS (2014) 1344. 21 Human A "A Tale of Two Tiers: Inequality in South Africa's Health Care System" (2010) 2(1) UBCMJ.
[6] Human A "A Tale of Two Tiers: Inequality in South Africa's Health Care System" (2010) 2(1) UBCMJ

government policies, and regional and global human rights instruments. This research will also consider secondary sources such as textbooks, journals, and scholarly papers that have addressed the subject matter of the research. Any inferences drawn and conclusions reached will tailored in such a manner as to answer the research questions.

1.6 Preliminary Literature Review

South Africa's constitutional dispensation was born in 1994 at its independence and the heart of the new constitutional dispensation was aimed at poverty alleviation, equality, and equity for all. This new constitutional dispensation establishes a government that requires solidarity of all races and ethnic groups despite their indifferences. The cornerstones of the constitution include amongst others , human dignity, equality .[7] These cornerstones and/or founding values paves a way for the necessity of enforcing provisions stipulating that "Everyone has the right to have access to health care services, including reproductive health care".[8] As a consequence , the government is given the burden and responsibility to implement and adopt legislation, policies, and structures that the said right is provided adequately.[9]

Numerous scholars have written on the right in general, even though the practical aspect of the right has not been the focus of many scholars, specifically where the adequate realisation of this right is concerned. The views expressed by many scholars are about how effective is the right, how it can be achieved, what challenges the country faces as a result of the apartheid regime, whether there has been progress with the realisation of this right since democracy, and who is to blame for the failure of the realisation of this right. The study undertakes an in-depth investigation of the practical applicability of the right.

Coovadia, stated that our democratic government has adopted and enacted reforms and policies to make transformational changes in the health sector[10] to address

[7] Deegan H South African Reborn: Building a New Democracy (UCL Press Limited1999)
[8] Section 27 of the Constitution of the Republic of South Africa (Act 108 of 1996) as adopted on 8 May 1996 and amended on 11 October 1996 by the Constitutional http//: www.Justice.gov.za/legislation/constitution SAConstitution-web-eng.pdf. (Date of use: 05 November 2015).
[9] Section 7 (2) of the Constitution.
[10] Coovadia H et al "The Health and Health System of South Africa: Historical Roots of Current Public Health Challenges" (2009) The Lancet 825, 828.

inequity and inequality in the health sector. One of the reforms was the replacement of the fourteen individual health departments for Bantustans into one national health department with nine provincial health departments.[11] Furthermore, Nxumalo submits that from beginning of the era of democracy, tremendous steps have been taken towards adopting and implementing progressive policies and measures to transform the health sector and eradicate the apartheid structural inequalities that were in the health department.[12]

Subsequently our government has invested significantly in the Public Health department by increasing programs that deals with serious diseases such as TB , human immunodeficiency virus and AIDS—by so doing the government of South Africa also increased the utilisation of health care services.[13] After careful consideration of the current data on the public health department of the Republic, it has been noted that transformation of the health sector through, policy and service delivery is a necessity.

The data has also indicated the impressive progressive strides that have been undertaken to transform the health sector with access to public health facilities. Arguably, this indicates the intention our government to address inequality evidenced from how there is preference on who should receive such health facilities.[14]These preferences emanate from the inevitable difference of social classes of people. Arguments have been made that despite the adoption of relevant legal instruments the aforementioned right has not yet been achieved. The Commission that specifically deals with human rights has revealed that there were loopholes in the enforcement of the legal instruments that had been developed by the Department of Health at all levels of the government.[15]

The paper suggested that the gaps in enforcement resulted from a deficiency in the capacity of qualified persons such as medical doctors, nurses, and other specialised professions in the healthcare sector, and the limited delivery of medical services to poor in less developed areas. The deficiencies may be construed as a segregation

[11] Ibid.
[12] Nxumalo L N, Goudge J and Thomas L "Outreach services to improve access to health care in South Africa: Lessons from three community health worker programmes" (2013) COACTION 220
[13] ~~See also~~ Lomahoza K Monitoring the right to health care in South Africa: An analysis of the policy gaps, resource allocation and health outcomes (Studies in Poverty and Institute on the Progressive Realisation of Socio-Economic Rights September 2013)
[14] Ibid.
[15] South African Human Rights Commission (SAHRC) Chapter 8: The Right to Health (7th Report on Economic and Social Rights 2006-2009) 79.

which contravenes the approach of achieving human rights.[16] A study abbreviated as the (SPII) was created to safeguard the right envisaged in section 27(1) of the supreme law of land. These inequalities were found to have been caused by among others low health outcomes, disease burden, deficiency in human resources, and inequality in the implementation and monitoring of policies within different divisions of the health department.[17]

Despite these challenges, there is still a constitutional commitment by the government to make provision for the right in question. Many academics have noted transformative features in the constitution and our courts have taken a stance of applying the law in a manner that promotes transformation, through interpretations of legislations and policies that promote equality and human dignity for all South Africans.

However, the evidence available indicates whether the government of South Africa has fully complied with its mandate to realise the constitutional mandate and prevent the abovementioned deficiencies proactively. The purpose of this research emanates from these issues in order to show the necessity of breaking barriers that prevents equal delivery of the right to access medical services . [18]

1.7 Ethical Considerations

The study does not have any ethical issues that need to be observed other than acknowledging all the sources used.

1.8 Overview of Chapters

This paper is categorized into five chapters and below is a succinct description and discussion of each chapter.

Chapter One: **Introduction**

This is the introductory chapter, and its purpose is to outline the scientific and methodological structure of the research. The chapter deals with the aims and objectives of the research. Chapter One attempts to provide general insight into the approach employed throughout this paper.

Chapter Two: **Legal framework on the right to access healthcare services in South Africa**

[16] Ibid.
[17] Lomahoza (note 13 above).
[18] Klare K "Legal Culture and Transformative Constitutionalism" (1998) 14 SAJHR 150. Davis DM "Transformation: The Constitutional Promise and Reality" (2010) 26 SAJHR 23-76.

In this chapter, this research set down the legal frameworks on the rights to access medical services. This chapter examines both national and international instruments, policies, and measures enacted and or established for the sole purpose of ensuring the achievement of the access medical facilities. To address the injustices of the past and to transform South African inequality, the realisation of the Bill of Rights must be fully achieved including the right to have access to adequate health care services. The government is mandated by the Constitution to such measures and implement policies and legislations that will lead and result in the achievement of full realisation of the Bill of Rights as enshrined in the Constitution. As a result, this chapter shall provide insight into the measures that the government has adopted and the impact of such measures on the transformation of healthcare services. The paper will give insight on the relevant health insurance which is abbreviated as (NHI).

The NHI's mandate is reinforced by the provision of the right to access medical services and it is presently in its initial implementation stage in selected pilot districts. As a result, it is considered one of the instruments of transformational justice about inequality and access to healthcare services. The Policy of NHI observes religiously the notion of social solidarity and has in its backbone in the promotion of affordability, efficiency, and equity.

Chapter Three: **The nature, scope, content, and extent of the right to access health care services in South Africa**

This part of the paper makes a detailed enquiry into the right that guarantees accessibility of facilities, stuff and programmes within the health department. The research further enquires on how national and international institutions, including the judiciary, have interpreted and applied the aforesaid right. As a result, this section analyses whether objectives of transformative constitutionalism have been achieved to the satisfaction of the provision of the said the right.

Chapter Four: **Opportunities and barriers to the realisation of the right to access health services in South Africa**

This chapter examines opportunities and barriers inherent in the realisation of the aforesaid right. Chapter four's focus will be on the current implementation of NHI policies and whether they have been successful in achieving their objectives which are consistent with the constitution. Particularly, the chapter assesses the hindrances that lead to deficiencies in the provision of the said right.

Chapter Five: **Conclusion and Recommendations**

Chapter five will sum up the findings of the research and also make actual suggestions and or recommendations of approaches and/or avenues that can be explored for purposes of amending the deficiencies in the provision of the aforesaid right can be addressed .

CHAPTER TWO: LEGAL FRAMEWORK ON THE RIGHT TO ACCESS HEALTHCARE SERVICES.

2.1 Introduction

The right to access healthcare services is enshrined both under national and international laws. Because of their nature as human rights, these rights are interconnected, interdependent, universal, and extremely vital when one takes into consideration their intersectionality with other non-derogable rights such as civil and political rights. One cannot achieve the right to life and dignity without good health. Therefore, the enjoyment of socio-economic rights ensures the enjoyment of other human rights. The importance of these right was unequivocally asserted in the landmark decision which saw the death sentence being abolished in South Africa on the basis that it was in contravention of the right to life.[19] However, despite this intersectionality, access to healthcare services remains a right that can only be fully achieved when the state wields the resources as best exemplified in the case of *S v Soobramoney*.[20] Consequently, there is a need to interrogate whether the legislative frame of South Africa is making strides towards the progressive realisation of this right. This chapter will therefore define the contours of the phrase "progressive realisation". Furthermore, it undertakes a discussion on the role of South African legal framework, in fostering the progressive realisation of access to healthcare in South Africa

2.2 Legal Framework Governing Access to Health Care Services in South Africa

Considering submissions made on the previous paragraphs, it is conceded that the rights such as the right to education and the right to access to medical services may not be immediately realisable to the fullest envisioned extent. However, there is a consensus amongst scholars and experts that it is incumbent on states to immediately promulgate and adopt the policy and legislative framework necessary to achieve these

[19] *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3

[20] *Soobramoney v Minister of Health* (Kwazulu-Natal) (CCT32/97) [1997] ZACC 17

rights.[21] Equally, it is incomprehensible for a state to regress in the fulfilment of these rights.

2.2.1. The Right to access to Healthcare in the South African Constitution

Many constitutional provisions protect the rights to access healthcare, including "reproductive health care; *(b)* sufficient food and water; …" In this democratic era, legislatures have seen the need to enact provisions that cater for socio-economic rights, which include the right to have access to health care services. It is therefore important to note that ,Sections 12 (2), 24 (a), 27 (1)(a), 27 (3), 28(1)(c) and 35 (2)(e) contain provisions that are favourable and or in support of the rationale behind human rights.

These rights include "the rights to bodily and psychological integrity, including the right to make decisions on reproduction, the right to security in and control over your body, and the right not to be subjected to medical experiments without consent".[22] Section 24 (a) on its part, provides for the entitlement to residential areas and workplaces that are not injurious to the health or well-being. It is also significant to note the provisions of Section 27 (1) (a) & (3) provide for the entitlement to access to hospital and/or medical services and the right to receive urgent medical attention. Sections 28 (1) (c) and 35 (2) (e) provide for the rights to basic health care services and the right to adequate medical treatment at state expense. Having dedicated more than two Sections to the same rights, The Commission that drafted the constitution prioritized the said right to the extent that Section 27 (1) (a) is very explicit in that it enjoins our government to ensure efficient accessibility of hospital staff, equipment's, and goods, but also expresses the conditions under which the aforesaid right must and/or should be exercised. Some of these elements or conditions were briefly analysed in previous sections. However, it should be stressed that the Constitution refers to the "availability of resources" as one of the elements to have access to health care services. This means that while the state must provide people with better access to health care, it does not do more than it can with the number of resources available. Likewise, the Constitution does not allow discrimination on any ground, including race, gender, sex, religion, age, marital status, sexual orientation, or disability. In order to ensure that the

[21] Kumm, M, "The legitimacy of international law: A constitutionalist framework of analysis." (2004) 15 (5) *European Journal of International Law* 907-931.
[22] Section 12 (2) Constitution of South Africa.

right to hospital and or medical services is sufficiently enforced, legislatures saw the need to also introduce other legal instruments such as legislations and polices that aims to aid in the enforcement of the said right.[23]

2.2.2. National Health Act 61 of 2003 (NHA)

The cornerstones and /or founding values of the democratic government challenges legislatures to promulgate laws that give effect to rights affirmed by the Constitution. To this end, the parliament enacted the (NHA), which can be categorized as the most significant legislation promulgated in order to efficiently realise the said right .[24] It was Passed in 2003 and assented to by the President in July 2004.[25] the act incarnates key health system policies that date back to the birth of the democratic state of South Africa. It is reflective of certain characteristic traits of ruling political party's initiatives such the health plan which was introduced in 1994.

These similarities are drawn from the fact that the Act includes the delegation of health care services from National into provincial and district systems. The Act also dwells on the objective of standardizing various divisions within the health department. The Act also focusses on removing the inequalities inherited from the previous government.[26]

The NHA purports to regulate the health sector at all levels and set out uniformity in standards of provision of health services through consolidation various sectors at the national level. The key initiative of the act is centralised on the promotion and protection of the right to have accessibility to hospital services.[27] The Act also addresses the socio-economic fragmentation within the department of health that stems from the Apartheid regime. The Act focuses on and promotes the preference for the provision of health services to vulnerable members of society such as women,

[23] Copp, D, "The right to an adequate standard of living: Justice, autonomy, and the basic needs." (1992) 9 (1) *Social Philosophy and Policy* 231-261.

[24] Hassim A, Heywood M and Honermann B *The National Health Act 61 of 2003: A Guide* (1st ed Siber Ink 2008

[25] National Health Act, Act 61 of 2003 http://www.hst.org.za/uploads/files/chap2_03.pdf (accessed 1 December 2021).

[26] Ibid.

[27] Section 2 of the National Health Act (a)-(c).

children, the elderly, and the disabled.[28] The objective of the Act is to uphold the spirit and purport of the Act to ensure that everyone enjoys their democratic government which was elected in order for them to have entitlements such as the right to access hospital services.

The Act has included some significant provisions that have a direct nexus with the intentions of section 27 of the constitution to achieve the objectives of the constitutional transformation. Section 3 of NHA is to the effect that, the Minister of Health must within available resources, "ensure the provision of such essential health care services, which must at least include primary health services, to the population of the Republic as may be prescribed after consultation with the National Health Council".[29] The minister of heath is empowered to apply an efficient approach that will aid in the determination of categories of people who are entitled to free health care services.[30] In exercising this prerogative, they must consider the following:

I. The variety of free-of-charge health services presently accessible;
II. The types of patients currently unable to cover medical expenses;
III. The bearing of any such state on access to health care services; and
IV. the needs of vulnerable groups such as women, children, older persons, and persons with disabilities.[31]

The NHA reiterates the ambit and purpose of the provision that stipulates that no hospital or clinic has the authority to refuse anyone access to medical services[32] as consequence , the legislature appears to have drafted the aforesaid section with the intention of dissuading private health institutions from denying access to those who are less economically active.[33] The NHA also authorizes patients or their next of kin to hold healthcare practitioners accountable for any medical malpractice. It makes

[28] Ibid.

[29] Section 3 of the National Health Act.

[30] See section 4 (1) of the National Health Act.

[31] See section 4 (2) of the National Health Act

[32] Section 5 of the National Health Act.

[33] Gray A et al "Health Legislation" in Ijumba P and Barron P (eds) *South African Health Review* (Health Trust Systems 2005) 18.

provision for procedures on how to lodge complaints relating to the dissatisfaction they may hold regarding the treatment they would have received from a healthcare facility.[34]

2.2.3. The National Health Insurance Bill

The South African government, in the year 2011, introduced a policy paper that recommended the comprehensive development of the National Health Insurance (NHI).[35] This development would spread through "a period of fourteen years, starting with a pilot programme for five years in ten selected districts in 2012".[36] The said bill is aimed at the transformation the department of health which is distanced from solidarity due to its different divisions.[37] Cantered at the helm of the National Health Insurance aims is the eradication of discriminatory public health care that impedes the accessibility of health care services by everyone regardless of their social status.[38] Proponents of the said Bill argue that it would intensely improve the accessibility of health services by everyone through the rationing of health care services.[39] There is a general sentiment that the Bill is a progressive pro-poor whose effective implementation would go a long way in improving the standard of life among the impoverished South Africans who struggle to access quality healthcare services.[40] Nevertheless, some critics question the effectiveness of the Bill when the time comes for its practical implementation, especially on issues relating to costs and whether South Africa can afford the cost.[41] Initially, the projections of the NHI scheme anticipated that an amount of R240 billion would be required for fourteen (14) years.[42] The money was intended to be used for purposes of improving infrastructure and skills

[34] Section 18 National Health Act.

[35] National Health Act No 61 of 2003: (Policy Paper on National Health Insurance, Government Notice, 657 Pretoria: Government Printers 2011).

[36] Ibid.

[37] Lomahoza (as n13 above) 7.

[38] Ibid.

[39] South African Private Practitioner Forum in *National Health Insurance in South Africa* (SAPPF submissions on Green Paper on National Health Insurance, 2011-12-06) 19 para 11.2.

[40] Ibid.

[41] Ibid.

[42] Ibid.

of medical resources, facilities, and human resources.[43] Questions arose regarding the government's ability to administer the system efficiently considering that the government was failing to manage legal entities put in place to compensate people for injuries sustained at work places (COIDA) and third-party claim arising from motor vehicle collisions occurring on national roads (RAF).[44] Despite concerns, the NHI pilot project commenced in April 2012 when the 2012 budget allocated it a special condition.[45]

2.2.4. Other Policies and Legal Framework Augmenting Access to Health Care Services

Before the enactment of the NHA there were various legal instruments and policies that gave effect to the ethos of Health rights as affirmed by the Constitution in section 27, these policies are discussed below:

2.2.4.1. Choice on Termination of Pregnancy Act 92 of 1996

This piece of legislation may be categorised as one of the legal instruments forming part of the government's mandate to undertake reasonable legislative measures that guarantee everyone access to hospital and or medical services, specifically those referring to reproductive health care.[46] Reproductive health care in this context implies that women are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so. It is further guaranteed that pregnant women receive adequate health treatment during the tenure of their pregnancy and the choice to terminate their pregnancy safely. The purpose is to limit maternal morbidity and mortality.[47] Mojapelo J found that " the cornerstone of the regulation of termination of pregnancy of a girl and indeed of any

[43] Ibid.

[44] Brendah MM *Critical Discussion of the Right of Access to Health Care Services and the National Health Insurance Scheme* (LLM Thesis School of Law University of Limpopo 2013) 45-6.

[45] Ogunbanjo G "What is the Status-quo of South Africa's National Health Insurance Pilot Project?" (2013) *S Afr Fam Pract* 301.

[46] Section 27(1) of the Constitution.

[47] Pickles C "Termination of Pregnancy Rights and Foetal Interest in Continued Existence in South Africa: *The Choice on Termination of Pregnancy Act 92 of 199"* (2012) *PELJ* No 5 410. O'Sullivan M "Reproductive Health Rights" in Woolman S *et al* (eds) *Constitutional Law of South Africa* (Juta Cape Town Revised Service 3 2011) 27-34.

woman under the act is the requirement of her ' informed consent'. No woman regardless of age may have her pregnancy terminated unless she capable of giving her informed consent to the termination and in fact does so"[48].

The said piece of legislation prescribes methods and approaches followed during the legal termination of a pregnancy[49] The promulgation of the Act was necessitated by the high number of illegal street abortions estimated to be more than 44,000 per year.[50] It was claimed that these illegal and unsafe abortions accounted for about 3% of deaths among women aged 20-29 years.[51] In terms of the said act, women within 12 weeks of gestation may request a medical practitioner to perform an abortion on them without any conditions attached.[52] "Pregnancies falling between 13 weeks to 20 weeks of gestation may only be terminated when a medical practitioner is of the following conviction:

I. That continued pregnancy would pose a risk of injury to the woman's physical or mental health
II. There is a danger that the foetus would suffer from a severe physical or mental abnormality
III. The pregnancy resulted from rape or incest
IV. The continued pregnancy would significantly affect the social or economic circumstances of the woman".[53]

After 20 weeks of gestation, termination can only be performed if the medical practitioner thinks that:

I. Continued pregnancy would endanger the woman's life
II. Continued pregnancy would result in a severely malformed foetus
III. Continued pregnancy would pose a risk to the fetus.[54]

Since the Act came into effect, the number of termination of pregnancies has increased however there has also been a significant decrease in morbidity and

[48] Christian lawyers's association v National Minister of Health and other[2004] 4 all SA 31 (T)
[49] Section 2 of Choice on Termination of Pregnancy Act 92 of 1996.
[50] Harrison D (2009) 14.
[51] Ibid.
[52] See Section 2 (1), Choice of Termination of Pregnancy Act of 1996.
[53] Ibid.
[54] Ibid.

mortality associated with unsafe abortions.[55] These mortalities and unsafe abortions led to the death of many young females who had brilliant futures ahead of them and as consequence many teenagers has resorted to different preventive methods are or may not be scientifically approved.

2.2.4.2. Medicine and Related Substance Control and Amendment Act 90 of 1997

The availability and affordability of medicine are intrinsically intertwined with the progressive realisation of access to healthcare services. To this end, the government of South Africa adopted the Medicine and Related Substance Control and Amendment Act 90 of 1997. This Act makes provision for *inter alia* the creation of a medicine committee, the introduction of a transparent, non-discriminatory pricing system of medicines, and the parallel importation of medicines.[56]

2.2.4.3. Medical Schemes Act 131 of 1998

As evident from its name, the Act focuses on how medical schemes are registered and regulated". However, it is credited for *inter alia* clearly defining some main concepts which are vital to the enjoyment of section 27 rights; for example, "the term health service is more clearly articulated in the Medical Schemes Act than in any other South African statute or policy document".[57] The piece of legislation upholds the equality clause of the constitution through the prohibition of discrimination.[58]

The Act also provides for the establishment of a Council for Medical Schemes. The Council for Medical Schemes must ensure that medical schemes comply with the Act and its regulations.[59] The advocacy of the rights of members of medical aid schemes also forms part of the council's objectives and members are encouraged to appraise themselves of the rights conferred by the Act[60]. Where there is a dispute, the council

[55] See Harrison (n 50 above).

[56] Section 2 of the Medicines and Related Substances Act 101 1965. *See the entire Act*.

[57] Section 1 of Act 131 of 1998.

[58] Section 24(2) of the Medical Schemes Act 131 of 1998.

[59] Section 3 of Act 131 of 1998.

[60] Hogerwerf, L, René van den B, Hendrik IJ R, Annemarie B, Piet V, Maarten P, Daan D, and Mirjam N, "Reduction of Coxiella burnetii prevalence by vaccination of goats and sheep, The Netherlands." (2011) 17:3 *Emerging infectious diseases* 379.

recommends that parties follow the internal dispute resolution process and where such has failed, the council has a mechanism in which members may lodge their complaints.[61]

2.2.4.4. Patients' Right Charter

The Patients' Rights Charter of 2000 predates the NHA, and it is important to note that the NHA was modelled on the provisions of the Charter.[62] A typical example of this can be denoted in section 2.3 of this charter, which states that everyone within South Africa regardless of their status has the right to have access to quality health care services. [63] The aforementioned right of access has explicitly been credited for expressly including the right to have access to health care services.

2.2.4.5. The Mental Health Care Act 17 of 2002

On the 15th of December 2004, the Mental Health Act came into operation.[64] The objective of the Act is to improve access and quality of care for vulnerable members of society suffering from mental disorders. Some scholars have questioned the consideration that was given to this notion at the time the Act was passed.[65] One of the aims of the Mental Health Care Act is to regulate the treatment, care, and rehabilitation of persons suffering from mental disorders. It also sets out the conditions and regulations to be followed when administering health services to persons with mental disorders. It also establishes review boards that are mandated to uphold the spirit, purpose, and objectives of the Mental Health Act in health facilities.[66] In mitigation of challenges identified with the implementation of the Act, the National

[61] Section 47 of Act 131 of 1998.

[62] National Parents' Rights Charter 2000.

[63] Section 2.3 of the National Parent Rights Charter.

[64] Lund C et al "Challenges faced by South African health services in implementing the Mental Health Act" (2007) *SAMJ* 352.

[65] Van Rensburg ABJ "A Framework for Current Mental Health Care Practice in South Africa" (2007) Afr *J Psychiatry* 205-206.

[66] Ibid.

Health Council (NHC) adopted the Mental Health Policy Framework for South Africa and the Strategic Plan 2013-2020.[67]

The plan had the following key objectives namely:

I. "District-based mental health services and primary health care re-engineering;
II. building institutional capacity;
III. Surveillance, research, and innovation;
IV. building infrastructures and capacity facilities;
V. mental health technology equipment and medicines;
VI. Inter-sectoral collaboration;
VII. human resource for mental health, advocacy, and mental health promotion
VIII. promotion of mental illness".[68]

2.2.4.6. The Charter of the Public and Private Health Sectors of the Republic of South Africa

The Charter is credited by the public and private sectors for translating the right to have access to health care services. It is also applauded for reducing the fragmentation between the public and the private sector and was initially drawn up in 2004.

2.2.4.7. Traditional Health Practitioner Act No. 22 of 2007

The Traditional Health Practitioner Act No. 22 of 2007 was enacted in 2007 in a bid to regulate and hold accountable health practitioners who previously operated with little oversight.[69] The Act provides for the creation of the Traditional Health Practitioners Council of South Africa (THPCSA), which is responsible for the registration of traditional health care practitioners. Its other duties include setting out regulations that the health care services provided by traditional healers are quality services which safe and efficient.[70]

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[67] Van Rensburg ABJ "Contributions from the South African Society of Psychiatrists (SASOP) to the National Mental Health Action" (2013) *South African Journal of Psychiatrist* 205.

[68] ibid.

[69] Tshela B "Traditional Health Practitioners and the Authority to Issue Medical Certificates" (2015) *SAMJ* 279.

[70] Section 4 of the Traditional Health Practitioners Act, Act 22 of 2007.

2.3. International law on the Right to have Access to Healthcare Services

Entitlement to healthcare is enshrined in both international and national instruments. The Universal Declaration of Human Rights, the International Covenant on Socio-Economic and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and the Convention on the Rights of the Child (CRC) provide that each and every human being is entitled to the highest standard of physical or mental health.

2.3.1 Universal Declaration of Human Rights.

Article 25 of UDHR stipulates "that everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, housing and medical care…"[71] The normative framework of this provision is found in many other international instruments, academic writings and it is referred to as "the right to an adequate standard of living".[72]

2.3.2 International Covenant on Socio-Economic and Cultural Rights

Article 12 of ECOSOC states that all member states must recognize that everyone is entitled to enjoy an acceptable standard of physical and mental health.[73] The article stipulates that, measures to be taken by member states in ensuring that the said right is realised "shall include those necessary for:

a) The provision for the reduction of the stillbirth rate and of infant mortality and for the health development of the child;
b) The improvement of all aspects of environmental and industrial hygiene;
c) The prevention, treatment, and control of epidemic, endemic, occupation, and other diseases;
d) The creation of conditions which would assure all medical service and medical attention in the event of sickness".[74]

[71] https://www.un.org/en/about-us/universal-declaration-of-human-rights#:~:text=Article%2025&text=All%20children%2C%20whether%20born%20in,enjoy%20the%20same%20social%20protection
[72] Copp, D, "The right to an adequate standard of living: Justice, autonomy, and the basic needs." (1992) 9 (1) *Social Philosophy and Policy* 231-261.
[73] The Core International Human Rights Treaties. Available at https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights
[74] Ibid.

Numerous treaties and other global instruments have stressed the significance of the said entitlement. It is important to note that some of these treaties have been ratified and domesticated by South Africa. This is the case of the International Covenant on Socio-Economic and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and the Convention on the Rights of the Child (CRC). It should be remembered that the country followed a dualist system for the acceptance of international treaties. Accordingly, any international treaty become laws only after an implementation law has been adopted by the parliament. Although the wording in most of these instruments differs from that of chapter two of the constitution, the main and common concepts are

a) availability,
b) accessibility,
c) appropriateness,
d) acceptability. [75]

The first element requires the availability of healthcare facilities, goods, programmes, and services. The second element requires healthcare services, supplies and facilities to be accessed by everyone. As consequence of this element the said supplies and facilities must also be received by those who are less economically active.[76] The third element stresses the necessity of appropriate medicines, well trained stuff, programmes based on proven scientific methods. The last element encourages medical practitioners to follow medical experiments that within the parameters of ethical boundaries.[77]In this regard it was stated that " all health facilities, goods and services must be respectful of medical ethics and culturally appropriate ,i.e. respectful of the culture of individuals ,minorities, peoples and communities ,sensitive to gender and life -cycle requirements, as well as being designed to respect confidentiality and improve the health status of those concerned".[78] The quality of the medical supplies and facilities must be observed. The above elements will not be discussed extensively due to the nature of the research being a mini dissertation. It is also noteworthy to mention the General Comment on Women and Health. Committee on the Elimination of All Forms of Discrimination against Women adopted General Comment N0 24 of

[75] CESCR general comment no 14 . the right to the highest standard of health (art 12)
[76] Note 26 above page 4
77 Khoza S. Socio-economic rights in South Africa: A resource book. (Community Law Centre, University of the Western Cape; 2007).
[78] Note 26 above page 5.

1999. This is based on Article 12 of the CEDAW, which obliges countries to turn their focus on the elimination of discriminatory actions experienced and or suffered by females within the health department.

States are enjoined not to stop females both old and young from receiving medical treatments simply because they have been barred from receiving such treatment by their husbands, father, and religious practices . Likewise, the Committee on the Rights of the Child adopted a General Comment on HIV/Aids and the rights of the child.[79] The Committee expressed concerns about the devastating effect of HIV/AIDS on the lives of children, affecting not only the right to health care but all the rights of children. The Committee also adopted General Comment No. 4 dealing with adolescent health and development. The Committee recognises the right of the adolescent child to have access to information that is essential for their health, including information on their sexual and reproductive. It also encourages States to create a safe and supportive environment for adolescents and to protect them from harmful traditional practices such as female genital mutilation and earlier marriage.

2.4. Conclusion

It can be inferred from the preceding discussions that varying measures, policies, and legislations have been adopted and implemented that there is progress in the realisation of the right to have access to health care services in the constitutional dispensation. The discussion above evinces that these measures adapt to the practices that are internationally accepted and which indicates the commitment of the government to fight for access to health care services. This adaptation can also be traced in decision and or judgements made by various courts, as these courts are required to consider the international law when dealing with legal issue centred around the provisions of the bill of rights.

A close introspection of the various legislative frameworks promulgated by the government denotes the government is on a gradual path to transform the healthcare standards of South Africa. Despite the tremendous progress up to date in achieving access to health care services, there is still more that can be done as progressive realisation is a concept that is ever evolving.

79 General Comments No 3 and 4 of 2003 on HIV/ AIDS and the Rights of the Child. Committee on the Rights of the Child.

CHAPTER THREE: THE NATURE, SCOPE, CONTENT AND EXTENT OF THE RIGHT TO ACCESS HEALTH CARE SERVICES

3.1 Introduction

Due to the intersectionality of entitlements provided for under chapter two of the constitution the government must ensure the efficacious adoption of provisions such as the one set out in section 27(1)(a) of the supreme law of the land due to the impact it has other fundamental entitlements.[80] Enforcement of said entitlement brings about a plethora of questions and is consequently a topic of contention.

There are still some discrepancies within the public sector, and this is evinced by the disparities between the public and the private sectors. Effectively, these disparities have given rise to a two-tier system wherein effective and efficient healthcare facilities are received by those who more economically active as opposed to those who are less economically active.[81] South Africa as a country must ensure that there is equal provision of the said right. However, it is important to take note that the said right absolute and it subject to the limitation clause.[82]

These entitlements are considered as corner stones of the democratic transformation of South Africa. The provisions set out under chapter two of the constitution protects the said entitlements which are guided by the supremacy clause and other democratic principles such as the entitlement to human dignity.[83]

These rights must be interpreted in a method and/or approach that promotes the founding democratic values of our constitution. The doctrine of the separation of powers dictates that our courts are empowered with authority to assess the enforcement and/or applications of legislations and other legal instruments enacted to safeguard such rights and declare void or invalid those that are inconsistent with the constitution and its values.[84] In this regard, hospital bylaws that promotes inequality in

[80] Section 27(1)(a) of the Constitution of the Republic of South Africa Act 108 of 1996 reads: Everyone has the right to have access to health care services including reproductive health care
[81] Montgomery Y, Private vs Public healthcare in South Africa (2016). Honours Thesis
[82] Section 27(2) of the Constitution of the Republic of South Africa.
[83] Section 7 (1) of the Constitution of the Republic of South Africa.
[84] Section 2 of the Constitution of the Republic of South Africa. See also *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3
Wherein the death sentence was abolished as a result of the Constitutional Court finding it inconsistent with the right to life and dignity which are both guaranteed by the Constitution.

the provision of medical services should always be considered as invalid as they are in conflict with the values of the constitution.

Equality is one of the constitutional values and it means that everyone must receive equal protection and benefits of the law. It is therefore important to note that access to efficient health care services should be afforded to everyone despite their race, ethnicity, social status, or geographical location. The ambit of the supreme law of the land is to ensure that each and every human being residing within the country receives full recognition, which entails that medical and /or hospital facilities should be accessible even to the indigent members of society.[85]

It is the prerogative of the government to make available resources and facilities to people residing in all corners of the country to ensure that everyone enjoys adequate quality healthcare facilities. To achieve this, the government must adopt and implement legislation, policies, and other measures ensuring equal enjoyment of the rights categorised under chapter two of the supreme law of the land and more particularly the entitlement to have access to hospital services.

3.2 The right of access to health care services

Socio-economic rights such as the fundamental right which is provided for in terms of section 27(1) of the constitution[86] have been declared as justiciable, thus categorised one of the objectives they were incorporated in the Constitution for.[87] As a result these rights may be interpreted, examined, and applied by our courts in a similar approach, used in the interpretation of other rights . Therefore, all fundamental Rights, must receive equal protection of our law. Most fatalities in the world are due to preventable or avoidable situations in the health sector specifically those relating to access to adequate medical services.

Other argue that legislatures should have excluded socio-economic rights from the constitution.[88] Despite the same, the said rights are part of chapter two of the constitution and have been declared as justiciable by our courts. It is thus important to

[85] Section 27 (2) of the Constitution.
[86] As n1 above.
[87] Certification of the Constitution of the Republic of South Africa para 49.
[88] McLean K Constitutional Deference, Courts and Socio-Economic Rights in South Africa (Pretoria University Law Press 2009)109

note that these rights can also be limited in terms of section 36 of the supreme law of the land.[89]

In the Certification judgment case, the Constitutional Court attempted to interpret the right to have access to health care services in terms of section 27 (1). It held that "The method the drafters of the CPs adopted to give content to the bill of rights was to refer to 'all universally accepted fundamental rights, freedoms and civil liberties. There are two components to this: 'fundamental rights, freedoms, and civil liberties' and 'universally accepted."[90] Despite the constitutional provisions dealing with the right to access to health care services together with other international instruments integrated into our law to uphold the provision, many South Africans find themselves without access to adequate healthcare services.[91]

It is in line with these limitations that Carstens and Pearmain advise that the way the right to health care services is limited is crucial to a proper understanding of the right of access to health care services as the state is only required to take reasonable legislative and other measures, within its available resources to achieve its realisation.[92] Accordingly, there is an acknowledgment within the Constitution that the aforesaid rights including the right of access to health care services may not be achieved as a result of limited government resources. This has further been confirmed by landmark cases such as the Soobramoney case.[93]

3.2.1. The meaning of progressive realisation

The Constitution acknowledges the resource implications related to the realisation of socio-economic rights and thus mandates the state to enact legislation that will foster the progressive realisation of rights such as housing, water, and social security.[94] It is necessary to define the precise ambits of this phrase – "progressive realisation" – before one can begin to assess whether the state is not being competent in executing

[89] Section 36 of the Constitution.
[90] Certification of the Constitution of the Republic of South Africa para 49.
[91] It is submitted that the proposal to introduce the National Health Insurance Scheme is largely premised on the notion that while the public health sector services over 71% of the South African population, it is under underfunded and thus does not always provide adequate and effective health services. See generally https://www.wits.ac.za/news/latest-news/opinion/2021/2021-07/healthcare-in-south-africa-how-inequity-is-contributing-to-inefficiency.html
[92]Carstens P and Pearmain D Foundation Principles of South African Medical Law (Butterworths Lexis Nexis 2007) 38. Section 27(2) of the Constitution.
[93] Soobramoney v Minister of Health (Kwazulu-Natal), 1998 (1) SA 765.
[94] See Section 27 (3), the South African Constitution, 1996.

the dictates of section 27 (3).[95] Further compounding this necessity are the adverse effects that will flow from the government's complacency, namely that ordinary citizens cannot claim these rights if there are genuinely no resources to acquiesce their claims as evidenced in the *Soobramoney* case.[96] Defining the contours of the term progressive realisation will also coerce states to expediently strive towards the most efficacious realisation of socio-economic rights.[97] The Committee on Economic, Social and Cultural Rights (CESCR), despite not articulating how the expedient and efficacious "progress implementation" should manifest, was a consensus that condemned any regression in the comprehension of socio-economic rights.[98] This consensus is criticised for its mediocrity in assessing the compliance of a state when it comes to the attainment of socioeconomic rights.[99] The criticism is rationalised on the notion that the utilisation of the non-retrogression principle as an indication of assessing the extent to which a state exerts itself in the progressive realisation of socio-economic is potentially catastrophic.[100] This is because the principle may retard

[95] Sepulveda M *The nature of the obligation under the International Convention on Economic, Social and Cultural Rights* (INTERSENTIA 2003)

[96] See Soobramoney note above, par. 1: wherein a diabetic man, aged 41, and suffering from ischaemic heart disease and cerebro-vascular disease that ultimately led him to have a stroke and subsequently kidney failure in the year 1996. With his condition being diagnosed as irreversible, he found himself in the final stages of chronic renal failure and thus was in need of regular renal dialysis to prolong his life. Efforts to seek such treatment from Addington hospital in Durban were futile as the Addington could, only render dialysis treatment to a limited number of patients. The renal unit had 20 dialysis machines available to it, and some of them were even in poor condition. What further exacerbated his unfortunate plight was the duration of the treatment, which took approximately four hours excluding an additional two hours that had to be factored in for the cleaning of the machine, before it could be used again on another patient. Owing to the limited availability of facilities at the hospital, the appellant could not be provided with treatment he was in need off.

[97] Committee on Economic, Social and Cultural Rights, General Comment No. 3, par. 9.

[98] Chenwi L "Unpacking "progressive realisation", its relation to resources, minimum core and reasonableness and some methodological consideration for assessing compliance" (2013) De Jure 744-746.

[99] Mary Dowell-Jones Contextualising the International Covenant on Economic, Social and Cultural Rights: Assessing the Economic deficits (2004) 52.

[100] Ibid.

any positive strides as it merely obliges states not to regress from the existing *status quo* of socio-economic rights.[101]

While it is conceded that the concept of progressive realization is indicative of a concession that the full realization of all economic, social, and cultural rights is unattainable immediately;[102] it must be noted that the progressive realisation of rights should not be misconstrued as fostering an environment wherein a state is only obligated to provide for the bare minimum elements of socio-economic rights; instead, the phrase exhorts states to work towards an ever-evolving, comprehensive realisation of the said rights.[103] The term progressive realisation enjoins states to demonstrate ingenuity towards the attainment of these rights even in the face of adversity.[104] Consequently, a state must, to satisfy its compliance of fostering the progressive realisation of socio-economic rights, prove that it is making tangible and notable progress towards the fulfillment of any socio-economic right in question.[105]

An intricate analysis of what progressive realisation entails denotes an obligation that is dual as depicted in the Limburg principles of 1988.[106] While it is acknowledged that socio-economic rights, due to the resource implication they entail, are generally expected to be achieved over time, there are however obligations that are expected to be realised immediately.[107] The non-discriminatory exercise of socio-economic rights best exemplifies obligations that are immediately realisable about socio-economic rights; equally, the mandate incumbent upon states to undertake affirmative and tangible steps towards the full realisation of these rights is another typical example of immediate obligations that states must ensure.[108]

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[101] See Dowell-Jones note above.

[102] See CESCR note 6

[103] See Chenwi note above, 744.

[104] See Chenwi note above, 743.

[105] See CESCR note 6.

[106] See the Limburg principles wherein Paragraph 16 states that all members "have an obligation to begin immediately to take steps towards full realisation" of the rights in the ICESCR. This is emphasized in paragraph 22, which states that "some obligations under the Covenant require immediate implementation in full" by all member states.

[107] CESCR General Comment No 2: Non-discrimination in Economic, Social and Cultural Rights (article 2(2) of the ICESCR) 2 July 2009 E/C 12/GC/20 para 7.

[108] Ibid.

South African courts have been seized with the opportunity to articulate what the confines of this phrase are. In the *Grootboom* case, the Constitutional Court deemed that the use of the phrase "progressive realisation" in the Constitution was synonymous in context with the way it was contained in Article 2(1) of the ICESCR.[109] The Court acknowledged that the right to housing - owing to the resource implications attached to it - could not be attained immediately and thus mandated the government to initiate steps to ensure the realisation of the right.[110]

The Constitutional Court attempted to define this phrase; it went on to define progressive realisation as the facilitation of socio-economic rights that is fostered through the tenacity of the government in circumventing any legal, operational, administrative, or financial obstacles that may serve as an impediment to the realisation of any socio-economic right.[111] The Court has also, in *President of the Republic of South Africa and Anor v Modderklip Boerdery (Pty) Ltd* [112], given consideration to the term progressive realisation.

In considering this term, the Court held that progressive realisation necessitated meticulous planning and the implementation of fair procedures tailor-made to suit those mostly affected by the problem of housing.[113] The Court also emphasized the need for organised processes that were both transparent and predictable.[114] The Court opined that achieving progressive realisation required ingenuity as there was a need for the adoption of measures that were pliable to being varied in changing situations.[115]

The Constitutional Court was again, in the case of the *Mazibuko v City of Johannesburg,* seized with the opportunity to pronounce on the ambits of the term progressive realisation.[116] In articulating the phrase, The Court gave cognisance to the fact that there was a need to review and revise the state-formulated policies giving effect to socio-economic rights to ensure the progressive realisation of the said

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[109] *Government of the Republic of South Africa v Grootboom* para 45.

[110] Ibid.

[111] Ibid.

[112] *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (CCT20/04) [2005] ZACC 5; 2005 (5) SA 3 (CC); 2005 (8) BCLR 786 (CC) (13 May 2005)*

[113] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd*2005 (5) SA 3 CC par. 49.

[114] Ibid.

[115] Ibid.

[116] *Mazibuko v City of Johannesburg* (CCT 39/09) [2009] ZACC 28.

rights.[117] Inference can be drawn from the Court's reasoning that revision of policies giving effect to socio-economic rights over years, satisfies the obligation to guarantee the gradual realisation of socio-economic rights.[118]

The Constitutional Court affirmed that progressive realisation means the gradual growth of access to socio-economic rights to everyone including the vulnerable groups in the society thus confirming the rationalisation of the CESCR discussed above wherein the committee asserts its condemnation of any retrogression in socio-economic right standards.[119] However, scholars have expressed concern over the inference that states are progressively realising socio-economic rights through the revision of policies.[120] This is because the revision of policies does not necessarily translate to the enhancement and enjoyment of a specific socio-economic right. It is argued that the revision of policies merely improves the policy promulgated to ensure the realisation of the right and yet it does not guarantee that the citizens are realising the right.[121]

In summation, the progressive realisation of socio-economic rights seems to describe the implementation of measures that, when one takes into cognisance the limited availability of resources of a state, foster the full enjoyment of the said rights to the utmost extent possible.

3.2.2. Jurisprudence of the Courts

The Constitution explicitly makes provision for the right to health care services without any qualification. This means that financial resources must not be a consideration in the determination of the supply of health care services. Therefore, regardless of the social status and geographical location of the people, everyone should enjoy equal rights to access health care services. There are vast instances wherein our courts

[117] See note above par.40.

[118] See note above in par. 40 wherein the Court states that evidence may be admitted demonstrating that the City accepts an obligation to continue to revise its policy consistently with the obligation to ensure the progressive realisation of rights. Equally the Court in paragraph 67, stated that the obligation of progressive realisation imposes a duty upon government to continually review its policies to ensure that the achievement of the right is progressively realised.

[119] See note above at par.97.

[120] Bilchitz, D, "Socio-economic rights, economic crisis, and legal doctrine." (2014) 12:3 *International Journal of Constitutional Law* 710.

[121] As note 97 above.

have been burdened with the duty to adjudicate over socio-economic rights of the population enshrined in the Constitution. Access to health care services is one of these rights, that ought to be available to everyone who resides in South Africa. The inference is drawn from the preamble of the constitution which recognises that South Africa belongs to everyone who dwells within it. However, in the interpretation of any right subject the limitation clause of section 36 must be considered,[122] and also taking into cognisance the progressive realisation clause asserted in subsection 2.[123]

There has been wide approval of the decisions made by our courts in the interpretation and application of the Constitution to fundamental rights. In so doing the courts have been applauded for upholding the values of the constitution and other conventions of the United Nations which have been ratified by South Africa as evident in the case of Grootboom.[124] Despite the same, the courts are still lacking in their interpretation and application of the right to access health care services as contained in section 27 (1) of the Constitution. Our judiciary has been reluctant to put the executive and legislative organs to task in enacting policies, and legislation and adopting measures that promote the full realisation of the right to access health care services and other socio-economic rights.[125] This is believed to have been because there is influence on the judiciary from other organs of state specifically the executive organ which constantly pleads that it cannot attain the full realisation of rights due to lack of resources.[126]

In the case of *Soobramoney v Minister of Health* Chaskalson P stated that, in the South African Constitution, the right to medical treatment does not have to be inferred from the nature of the State established by the Constitution or from the right to life which it guarantees. It is noted that Section 27(3) is interpreted to make it substantially more difficult for the State to fulfil its primary responsibility under Section 27(1) and (2) to provide health care services to “everyone” within its available resources. Looking into the consequence of prioritising the treatment of terminal illnesses over other forms of medical care, would reduce the resources available to the State for purposes such

[122] The Constitution of the Republic of South African.
[123] Section 27(2) of the Constitution.
[124] Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46.
[125]Ngang CC “Judicial enforcement of socio-economic rights in South Africa and the separation of powers objection: The obligation to take other measures” (2014) African Human Rights Law Journal 655-680.
[126] Mbazira C Litigating socio-economic rights in South Africa: A choice between corrective and distributive justice (Pretoria University Law Press 2009) 202.

as preventative health care and medical treatment for persons suffering from illnesses or bodily infirmities which are not life-threatening. [127]

In the case *Soobramoney v Minister of Health* case, an unemployed man, who was a diabetic patient, suffered from ischaemic heart disease and cerebrovascular disease, which caused him to have a stroke, his kidneys also failed and his condition in the final stages of chronic renal failure. Soobramoney had sought treatment at the renal unit of the Addington State Hospital in Durban. Due to limited facilities that were available for kidney dialysis, the hospital was unable to provide the treatment he had requested. An application was lodged with the High Court of Durban to compel the hospital so that Soobramoney could receive the essential treatment. The application was dismissed in the High Court and an appeal was made to the Constitutional Court. The Constitutional Court dismissed the application again after an analysis of the standards of Addington Hospital held that their standards were reasonable. The court held further that failure to provide treatment by Addington Hospital could not be construed as amounting to a violation of any rights enshrined in the Constitution.[128]

Chaskalson stated in his analysis, that value judgment must be applied as a criterion to determine how to make decisions in the application of socioeconomic rights. He held further that under the circumstances there was no obligation on the government to provide medical services to a particular citizen. He defines the obligation of the state as providing health care services or facilities and ensuring that all citizens have access to such services. He submits further that there is a limitation of these resources due to the available resources. Therefore, the right as contained in section 27 could not be achieved as highlighted in the case of Soobramoney due to the limitations as expressed in section 36 of the Constitution.[129]

South Africa's history depicts access to health care services ensuing to imbalances and falsifications.[130] In support of the above opinion, in South Africa black indigenous groups residing in rural areas encounter limited access to health care services and they are suffering from curable diseases likely to result in death which could be prevented should adequate health care facilities be made available.[131] People residing

[127] Soobramoney v Minister of Health (Kwazulu-Natal), para 19.
[128] Soobramoney v Minister of Health (Kwazulu-Natal) para 10.
[129] Section 36 of the Constitution.
[130] Harris B et al "Inequities in access to health care in South Africa" (2011) Journal of Public Health Policy 2.
[131] Gilson L and McIntyre D "Post-apartheid challenges: Household access and use of health cared in South Africa" (2007) International Journal of Health Services 673-691. Coovadia H et al "The health

in rural areas most often have to travel a great distance usually on poor roads to access health care services.

The Constitutional court in *Sobramooney* opined that the lack of resources is one of the constraints hindering the enjoyment of socio-economic rights. The courts also considered the socio-historical context of socio-economic rights including the right to have access to health care services.[132] The Constitutional court in *Grootboom* held that any measures or policies that fail to consider and include the serving needs of the vulnerable members of society are unreasonable in light of the Constitution.[133] The court went on further to state that any plans implemented which do not meet the reasonableness test would not qualify as the fulfilment of the state obligations in the realisation of socio-economic rights.[134] In another decision, the Constitutional Court dealt with an issue relating to the prevention of mother-to-child transmission of HIV.

In this case, the pregnant women sought for the government to make available to all women who test positive for HIV an anti-retroviral drug called Nevirapine. At the time of the application, the drug was only available at selected 18 pilot sites. [135]Unlike in Sobramooney, the court upheld the decision of the High Court and ordered the government to make available Nevirapine to all HIV-positive pregnant women.

From the decisions of the court in the case of Grootboom, Sobramooney, and TAC, inferences may be drawn that the Constitutional Court has been proactive in the protection of socio-economic rights including the right to have access to health services. Despite the positive impact of the court decisions, the judiciary has been under heavy by the executive for violating the separation of powers by the executive for encroaching on their constitutionally assigned powers and duties. The doctrine of separation of powers has been a contentious issue in several judgments of the Constitutional Court. In the case of South African Association of Personal Injury Lawyers v Heath and Others, Chaskalson CJ, compared our South African constitution

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and health system of South Africa. Historical Roots of current public health challenges" (2009) Lancet 817.

[132] Soobramoney v Minister of Health (Kwazulu-Natal) para 8.

51 Government of South Africa and Others v Grootboom and Others (CCT 11/00) [2000] ZACC 19; 2001(1) SA 46; 2000 (11) BCLR 1169 (4 October 2000) para 29 –35. Minister of Health and Others v Treatment Action Campaign (No 1) (CCT 9/02) [2002] ZACC 16; 2002 (5) SA 703; 2002 (10) BCLR 1075 (5 July 2002)19 – 46.

[133] See Grootboom note 16, par 44.

[134] Ibid.

[135] Minister of Health and Others v Treatment Action Campaign and others (No 2) (CCYT8/02) [2002] ZACC 15.

to that of the United States of America and Australia, and he held that in all three countries, there appears to be a clear separation of powers, but the separation is not absolute.[136]

In several other decisions, the Constitutional Court has argued that the doctrine of separation of powers does not require strict application in all circumstances.[137] In the first certification judgment, *Ex parte* Chairperson of the Constitutional Assembly of the Republic of South Africa, the First Certification case, the court opined that: "There is, however, no universal model of separation of powers and, in a democratic system of government in which checks and balances result in the imposition of restraints by one branch of the government upon another, there is no separation of powers that is absolute".[138] The doctrine of separation of powers establishes and sets out the independence of the three branches of government. At the same time, it creates an obligation among branches to exercise checks and balances to ensure that the constitutional order is maintained by preventing the usurping of power.

The separation of powers protects the intrusion of one government organ on the other. The courts must develop a model that is fit for South Africa about the doctrine of separation of powers. Ever since the promulgation of the constitution in 1994, our courts have thoroughly dealt with the nature, extent, and content of the doctrine of separation of powers[139]. Inferences may be drawn from the several court decisions that there is no absolute separation of powers.

Despite the same, there are several decisions of the Constitutional Court wherein the courts have strictly applied the doctrine of separation of powers. This is usually in cases that involve the relationship between the legislature and the executive. In De Lange v Smuts No and Others, for instance, the Constitutional Court held that a member of the executive may not be given the power to commit an uncooperative witness to prison.[140] This is because the courts have such power to send someone to prison. It is a judicial function and not an executive one. In South African Association of Personal Injury Lawyers v Heath and Others, the Constitutional Court held that a

[136] South African Association of Personal Injury Lawyers v Health and Others (CCT 27/00) [2000] ZACC 22

[137] Bellamy R, "The political form of the constitution: the separation of powers, rights and representative democracy." In *The Rule of Law and the Separation of Powers* (Routledge, 2017) pp. 253-273.

[138] Certification of the Constitution of the Republic of South Africa, 1996 (CCT 23/96) [1996] ZACC 26

[139] See Glenister v President of the Republic of South Africa and Others (CCT 41/08) [2008] ZACC 19.

[140] *De Lange v Smuts NO and Others (CCT 26/97) [1998] ZACC 6*.

judicial officer may not be appointed as the head of a criminal investigation unit. This is because the power to investigate and prosecute crimes is an executive function and not a judicial function.[141]

In S v Dodo, the Constitutional Court held that while the legislature may determine a minimum sentence for a particular crime, it may not determine the sentence that should be imposed in a particular case. This is because the power to impose a sentence on the offender is a judicial function and not an executive function.[142] In Executive Council Western Cape Legislature v President of the Republic of South Africa, the Constitutional Court held that while the legislature may not delegate plenary law-making powers to the executive, it may delegate subordinate law-making powers.[143]

3.3. Rationing of Health Care Services: A Constitutional Aspect

Should the courts adopt a practical approach to the right to access health services, the implications of such application will indicate that the rationing of the right contravenes the equality clause of the Constitution.[144] Allowing health facilities both in the public and private sectors to ration health services promotes inequality. The public sector is more susceptible to unreasonable rationing standards due to the lack of resources as evidenced in the case of Sobramooney.[145] Considering the budgets allocated to the health sector, the rationing of services becomes inevitable. In contrast, the private sector does not have severe rationing schemes, but the services therein are very expensive. This creates a distinction in society between those who can afford private facilities and such disparity between the public and private sector violates the ambit and purpose of equality in the constitution with regards to all socio-economic rights including the right to health care services.

3.4. Conclusion

This dissertation has already stated that the right to have access to health care services is a socio-economic right and that such rights have been declared by our constitutional court as justiciable rights. It has been argued that some contrasting opinions subscribe to the notion that socio-economic rights are non-justiciable and

[141] See note 29
[142] S v Dodo (CCT 1/01) [2001] ZACC 16.
[143] Executive Council Western Cape Legislature and Others v President of the Republic of South Africa and Others (CCT 27/95) [1995] ZACC 8
[144] Fleck L M, *Just caring: health care rationing and democratic deliberation*. (Oxford University Press, 2009).
[145] See generally note 13 above.

must not have been included in the Constitution.[146] Despite the right of access to health being a justifiable right, the right is still subject to limitations in terms of section 36 of the Constitution. Carstens and Pearmain have advised that it is significant and very crucial that the state take reasonable steps to ensure are taken taking into account the availability of resources to achieve the full realisation of this right.[147] There is wide acceptance that the right to have access to health care services may not limited sorely on the basis that there are limited government resources.

Deductions may be drawn from the aforementioned discussion that socioeconomic rights are fundamental human rights that are protected by the Constitution. The importance of socio-economic rights has been accepted by the constitution, court decisions, and other international instruments which have been ratified and adopted by South Africa. Despite the recognition of socio-economic rights and in this case, the right to have access to health care services, there still exist inequalities and inequities in our South African health sector about the provision and accessibility of health care services. These conclusions have been confirmed by various studies and scholars who have identified disadvantaged groups in South Africa as the most affected class. Thus, to achieve the full realisation of the right under section 27 of the Constitution, there is a need to implement a comprehensive approach to transform the current status quo of the health sector. Our courts need to adopt a standard and stern application and interpretation of socio-economic rights.

The judiciary must not be shy to hold the executive to task and inflict necessary pressure to ensure that policies and measures are adopted to ensure that with the available resources, the right to access health services is fully recognised and achieved.

The objective of this chapter has been achieved which was to expand on the nature, scope, and content of the right to health care services. In the next chapter, an investigation will be conducted into whether the right to access health care services can be enforced on non-state parties. The privatisation of certain services including health care services has been a key discussion about the right to access health care services and in the next chapter, the discussion is focused on the horizontal relations of section 27 of the constitution. Medical malpractice will also be considered in the

[146] See Generally Christiansen E, Adjudicating Non-Justiciable Rights: Socio Economic Rights and the South African Constitutional Court (2007) Columbia Human Rights Law review 321.
[147] See note 12 above.

next chapter, specifically due to the high number of medical malpractice cases over the years. The investigation will focus on whether there is a nexus between the rise of medical malpractice cases and the lack of full realisation of the right to access health care services as required by the constitution

CHAPTER FOUR: OPPORTUNITIES AND CHALLENGES IN THE REALISATION OF THE RIGHTS TO ACCESS HEALTHCARE SERVICES

4.1. Introduction

The right to healthcare is of equal importance with other socio-economic rights.[148] The right to health is crucial for the realisation of the Bill of Rights since all human rights are interrelated.[149] In South Africa, the delivery of health care services is largely undertaken by private parties. With the dawn of deregulation as well as privatisation of public healthcare sectors the country has seen an increase in a developed and highly specialized private health sector. The private healthcare sector is largely controlled by medical aid schemes which are primarily funded by contributions from employees and employers.

The private sector also includes large pharmaceutical companies that hold exclusive patent rights over the provision of particular services relating to health care to make sure that such services are affordable to communities across the country.[150] The private health sector has tremendous influence on the provision of health services to the entire health sector and as such it is important to regulate effective remedies that will address any imbalances between the public and private sector. Fortunately, the framework of section 27 of the Constitution permits the enforcement of the right to access health care services against private entities.

The following discussion is concerned with the horizontal application of the right to have access to health care services. The chapter focuses on the mechanisms that can be put in place to hold private entities who violate section 27 (1) (a) accountable under the Constitution. One of the most important things that this chapter reviews is the

[148] Pereira A "Live and let Live: Healthcare is a Fundamental Human Right Human Right" (2004) Connecticut Public Interest Law Journal 481.

[149] General Comment 14 (Committee on Economic, Social and Cultural Rights, The Right to the highest attainable standard of health Twenty-second session 2000 U.N. Doc. E/C.12/2000/4 2000 REPRINTED IN Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies U.N. Doc. HRI/gen/1/Rev 6 (2003)) 85

[150] Liebenberg S "South Africa's Evolving Jurisprudence on Socio-Economic Rights" An effective tool in challenging poverty?" (2002) 6 Law, Democracy and Development 165.

privatisation of health care services in South Africa and the main aim of this is to show the role those private entities and the evolution of the same play in the realisation of health care services in South Africa. In discussing the privatisation of healthcare services this chapter also looks at how the nexus between the privatisation of the health sector and socio-economic rights. It elaborates on the negative impact that limited access to healthcare services has on the delivery of socio-economic rights and services.

4.2. The evolution and features of the privatisation of health care in South Africa

Privatisation of the health sector in South Africa stems way back to the early 1980s and before that, the South African healthcare system was under the management of the state and was thus considered as a 'state property'.[151] Before the 1980's healthcare was much more socialised than privatised and this is mainly because the government-controlled and financed it. The idea of privatisation was received and implemented in South Africa in 1985 as part of the economic policy.[152] This concept of privatisation was influenced by philosophies that subscribed to the notion that the economic policy of privatisation would improve efficiency and also introduce a greater choice in terms of healthcare services while improving the quality of healthcare as a whole.[153] It should be noted that privatisation uplifted the health sector to a prominent position in the delivery of health facilities, care, and service and services in South Africa.[154]

[151] Van Rensburg HCJ and Fourie A "Privatisation of Health Care Services in South Africa: In whose Interest? (1988) Curationis 1.

[152] Jerome A "Privatisation and Regulation in South Africa. An Evaluation" (Paper delivered at the 3rd International Conference on Pro-Poor Regulation and Competition Issues, Policies and Practices September 2004 Cape Town-South Africa) 7-9.

[153] Loewenson, R, "Theory of change driven equity analysis Protecting equity in the face of privatization of health services in east and southern Africa." (2022).

[154] Ngwena C "The Historical Development of the Modern South African Health-Care System: From Privilege to Egalitarianism" in Van Der Walt AJ (ed) Theories of Social and Economic Justice (SUN PRESS 2005) 109.

Fast forward to a democratic South Africa, private health care remains a huge and prevailing role in the wider health care economy and this is further exacerbated by the amendments to the Medical Scheme Act[155] which now allow for the amalgamation of medical aid schemes and private health care providers.[156] Seeing that South Africa has a large private health sector which is made up of private health care providers, private health facilities, institutions that represent health professionals, and highly dominated by medical schemes that are primarily funded by contributions from employees and employers[157] it can be deduced that the private sector plays a huge role in helping the government in fulfilling its constitutional mandate of providing quality health care and services as well as making sure that all South Africans have access to health care services. Furthermore, it has been estimated that approximately half of the national health expenditure is being spent on the private healthcare sector and as such the role played by the private health sector in South Africa cannot be ignored.[158]

Based on the above it can be deduced that the private healthcare sector has risen to fulfil the demand for quality healthcare services in South Africa and has developed to enhance access to healthcare services. Despite the aforementioned, the next paragraphs shall focus on discussing whether privatisation has improved the right to have access to health care services or has led to the poor realisation of the aforesaid right. Therefore, the paragraphs that follow shall explore the significance of the concept of privatisation in the provision of health care services as a way of establishing whether the private health sector is indeed a national asset that has contributed to the realisation of the right to have access to health care services as enshrined in the South African Constitution.

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[155] Medical Scheme Act No.131 of 1998

[156] Söderlund N, Schierhout G and Van Den Heever A "Private Healthcare in South Africa: Technical Report to Chapter 13 of the 1998 South African Health Review" (1998) Health System Trust 3.

[157] Rispel L and Setswe G "Stewardship: Protecting the Public's Health: Oversight: Principles and Policy" (2007) South African Health Review 4.

[158] Econex Trade, Competition & Applied Economics The South African Private Healthcare Sector: Role and Contribution to the Economy (A study conducted by Econex on behalf of South African Private Practitioners Forum (SAPPF) and HealthMan (Pty)Ltd November 2013) 6.

4.2.1. The interconnection between privatisation and the right to access to health care services

Privatisation is often seen as a remedy for all the problems that are associated with any country's public health sector.[159] It is viewed as a vital aspect that is aimed at achieving efficiency, devolving responsibility to the individual, and reducing the state's burden.[160] It is however highly debatable as to whether privatisation does in practice lead to enhanced enjoyment and increased access to socio-economic rights, particularly the right to have access to health care services.[161] One can therefore argue that the preliminary trend of privatisation has lost its momentum and there is an increasing resentment and interrogation of the benefits of privatisation this is largely based on concerns that privatisation does not produce macroeconomic and distributional gains equivalent to its microeconomic benefit.[162]

Some scholars have argued that ironically the privatisation of health care services in South Africa has stressed rather than improved the state's burden in the provision of health care services.[163] These scholars have argued South Africa runs the risk that several structural characteristics or the demise of the country's public health sector will even manifest themselves stronger.[164] For instance, before the privatisation of health care services, a historically stubborn irregularity existed in the health care sector in South Africa in which health resources were disproportionate to the percentage of the population that the said services serve.[165] With the privatisation dispensation, this problem has increased as research conducted in 2013 shows that

[159] Blomqvist P, "The choice revolution: Privatization of Swedish welfare services in the 1990s." (2004) 38:2 *Social policy & administration* 139-155.

[160] Chapman A "The Impact of Reliance on Private Sector Health Services on the Right to Health" (2014) Health and Human Rights Journal 122-134.

[161] Chirwa D "Non-State Actors' Responsibility for Socio-Economic Rights: The nature of their obligation under the South African Constitution" (2002) ESR Review 1.

[162] See note 5 above.

[163] See note 6 above.

[164] See note 4 above, 1-6.

[165] See note 6 above.

the government subsidised the private sector over half of the country's budget yet it only provides coverage to less than 21% of the country's population.[166]

Another argument that can be advanced against the privatisation of health care and services in South Africa is the argument that privatisation is purely encouraged by profit motives.[167] In this regard, it is usually argued that private firms are only interested in profit-making and have no social objectives because they are not bound by any promises made to the people except those promises that they would have made to their investors.[168] Save for a few non-profit entities that exist in the private healthcare sector, most private healthcare facilities do not invest in healthcare to provide adequate health care but invest in healthcare for them to make a profit.[169] As a result, the private health sector, which is highly motivated by making a profit, often devises expensive medical schemes that mostly focus on curative care, and are largely biased against those individuals who are in the poorly remunerated sections of the population which means that such schemes will only be accessible to those who are rich urban dwellers.[170] This is apparent from the number of challenges that the private healthcare sector faces today which include issues around affordability, rising costs of medical aid schemes, and the large decrease in the access to healthcare and healthcare services.[171]

Furthermore, it is contended that the privatisation of health care services has made the health care system more disposed and vulnerable to discrimination.[172] Despite several policies aimed at transformation which have been put in place by the post-apartheid government of South Africa since 1994, wide-scale disproportions continue to exist between the public and the private health sector in respect of the quality of

[166] See note 6 above and Econex Trade, Competition & Applied Economics The South African Private Healthcare Sector: Role and Contribution to the Economy (A study conducted by Econex on behalf of South African Private Practitioners Forum (SAPPF) and HealthMan (Pty)Ltd November 2013) 6 and 18.

[167] See note 6 above.

[168] Chirwa D "Socio-Economic Rights and Privatisation of Basic Services in South Africa, A Theoretical Framework" (2004) ESR Review 5.

[169] See note 11 above.

[170] See note 6 above.

[171] See note 9 above.

[172] See note 4 above.

health care and cultural representation.[173] In this regard, many arguments have been advanced in support of the notion that the inequalities in healthcare spending, healthcare professionals, and access to healthcare between the private and public health sectors are one of the most serious impediments to an unbiased healthcare system in South Africa.[174]

Given some of the shortcomings relating to the privatisation of health care services in South Africa, some scholarly writers have advised that South Africa should be cautious with the privatisation of its health care sector as it entails a lot of harmful side effects which can be the expense of many groups, mostly the vulnerable groups, in the country.[175] Even if the privatisation of health care services were to achieve the benefits advocated by its champions, there are no guarantees that the achievement of these objectives will automatically lead to the accessibility of health care services by all people especially those who are from vulnerable groups.[176]

The growing global trend towards privatisation in health systems poses a significant risk to the unbiased availability and accessibility of health facilities especially for the poor and marginalised groups.[177] In conclusion and based on the above discussion, the writer submits that allowing a dominant role for the private sector to provide health care services will complicate efforts to promote and protect the right to have access to health care services provided in section 27 of the Constitution.

4.2.2. The impact of privatisation on the right to have access to healthcare services

The concept of universal access to health care and health care services forms the basis of the South African constitution, particularly section 27 which deals with the right to health care. The private health sector has helped the government to provide health care facilities and in doing this the private health sector has ensured that the government is relieved of the burden to provide health care services since the

[173] See note 9 above.

[174] McIntyre D, Valentine N and Cornell J "Putting Health back onto the social policy agenda: experience from South Africa" (2002) Soc Sci Med 54: 1637-56.

[175] See note 4 above.

[176] See note 19 above.

[177] See note 11 above.

government is often stressed with problems of limited resources which means it is usually not in the position to provide health care services.

Despite the above-mentioned the private healthcare sector also has challenges that it faces such as its affordability, rising costs as well as the decrease in access to healthcare services as a whole.[178] For the government to be able to achieve universal health care, the right to have access to health care services must be realised across the country and within societies so that those who need health care must be able to have access to it, irrespective of their socio-economic status or their ability to pay.[179] However, it should be noted that one of the effects of the privatisation of health care services has been the drastic reduction of access to said health care services which ultimately violates the provisions of section 27 (1) (a) of the Constitution. In this regard, privatisation has reinforced the harsh legacy of the apartheid era which continues to shape the provision of healthcare services between the public and private sectors as the rural-urban, socio-economic and racial differentials remain a huge challenge.[180] To this end, one of South Africa's greatest challenges is the disproportion in the provision and quality of health care between the private and public sectors.[181]

It is found that that almost half of the national healthcare expenditure is spent on subsidising the private health care and this simply means that the number of resources allocated to the private sector are disproportionate to the percentage of the population that private healthcare serves.[182] It should be noted that although some studies[183] dispute the notion that the amount of resources allocated to the private sector is not proportionate to the population it serves the reality remains that with the ongoing shift in the provision of health care service away from the socially valued services to a market commodity, the unaccountable increase in the costs of health care has been

[178] See note 9 above.

[179] Harris B et al "Inequities in access to health care in South Africa" (2011) Journal of Public Health Policy 119.

[180] See note 30 above.

[181] See generally, Human A "A Tale of Two Tiers: Inequality in South Africa's Health Care System" (2010) UBCMJ 33.

[182] Blecher M and Harris S "Health Care Financing" in Ijumba P and Padarath A (eds) South African Health Review Durban: Health Trust Systems (2006) 32.

[183] See note 10 above.

encountered has resulted in an escalation of medical insurance premiums in South Africa.[184]

In this regard, the drastic increase in costs for health care has had an impact on the affordability of medical aid schemes which has thus resulted in reduced access to private healthcare facilities since those in the vulnerable, poor, and marginalised groups are not able to access such facilities. This then leads to a gross infringement of the constitutional right to have access to health care services in an equal manner.

The reduced access and inability of certain groups of people to access health care services become an infringement of a constitutionally protected right because one of the obligations which are set out in the Constitution is to progressively realise the right to have access to health care services free from any form of discrimination unless the said discrimination can be justified as being fair under the constitution. This obligation is thus violated if a policy that has the effect of benefiting only a particular group of people based on their socio-economic status and excluding others is being pursued.

Based on the above discussion the writer deduces that the involvement of the private sector in the provision and funding of health care services in South Africa has had an enormous effect on the right to have access to health care services. In this regard, it should be noted that although the human rights approach assumes that states are responsible for implementing and shaping the delivery of health care services to ensure consistency with human rights requirements, the obligations to protect and promote access to all socio-economic rights should also demand that private parties such as multinational corporations are prevented from compromising equal access to health care services.[185] It is therefore essential that all private entities that contribute towards the provision of health care services comply with the constitutional obligations under section 27 (1) (a) and other provisions of the constitution which are relevant to realizing the right to have access to health care services in South Africa.

4.2.3. Lack of judicial enforcement of Section 27(1) (a) against Private Entities

In terms of section 8(2) and section 8(3) of the South African Constitution, the regulation of the private healthcare sector is made possible and must be facilitated through legislation and the application as well as the development of common law to

[184] See generally, Benatar SR “The Challenges of health disparities in South Africa” (2013) South African Medical Journal 154.

[185] See note 11 above.

enable compliance with constitutional obligations which are put in place for private entities.[186] The duty to protect socio-economic rights therefore places an obligation on the legislature to enact as well as impose the necessary legislation to regulate and enable private entities and actors to fulfil their constitutional obligations, especially in instances where many social services have been privatised.[187] Where a specific socio-economic right, such as the right to have access to health care services, is not offered enough protection in the legislation or by the existing common law, the courts are charged with the duty to develop new remedies that will give effect to the horizontal application of the socio-economic right.[188]

Unfortunately to this end, South Africa has had little development in the form of the common law relating to the enforcement of the right to have access to health care services horizontally. The South African courts have failed to develop the common law to give effect to the right to have access to health care services in the private sphere.[189] For instance, in the case of *Afrox Healthcare Bpk v Strydom,* the Supreme Court of Appeal left open the question of whether private hospitals were bound under section 27(1) (a) of the Constitution. Instead, the Court enquired as to whether the clause was contrary to public policy, which the court claimed had to be understood in the light of constitutional values including those associated with section 27(1) (a).[190]

Since courts have been reluctant to develop remedies that align with the values associated with section 27(1) (a) of the constitution with regards to whether private entities can be bound by the provisions of this particular section of the Constitution, the other preferred way for courts to give horizontal effect to socio-economic rights such as the right to have access to health care services is by judicial application or the development of the common law. In this regard, scholars such as Pieterse have argued that the current state of the South African common law already gives effect to

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[186] See Section 8 of the Constitution.

[187] Liebenberg S (2010) 153. Wilson S "Breaking the tie: Eviction from private land, homelessness and a new normality" (2009) South African Law Journal 270, 274-275. Orago NW (2013) 444 and Liebenberg S Socio-economic rights: Adjudicating under a transformative Constitution (Juta & Co Ltd 2010) 25.

[188] Section 8(3) of the Constitution.

[189] Pieterse M Can Rights Cure? The Impact of Human Rights Litigation on South Africa (PULP 2014)146.

[190] *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) para 15, 17, 18 and 22.

constitutional socio-economic guarantees or requires minimal development to cater to constitutional entitlements.[191]

4.3. Conclusion

The research therefore, concludes that the lack of judicial enforcement of section 27(1) (a) of the Constitution against private entities and actors has led to the poor realization of the right to have access to health care services since it has already been noted above that the private health sector receives a large amount of the government's budget and still marginalises people from certain groups which means that if the right enshrined in section 27(1) (a) cannot be enforced on private entities it becomes close to impossible for the right to be progressively realised.

[191] Pieterse M "Indirect Horizontal Application of the Right to have Access to Health Care Services" (2007) South African Journal on Human Rights 160.

CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

5.1. Conclusion

It is submitted that the fundamentality of the right to have access health care services is derived from its intersectionality with the right to life and dignity. Consequently, it is incorporated in the Bill of Rights and has on numerous occasions been confirmed by the South African High Courts and the Constitutional Court as a justiciable socio-economic right. There are notable positive steps that have been taken by the government in a bid to protect and enforce this right. The discussion in the preceding chapters serves as proof of South Africa's commitment to the realisation of this right.

The government is commended for the numerous policies and legislative framework has been promulgated in the furtherance of the right to access health care services. And with even more daring legislation such as the National Health Insurance Act the progressive realisation of the right is paved with optimism. However, the findings in the second chapter evince that despite positive strides, discriminations still exist in the South African health sector specifically concerning the accessibility of healthcare services. These conclusions are consistent with most South African studies, which expose the deficiency that there is limited access to health care services specifically among the regions where there are disadvantaged and marginalised folk of South Africa. The facts case of *Soobramoney* demonstrates how overwhelmed and under-resourced government healthcare facilities are.

Critics have further gone on to point out the inadequacies of the current jurisprudence when it comes to clearly articulating the precise contours of what the right to access healthcare services in South Africa entails. A pessimistic overview of the comments of Justice Chaskalson and Madala in the *Soobramoney* case may result in the under-emphasis of socio-economic rights if their realisation is subject to the resources of a state whose facilities are generally under-resourced and overrun.

The right to have access to health rights is still an area wherein there is still much room for development. It, therefore, necessitates the allocation of more government resources and the application of thought towards the current impediments the realisation of this right is facing. Amid this phenomenon, this study submits the recommendations discussed in the subsequent subheading:

5.2. Recommendations

5.2.1. The incorporation of transformative constitutionalism

It is submitted that the South African government must articulate the minimum reasonable standards that are attached when one seeks health care services. The thought application factored in making this determination must be in line with the dictates of section 39 of the constitution implores the promotion of the spirit and purpose of the Bill rights when interpreting rights within the Bill of Rights itself. Taking cognizance of the fact that there is a high unemployment rate in the country, it is typically expected that the general populace will be heavily reliant on state institutions for access to health care. It is recommended that the state fully prescribe minimum standards of resources that their facilities ought to have to be considered effective in providing health care services.

5.2.2. Implementation and interpretation of legislation and policies

The writer notes that various pieces of legislation and policies deal with the right enshrined in section 27 (1) of the Constitution however the implementation struggles with regards to the measures taken to ensure that this right is attained remains an enormous challenge. It is based on this that the writer opines that the aim of attaining just and equitable access to health care services has not been fully realised in South Africa and as such it is recommended that South Africa should adopt more transformative approaches to the interpretation and implementation of the right to access to health care services.

5.2.3. Adoption of the progressive aspect of the minimum core approach

It is recommended that the courts implement a uniform approach that sets out the standard approach to implement a more transformative and integrative approach to the adjudication of the right to access healthcare services. The phenomenon of 'minimum core' in the sphere of the right to health and access to health care services aims to confer minimum legal content of the right in question. This phenomenon is important because it prevents the government from mentioning excuses such as lack of resources for neglecting to fulfil the realisation of their duties including the right to access health care services.

Courts should adopt an expansive reasonableness approach which they will use to scrutinise as well as assess the government's promulgated policies and legislations implemented to develop the right to access to health care services and the adjudication of same. By using this approach courts will be able to enquire whether implementation frameworks for the right enshrined in section 27 (1) of the Constitution adopted by the government make provision for the basic minimum essential elements to make provision for the needs of the vulnerable and marginalize groups of people in the society. If the implementation frameworks fail to provide the minimum essential elements mentioned above then the courts should have the prerogative, and they should hold that the frameworks are unreasonable.

5.2.4. Constitutional dialogues

In addition to the above mentioned, it is recommended that courts develop a more substantive approach to the right to have access to health care services by enhancing constitutional dialogues between the judiciary, legislative, and executive arms of government. These dialogues will be aimed at the judicial enforcement of the right to access health care services and envisage greater cooperation between the courts, legislature, and the executive in achieving the realisation of this right. This approach will also assist the courts in having more latitude in defining rights in a border manner and be able to adopt stronger and more effective remedies.

Since this recommended dialogue will be solely aimed at the advocacy of societal participation in the design of frameworks for the implementation and design of judicial remedies for the right to access to health care services, the theoretical part of the dialogue will ensure that the realities of the society are taken into consideration in this

process. In so doing the courts will have the necessary capacity to respond to previously unforeseen multicentred challenges.

5.2.5. Remedies in terms of sections 38 and 172 (1) (a) and (b) of the Constitution

Lastly, the writer recommends that courts can ultimately play a more proactive role in coming up with more creative and effective remedies to deal with the non-compliance attached to the right to access health care and services. In this regard the courts will be acting well within their mandates in terms of section 38 and section 172 (1) (a) and (b) of the Constitution.[192]

The application of this remedial power will provide the courts with ample opportunities to further enhance their relationship and dialogue with the other two branches of government. This approach will foster the achievement of balance between the doctrine of separation of powers and judicial difference and will also assist in maintaining the necessary checks and balances between the judiciary, legislature, and executive.

[192] Section 38 & Section 172 (1) (a) and (b) of the constitution of South Africa of 1996.

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