

## TOWARDS MAKING THE RIGHT OF ACCESS TO HEALTH CARE SERVICES A REALITY

### *Introduction*

Although the inclusion of economic and social rights in the South African Constitution is much welcomed, the practical realization of this category of human rights is proving to be a tremendous challenge. This article examines the right of access to health care services and provides some insight into the meaning of the right and the nature of the obligations that it imposes on the state. In doing so some reference is made to the International Covenant on Economic, Social and Cultural Rights. Although the Covenant still awaits ratification by the South African government, the General Comments by the Committee on Economic, Social and Cultural Rights provides some useful guidance into certain aspects of health rights.

### *The Constitutional Right of Access to Health Care Services*

Section 27(1)(a) of the Constitution provides: "Everyone has the right to have access to health care services, including reproductive health care." Section 27(2) obliges the state to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realization" of the right. Section 27(1)(a) when read with the equality clause (Section 9 of the Constitution) effectively translates into a right of access to health care services on the basis of equality and free from unfair discrimination. Section 9(3) of the Constitution prohibits the state from unfair discrimination directly or indirectly on a number of grounds, which though not exhaustive include race, gender, sex, sexual orientation and disability. As HIV/AIDS is considered a disability, discrimination on the basis of an individual's HIV status for instance, whether it occurs directly or indirectly is expressly prohibited by the Constitution.

The initial challenge posed by Section 27 of the Constitution is an actual definition of the term "health care services." The World Health Organization has adopted the following definition of health: "Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity." (*Basic Documents*, WHO 1988, at page 1-2). However, at the outset it must be pointed out that a right of access to health care services is clearly not a guarantee of good health to everyone. Instead, it is suggested that the term refers to those health services that are necessary to ensure a state of complete physical, mental and social well-being. The definition would include but is not limited to services aimed at preventing, diagnosing, alleviating, curing, healing and treating conditions that threaten or compromise an individual's state of physical, mental or social well-being. Reference to "social well-being" illustrates the inter-relationship between the right of access to health care services and other economic and social rights in the Constitution, such as the rights of access to sufficient food and water, adequate housing etc.

Furthermore, Section 27 of the Constitution makes reference to a right of *access* to health care services as opposed to health care *per se*. The terminology refers to an obligation on the part of the state to create an enabling environment by providing the conditions for the individual to realize the right themselves as opposed to the state providing free health care on demand to everyone. Article 2 of the UN Declaration on the Right to Development reiterates that the individual is expected, whenever possible through his or her own efforts and by use of own resources, to find ways to ensure the satisfaction of his or her own needs, individually or in association with others. The right of *access* to health care services accordingly refers to an obligation on the state to make the necessary health care services accessible and available to individuals, though these services need not necessarily be provided free of charge.

It should also be noted that the right of access to health care services is subject to *progressive realization* as opposed to *immediate implementation*. Hence, whilst the ultimate goal is to provide health care services (as defined above) to everyone, due to resource constraints, the Constitution allows for this goal to be realized over a period of time and on a progressive basis. The UN Committee on Economic and Social Rights has interpreted the phrase "progressive realization" to mean an obligation on the part of the state "to move as effectively and expeditiously as possible to securing its ultimate goal." The Committee has however noted that the phrase "should not be misinterpreted of depriving the obligation of all meaningful content." It has further expressed that "any deliberately retrogressive measures will have to be fully justified." (UN General Comment No 3, Para 9.)

Section 27(2) of the Constitution also makes the realization of the right subject to the availability of resources. It obliges the state to take reasonable legislative and other measures *within its available resources* to achieve the progressive realization of the right. The qualifier refers to the fact that even where available resources are demonstrably inadequate, the state should still strive to ensure the widest possible enjoyment of the right under the prevailing resource constraints. (UN General Comment No 3, Para 11). In realizing the right of access to health care services, it is important that the available resources are effectively and equitably utilized. The issue of resource availability in the context of health care services was recently accorded much attention by the Constitutional Court in the case of *Soobramoney v Minister of Health, Kwa Zulu Natal* 1997 (12) BCLR 1696 (CC). In the said case the Constitutional Court held that the Kwa Zulu Natal Health Department's decision not to provide dialysis treatment to the applicant was justified on account of its resource constraints. The Court accordingly held that the Department did not violate the applicant's right of access to health care services.

### *Obligations Imposed on the State*

As has been noted, Section 27(2) of the Constitution obliges the state to take "reasonable legislative and other measures." The question of reasonableness must be determined in relation to the ultimate goal of providing access to health care services to everyone as well as the resources available to the state. Section 27(2) clearly refers to the fact that in addition to legislative measures, administrative, judicial, economic, social and educational measures must be taken. Reference to "other measures" in the context of HIV/AIDS would for instance, include education on prevention, treatment programmes, policies on non discrimination etc. The UN Committee on Economic, Social and Cultural Rights has noted that these measures must be "deliberate, concrete and targeted as clearly as possible" towards meeting the obligation of ensuring everyone the right of access to health care services. (General Comment No. 3, Para 2)

Section 7(2) of the Constitution further obliges the state to respect, protect, promote and fulfill the rights in the Bill of Rights. The rights in the Bill of Rights would clearly include the right of access to health care services. The present section provides a brief overview of what the obligations on the state to respect, protect, promote and fulfill the right of access to health care services would entail.

### *The Obligation on the State to Respect the Right of Access to Health Care Services*

The obligation on the state to respect the right of access to health care requires that the state refrain from undertaking any legislative or other measures that violate, infringe or threaten people's rights of access to health care services. For instance, should the state fail to extend access health care services to persons living with HIV, it will be in violation of its duty to respect the right of access to health care services.

### *The Obligation on the State to Protect the Right of Access to Health Care Services*

International law has interpreted the obligation to protect the right of access to health care services as requiring that the state take measures so as to ensure that an individual's right of access to health care services is not violated by other more powerful groups or individuals in society. Under international law, this obligation could for example require that the state take measures to protect an individual's right of access to health care services in private clinics. However, this duty to protect the right of access to health care services in the private sphere gives rise to certain complex questions regarding the horizontal application of the right which still awaits testing by South African courts.

### *The Obligation on the State to Promote and Fulfill the Right of Access to Health Care Services*

The obligation on the state to promote and fulfill the right of access to health care services requires that the state take positive measures so as to ensure that people who do not currently enjoy access to the right to health services are granted essential levels of the right. This would include direct provision of services or resources necessary to ensure a minimum core content of the right of access to health care services.

The UN Committee on Economic, Social and Cultural Rights has interpreted the International Covenant of Economic, Social Rights to impose a minimum core obligation on states parties to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights. (General Comment No. 3, Para 10) The Committee has noted that when the state fails, for example, to ensure access to primary health care, "it is *prima facie* failing to discharge its obligations under the Covenant." Furthermore, in order for the state party to rely on a lack of resources to justify a failure to meet its minimum core obligations, the Committee has stressed that "it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum core obligations." (General Comment No. 3, Para 10)

According to Eide, "as a minimum all governments should establish a nation wide system of identifying local needs and opportunities for the enjoyment of the economic and social rights and in doing so they should identify in particular the needs of groups which have the greatest difficulties in the enjoyment of these rights." (Eide, *Realization of Social and Economic Rights and the Minimum Threshold Approach* Human Rights Law Journal (1989) 10 at page 46) In view of the discrimination experienced by persons living with HIV/AIDS as well as the difficulties experienced in gaining access to treatment, the specific health needs and opportunities of persons living with HIV/AIDS should, for example be addressed as a matter of priority. Other examples of what might be considered minimum core obligations in the context of access to health care would include, but are not limited to the adoption of national policy as regards access to health care services that is consistent with the Constitution, the repeal of discriminatory legislation that would impede the access of health care services by certain vulnerable and disadvantaged groups as well as the provision of basic primary health care services as is required by the International Covenant on Economic, Social and Cultural Rights.

### *Conclusion*

Critical to the realization and proper enforcement of the right of access to health care services is knowledge of the substantive content of the right as well as the obligations it imposes on the state. This article has attempted to accord some substance to the right of access to health care services. However, the fact that

the content of health rights is still relatively under developed in the international arena, is indicative of the extensive research required on the subject. It should also be noted that health rights in the Constitution are not limited to the focus of this article but includes the rights of detained and sentenced prisoners to adequate medical treatment (Section 35(2)(e), the rights of children to basic health care services (Section 28(1)(c), as well as the right of everyone not to be refused emergency medical treatment (Section 27(3)). The Constitution therefore provides a platform for comprehensive and accessible health care services to all sectors of society. The challenge however, lies in making these rights a reality for the people of South Africa.