

**A Comparative Analysis of the Right to Health Care in the Public Sector and
Private Sector in South Africa**

Mini-dissertation submitted in partial fulfilment of the RHP 801 course.

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DECLARATION

I, **Valled Edward Lubisi**, do hereby declare that this mini-dissertation titled, **A Comparative Analysis of the Right to Health Care in the Public Sector and Private Sector in South Africa**, hereby submitted by me, is my own work in design and execution. All the sources that I have used or quoted have been indicated and duly acknowledged by means of complete references.

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SIGNATURE

(V.E LUBISI)

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Abstract

In a world where rights play an important role in the welfare of people, mere knowledge of the rights is not necessary but a clear understanding and appreciation of the nature of rights is essential. One of the most important rights which people are oblivious about is the right to health care services. From the face of it, the right to health care services seems to be an unsophisticated right which everyone understands and appreciates. However, this right, has far more implications than one may immediately perceive. Ideally, the right to health care services should be available to everyone as it concerns the welfare of people. This work will firstly study how the division between the private and the public health care sector affects the way in which the right to health care is afforded to individuals in South Africa. In this regard, the cost, quality and affordability of the health care services will be considered. The work will then study the gap that is created between the poor and the rich because of the division between the private and the public health care sector. The Act will also study the connection that exists between the right to health care services and the founding principles of the South African Constitution. The researcher's objective is to reconcile the private and the public health care sector to ensure that there is realisation of the right to health as provided for by the South African Constitution.

CHAPTER 1

1.1 INTRODUCTION

The Constitution of South Africa is the highest law of the Republic.¹ It is based on the democratic values of human dignity, equality and freedom.² In addition to these values, the South African Constitution (Constitution) enshrines other essential rights which are closely linked to the founding values of the Constitution namely equality, human dignity and freedom. One of the rights which is provided for by the Constitution and which is closely linked to the founding values of the Constitution is the right to health care services.

The right to access health is one of the rights which affects everyone and which seeks to cover and accommodate everyone. This is evidenced by its ability to accommodate different groups of people. Firstly, the right is depicted in a broad manner which accommodates everyone. In this regard the Constitution provides that everyone has the right to access health care services.³ Secondly, this right is narrowed down to the children and in this regard the Constitution provides for accessibility of elementary health care service for children.⁴ To add to this the Constitution also accommodates for the prisoners and the detained person and affords them the right to sufficient medical treatment at the expense of the state.⁵ The study will however focus on the right to access to affordable health care services as provided for by section 27 (1) (a) of the Constitution.

The issue of health care has become one of the most debated and hence most controversial in South Africa. This has been necessitated by the gradual depletion of the health care resources and the division between the public and the private health care sector.⁶ On one hand, the gradual depletion of health care resources is evidenced

¹ The Constitution of the Republic of South Africa, Act 108 of 1996, section 2.

² The Constitution of the Republic of South Africa, section 1(a).

³ The Constitution of the Republic of South Africa, Act 108 of 1996, section 27(1) (a).

⁴ The Constitution of the South Africa, Act 108 of 1996, section 28 (1) (c).

⁵ The Constitution of South Africa, Act 108 of 1996, section 35 (1).

⁶Patrick Figgis "Depleting resources adding pressure to healthcare" available at <http://www.pwc.com/gx/en/industries/healthcare/emerging-trends-pwc-healthcare/depleting-resources.html> (accessed on 19 March 2016).

by a deterioration in skilled labour in the health care sector. In South Africa, over the years there has been a decline in the skills of health care service providers caused by an increasing demand of the health care sector and lack of sufficient training of service providers to cater for the increased number of people in need of the health care services.⁷

On the other hand, division between the public and the private sectors in the health system is evidenced by the apparent severe inequalities in the extent and the quality of health care offered by the public health care sector on one hand and the private health care sector on the other hand. In the Soobramoney case, the court stated showed that there is a serious dividing line between the private health care sector and the public health care sector, with the former having quality services well skilled personnel and the latter having limited resources and not being able to assist everyone who needs help.⁸

One factor that has had an impact on health care resources leading to their depletion is the number of people living with HIV/AIDS in South Africa. In 2005, it was estimated that 5.5 million people in South Africa were living with HIV/AIDS.⁹The implications of such great numbers is that the government was burdened with task of providing antiretroviral drugs to the people living with the pandemic. Today, the roll out of ARVs is one of the factors that continues to deplete government resources.¹⁰ Financially and professionally, the government is unable to cater for other health issues and socio-economic issues as most of it budget is consumed and allocated for the use of providing free ARVs to those in need.¹¹

The depletion in the health care resources has affected the realisation and protection of other constitutional rights for example equality. It has amongst other things led to inequality in provision of health care services, some people receiving the best health

⁷ Mignonne Breier “The shortage of medical doctors in South Africa: Scarce and critical skills research Project” (2008) available at http://www.labour.gov.za/DOL/downloads/documents/research-documents/Medical%20Doctors_DoL_Report.pdf p9 (accessed on 21 March 2016).

⁸ Soobramoney v Minister of Health 1998 (1) SA 765 (CC) at paragraph 31.

⁹ (Note 7 above) page 19.

¹⁰ Jannie Hugo, Lucie Allan *Doctors for Tomorrow: Family Medicine in South Africa* (2008) 21.

¹¹ T Fleischer “Will escalating spending on HIV treatment displace funding for treatment of other diseases?” (2010) Vol. 100, No. 1 *South African Medical Journal* 32.

care service and others receiving the health care service which is not quality. This contention is first evidenced by the gap that has been created between the private and public sector with regard the affordability, quality and the way in which the health care services are accessible to different classes of people in South Africa.

Taking into cognisance the impact that the right to health has on other rights especially the values on which the Constitution is based, it is imperative to study and analyse the way in which the right to health care may be sustained and improved to ensure the realisation and upholding of the values on which the Constitution is based.

1.2 RESEACH QUESTIONS

- What is the impact of health care services on the constitutional values of freedom, dignity and equality?
- What are the differences between the public sector and private sector with regards to health care services?
- What are the roles and responsibilities of the state and international instruments to effectively realise the right to access health care services?
- What is the effect of the depletion of health care resources on the right of health care services and the way in which it is afforded to the poor population and the rich population?

1.3 PURPOSE OF STUDY

The premise of the study lies in the investigation and exploration of whether people in South Africa have access to affordable and good quality health care services. The work in this regard seeks to investigate the quality of health services provided by the public sector in contrast to the services provided by the private sector.

It has been argued, that the private sector provides more efficient and high quality services, contrariwise, the public sector has been seen to provide services that are of

low quality and hence lacks efficiency.¹² The work seeks to evaluate and assess the two sectors and to determine the extent to which the above arguments are true. The purpose of this assessment is to ensure that both systems accommodate everyone as provided for by the Constitution. Additionally, the study investigates whether the state is taking reasonable legislative measures to ensure the realization and the protection of the access to health care services.

The aim of the study is to investigate and explore the differences in the quality of services between the public sector and the private sector. The researcher also aims to harmonise the two sectors to bring about a system which can accommodate everyone and thereby protect the constitutional right to health care.

The objectives of this study are as follows:

- To evaluate the effectiveness and the quality of healthcare services provided by the private and the public sector
- To study which of these sectors seek to uphold the values on which the Constitution is based
- To study the mechanisms and the measures put in place by the state in realisation of the right to health care services
- To investigate the availability, quality and affordability of health care services in South Africa
- To compare between the two sectors with regards to healthcare services
- To investigate the possibility of harmonisation of the public sector and the private sector to realise and protect the constitutional right to health care services.

1.4 RESEARCH METHODOLOGY

Taking into consideration the nature of this study, it is apparent that doctrinal methodology will be conducted. Doctrinal methodology is also called desk-based methodology which makes use of primary sources such as books, journals, case law

¹² R Jenkins "Comparative Performance of Private and Public Healthcare Systems in Low and Middle-income Countries: A Systematic Review" available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3378609/> (accessed on 25 March 2016).

and internet sources. For conducting this study therefore, the researcher will consult the above-mentioned sources. And consequently, this research will be conducted through doctrinal methodology.

1.5 PROPOSED CHAPTER OUTLINE

CHAPTER 1: INTRODUCTION AND BACKGROUND OF STUDY

This chapter serves as an introduction and background to the study. In addition to that it outlines concisely, the purpose of the study and the aims and objectives. It also sets out the methods and techniques used for this research.

CHAPTER 2: THE IMPACT OF RIGHT TO HEALTH CARE SERVICES ON THE RIGHT TO FREEDOM, DIGNITY AND EQUALITY

As already stated above the right to health care services has an impact on the values on which the Constitution is based, namely equality, freedom and dignity. This chapter seeks to evaluate the connection that is seen to exist between the right to health care services and these constitutional values. In this regard the researcher will also assess the role that health care plays on the right to dignity, quality and freedom.

CHAPTER 3: THE COMPARATIVE ANALYSIS OF HEALTH CARE SERVICE PROVISION IN THE PUBLIC SECTOR AND IN THE PRIVATE SECTOR

The issue of health care services in the public and private sector has over the years become a subject of unending debates. In this chapter the researcher will compare the two sectors in terms of service provision, affordability, quality, and effectiveness. The researcher will also assess the depletion of the health care resources as a cause of the gap that exists between the two sectors.

This chapter will therefore try to tackle the gap that exists between the two sectors in terms of affordability and quality. In concluding the chapter, the researcher will analyse the way in which the sustainable provision of health care can be used as a measure to remedy the problem of depleting resources and the gap between the two sectors.

CHAPTER 4: THE ROLE AND OBLIGATION OF STATE TO ENSURE PROGRESSIVE REALISATION OF THE RIGHT TO HEALTH CARE

In addition to creating a gap between the private and public health sector, depletion of health care resources also affects the way in which the state realises and protects the right to health care. This chapter outlines the role of the state in ensuring successive realization of the right to access health care services.

CHAPTER 5: RECOMMENDATIONS AND CONCLUSIONS

Several problems will be seen throughout the chapters. The researcher in this chapter will make recommendation which have the potential of bringing change to the way in which the right to health may be realised in a way which is in line with the constitutional values of equality, freedom and human dignity. In addition to making recommendations, the chapter serves as a conclusion to the work.

1.6 LITERATURE REVIEW

Voluminous literature has covered the issues around health care and the accessibility thereof. This issue as already mentioned is one of the issues which has caused a lot of controversy to academics and to the courts. It is therefore imperative to study what other academics say about this issue. This will bring better understanding on the issue and help the researcher find a solution to the issue of accessibility of health care services and the reconcile the private health care sector and the private health care sector and ultimately create a health care system which accommodates everyone regardless of whether they can afford or not.

Hassim is of the view that the rights to human dignity, and equality are important for good health.¹³ The inference that can be drawn from this contention is that for one to be said to have a right to good health, their right to equality, dignity and freedom must be realised and respected. It is the opinion of the researcher however that the position is exactly the opposite of what Hassim opines.

¹³ Hassim et al *Health and Democracy* (2007) 19.

The researcher is in this regard, of the view that health care is important to the right to equality, dignity and freedom. This means that for one to argue that the rights to equality, dignity and freedom have been realised and protected, then health care services must be readily available. It is therefore the contention of the researcher that the realisation of the right to health care is one of the starting points to the protection and realisation of the three constitutional values of equality, dignity and freedom.

1.6.1 THE CONNECTION BETWEEN THE RIGHT TO HEALTH AND OTHER FUNDAMENTAL RIGHTS

The obligation placed on the state to ensure access of health care services to all is in a special way connected to some of the most fundamental rights encompassed in the Constitution. It is noteworthy, therefore in this regard that the issue of health care services and ensuring that the citizens have access thereof is an issue which affects the exercise of other rights encompassed in the Constitution as will be seen below.¹⁴

Marius Pieterse believes that the imposition of the obligation on the state to realise and protect the right to access health care services may have an impact on private rights legitimate expectation and interests.¹⁵ Pieterse goes on to highlight that the constitutional obligation to protect and realise the right to access health care services and other socio-economic rights may sometimes outweigh the competing private rights and interest and therefore justify the limitations of such private rights and interests.¹⁶

The researcher agrees that the obligation of the state to realise the right to access health care services may sometimes outweigh the competing civil and political rights. However, the researcher argues that despite the potential of the state's obligation to realize the socio-economic rights to outweigh the competing civil and political rights, there remains between these two extremes a connection which can never be done away with. Therefore, the researcher as will be shown below is of the strong opinion that the right to access health care services has a great impact on the private rights and interests.

¹⁴ M Pieterse "The Legitimizing/ Insulating Effect of Socio-economic Rights" (2007) 22 *Canadian Journal of Law Society* (1) 6.

¹⁵ M Pieterse *Can Rights Cure: The Impact of Human Rights Litigation on South African Health System* (2014) 130.

¹⁶ *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 (3) SA 1151 CC Para 37.

Health care comprises several socio-economic factors which entail its connection with other rights. The UN Committee on economic, social and cultural rights is of the view that the right to health is essential for the exercise of other indispensable human rights.¹⁷ To observe the right to health care in practice other socio-economic rights also need to be protected and promoted without fear, favour or prejudice. For instance, Section 27(1) (b) stipulates that everyone has the right to have access to sufficient food and water.¹⁸ The extent to which the citizens of a country can access good food and water is an indication of development.

Krisela Steyn believes development and health are closely related.¹⁹ This contention was supported by Kaplan who observed that for several years it has been recognised that the people with a low socio-economic level experience more health issues as compared to people with a good socio-economic welfare.²⁰ This serves as evidence of the close relationship that exist between other social economic rights like the rights to access water and food,²¹ and health.

Another right which is connected to the right to health care is the right to life.²² It was observed in the case of *S v Makwanyane* that; the right to life is antecedent to all the other rights in the Constitution.²³ This is because without the right to life it will be impossible to exercise other rights. The view of the researcher is that one cannot be said to have the full right to life if his or her right to health is not fully protected or recognised.

The General Comment supports the interrelated nature of human rights by stipulating that the right to health is closely related to and dependent upon other human rights.²⁴ This means that protection of other entitlements such as right to life, housing, food, human dignity and non-discrimination, among others, are important towards

¹⁷ General Comment No.14 2000, The Right to the Highest Attainable Standard of Health, Article 12 of the International Covenant on Economic, Social and Cultural Rights.

¹⁸ Constitution of the Republic of South Africa, Act 108 of 1996, Section 27(1) (b).

¹⁹Krisela Steyn & Michelle Schneider "An Overview of poverty in South Africa" (2001) available at <http://www.mrc.ac.za/bod/povertyfinal.pdf> (accessed on 23 March 2016).

²⁰ Kaplan RM, Hartwell SL, Wilson DK, Wallace JP, J Gen Effects of diet and exercise interventions on control and quality of life in non-insulin-dependent diabetes mellitus (1987) .

²¹ The South African Constitution, section 27(1) (b).

²² The Constitution of the Republic of South Africa, Act 108 of 1996, Section 11.

²³1995 (3) SA 391 CC.

²⁴ Note 12 above.

recognition of the right to health. It can therefore be concluded that the right to health cannot be separated from the other fundamental rights enshrined in the Constitution.

1.6.2 DIFFERENCE IN SERVICES BETWEEN THE PUBLIC HEALTH CARE AND THE PRIVATE HEALTH CARE FACILITIES

According to Harris, the South African economy is a free market economy which encompasses both the public and the private sector.²⁵ The two sectors are both role players in the economy and are equally important. Notwithstanding the advantages that come with having a mixed economy, it is noteworthy that several problems arise from it. Some of these problems are related to the issue of equality and are evident in the health care sector.

In a country based on democracy and Constitutionalism, equality is a right which is of fundamental importance and it is always the duty of the state to protect it. The current state in the South African health system reflects the opposite of what a state based on constitution seeks. According to Piertese, it would be an understatement to say that the current South African health care system reflects inequalities in the extent and quality of access of health care services.²⁶

Hassim in agreement with Piertese shows that the inequality in the extent and quality of access to health care is evidenced by the fact that while the minority enjoy world class health services in the private sector, the majority are subjected to low quality health care services offered by the public sector.²⁷ The huge gap existing between the private health sector and the public health sector has become an issue of contention which requires state intervention.

According to Carstens, the health system in South Africa consists of both the public and the private health care systems. He further highlights that the larger population in South Africa is reliant on public health care services while the private health care services is rendered to the people that can afford to pay for such services or who are

²⁵ Laurens Harris "A Mixed Economy of a Democratic South Africa" available at http://www.iassa.co.za/articles/033_sum1990_05.pdf (accessed on 21 November 24, 2016).

²⁶ M Pieterse (Note 15 above) 125.

²⁷ Hassim (Note 13 above) 17.

reliant on medical schemes to pay for them.²⁸ Reading between the lines of the above contention two problems may be seen.

While it is a great thing that the public health care sector is more affordable as compared to the private healthcare sector, it is submitted that the affordability has led to overcrowding in the public health care facilities and hence a decline in the quality of services provided by this sector. In this regard the researcher concurs with Marjorie Jobson who observed that since 1994, there has been an improvement in the access to clinics but also a substantial decline in the quality provided by those clinics.²⁹

Again, while it is incredible that the private health care sector has good facilities and good quality services, the sad reality is that they are expensive and unaffordable to most South Africans. The cost of the private health care sector is necessitated by the need by the fact that private health care service providers have the main aim of making profit. According to Hassim other factors that contribute towards high prices of are anti-competitive pricing of medicine, laboratories and specialist services and the collusions among big hospitals.³⁰ Due to the gap that exists between the private and the public sector, it can therefore be argued that accessibility to health care services is not based on equality.

The point of departure is proper understanding of the private/public gap is to highlight how it was created and how it expanded. It should be noted that the differences between the private health sector and the public health sector are sustained and reinforced by the operation of the South African health care system. Heywood, in this regard believes the public health sector continues to enable and flourish the private health sector by retaining the responsibility to train the professionals and this according to him continues to put pressure on the private sector.³¹

Heywood went on to highlight that the other reason why the private sector is expanding because the public sector is that after training the professionals, it underpays them and

²⁸ Carstens P and Pearmain P, *Foundational Principles of South African Law*, (2007) 229.

²⁹Marjorie Jobson "Structure of the health system in South Africa" (2015) available at www.khulumani.net/.../225_30267364dfc1416597dcad919c37ac71.htm... (accessed on 28 March 2016).

³⁰ Adila Hassim, Mark Heywood and Jonathan Berger *Health and Democracy* (2007) 164.

³¹N Heywood "Debunking 'Conglomo-talk': A Case Study of the animus curiae as an Instrument for Advocacy, Investigation and Mobilization " (2001) 5 *Law, Democracy, and Development* 133.

thereby draws well-trained workers away from it. In this way the public health care sector is left under-staffed and this usually draws the will resources patients away from it also. According to Van Rensburg, the private sector continues to expand because it is left unregulated and therefore its prices continue to sky rocket making the services unaffordable to the middle and lower class. This according to him expands the gap that exists between the private and the private sector.³²

The gap between the private health sector and the private health sector has expanded in the last two decades,³³and this has driven the state into taking all reasonable steps bridge it. Because South Africa has a mixed economy, the question of addressing the differences between the private and the public health sector requires a balance of seemingly competing rights.

One issue that stems from the issue of the private/ public health service is the issue of attaining equality for all as required by the Constitution and at the same time ensuring that the right to access health care services is also protected. Section 27 (2) of then Constitution provides that the state must take reasonable, legislative and other measures, within its available resources to achieve the progressive realisation of the right of everyone to have access to health care. Furthermore, section 9 (2) of the Constitution the right to equality entails full and equal enjoyment of rights and this includes the right to access health care.

The health system in South Africa as mentioned above is based on affordability as opposed to need. This has led to apparent inequalities in the extent and quality of service. on one hand while the minority enjoys world class quality services in the private sector, the majority are subjected to the low-quality services offered by the public sector. This has led to debates on whether the health system protects the right to equality which is provided for by section 9 of the Constitution. The state is therefore tasked with making efforts to eradicate and do away with the inequalities that exist in the access to health care.

³² HCJ van Rensburg & MC Engelbrecht “Transformation of the South African Health System: Post 1994” in Van Rensburg ed *Health and Health care in South Africa* 2nd ed (2012) 101.

³³ Van Rensburg (Note 32 above) 179.

The state has tried in several ways to bridge the gap existing between the private and public health sector and thereby eradicate inequalities by making provision for regulation of the private sector. This has however led to nothing but court cases before the Constitutional Court with the private alleging that regulation infringes on their rights. In the *Minister of Health v New Clicks South Africa (Pty) Ltd*,³⁴ the challenge was based on limits which were placed on the profit margins that the pharmacies could add to dispensed medicines. The court in this case firstly emphasised on the necessity of price control but it held that the limits on the profit margins were inappropriate and unconstitutional.

Noteworthy from this case is the fact that the court did not do away with the regulation of the prices in the private sector, nor did it eradicate the price control, the court simply held that the regulations by the public sector must be within the confines of the law and must be reasonable. And this means that the state, subject to the law may still regulate the private sector in order to make the health sector a better one which caters for everyone based in need and not affordability.

1.6.3 THE DUTY OF THE STATE TO REALISE THE RIGHT TO ACCESS HEALTH

Berger outlines the notion of access health care as a universal indispensable right for which the state has a corresponding duty to respect, fulfil, promote and protect for all.³⁵ This means that the state has the duty to take reasonable measure to realise and protect the rights to health. The protection of the right to access health care services entails the protection of the other fundamental rights provided for in the Constitution.

In a country based on equality and other Constitutional values, it is apparent that one of the state's duties is to ensure a fair and reasonable gap between the private and public health sectors. South Africa is one of the Country encountering problems with private/public divide in the health care sector and this has led to debates based on the

³⁴ 2006 (2) SA 311 (CC) para 32.

³⁵ (Note 23 Above) 167.

whether there is equality in the health sector. In South Africa, there is on one hand, a private health sector providing world class services and on the other hand a public sector providing services of low quality. This, according to the South African legislature is a cause for concern.

Pieterse is of the belief that the Constitution requires a fundamental reform of the health system.³⁶ The state in this regard has an obligation to ensure that the gap that exists between the private health care sector and the public health care sector is closed. From the steps that have been taken by the state, it can be said with confidence that the state has taken reasonable steps to bridge the gap between the private health sector and the public health care sector.

Firstly, the legislature set as a goal in its 1997 *White Paper on the Transformation of the Health Care system of South Africa*, the reduction of inequalities and discrepancies in the health care system. The government was to achieve this goal by combination of the private health care sector and the public health care sector into one system which would cater based on need and not on whether a person can afford or not.³⁷

Secondly the efforts of the state may be seen through the National Health Act.³⁸ In section 2 (a) this act provides for the objectives of the Act which include the establishment of a health care system encompassing both the private and the public health sector and which provides the population with the best health care services in manner which is equitable. In the above-mentioned ways the state is making an effort to ensure that the gap between the private and public sector is fair and rational.

Section 27(2) places a duty on the state to take reasonable measures within available resources to realise the right to health. Several cases for example the case of *Minister of Health and Others v Treatment Action Campaign*³⁹ have been decided to enforce the duty of the state to realise the right to access health care services. The realisation of the right to access health care has been a challenge because it is subject to the

³⁶ M Pieterse *Can Rights Cure: The Impact of the Human Rights Litigation on the South African Health System* (2014) 126.

³⁷ *White Paper on the Transformation of the Health Care System of South Africa* (1992) 1.1.1 and 1.1.2 (a)

³⁸ 61 of 2003.

³⁹ 2002 (5) SA 721 (CC).

availability of resources. The Constitution of South Africa provides that the state must take reasonable measures within available resources.⁴⁰

Whereas it is common cause that the availability of resources may be an obstacle to the protection of the right to health, the Constitutional Court of South Africa has guaranteed the justiciability of the socio-economic rights. In the case of *Government of the Republic of South Africa v Grootboom* the Constitutional Court held that the state may not use the notion availability of resources to evade its Constitutional duty to realise the right to realise socio economic rights.⁴¹ In agreement with Khoza, the researcher submits that where the cases of justiciability of socio-economic rights are brought before the court, the state cannot evade its duty to protect these rights by merely arguing that it lacks resources.⁴² The state has the duty to ensure that no obstacle stands in the way of citizens to access socio-economic rights. This, in the cases was to ensure that the action of the state is based on reasonableness and not on mere excuses based on lack of resources.

Pieterse is of the sentiment that the obligation of the state in protection of the right to access health care has implications on the individuals in the private health sector and firms therein. Pieterse had said this in agreement with Daniels who believes rights are not advanced by being invoked against the state, but the state sometimes must invoke then rights against the private entities to ensure that there is full enjoyment of rights by everyone.⁴³

In this regard, it is the researcher's submission that even though under normal circumstances, the private sector should be left unregulated, the regulation of the private sector to ensure full enjoyment of the right to health care by everyone is allowable. This submission agrees with Pieterse who hold the opinion that even if it is the duty of the state to realise the right to access health care, the state's infringement on the rights of the private institutions to protect this Constitutional right can be justified.⁴⁴

⁴⁰ Constitution of the Republic of South Africa, Section 27(2)

⁴¹ 2001 (1) SA 46 (CC) at paragraph 39.

⁴² S Khoza *Socio-economic Rights in South Africa* (2007) 41.

⁴³ N Daniels *Just Health Care* (1985) 114.

⁴⁴ M Pieterse (note 29 above) 128.

6.1.4 THE ROLE OF INTERNATIONAL BODIES IN THE PROTECTION OF THE RIGHT TO ACCESS HEALTH CARE SERVICES

International law standards require that the obligation of the state to protect the right to health entails the regulation by the state of the domestic health service delivery in a way that enables equitable access to healthcare services and ensures availability, accessibility, acceptability and quality of health care.⁴⁵ Reading between the lines of the above mentioned statement one may immediately perceive its effect on the states whose health care service delivery is partially or wholly privatised. The apparent effect of the statement will be that such states will be required to closely regulate the private sector activities.⁴⁶

The question that remains unanswered is whether the South African health system complies with the international standards which provide for the regulation by the state in cases where the health system is partially or wholly privatised. The South African domestic health care service delivery is partially privatised as it consists of both the public health care sector and the private health care sector. However, the private sector activities in South Africa have been left unsupervised and this is evidenced by the soaring prices in the private health care delivery. This has ultimately led to the problematic divide between the private and the public health care sectors in South Africa,

According to the World Health Organisation Constitution highest attainable standard of health is a fundamental right of every human being.⁴⁷ The right to access health care services is also mentioned in the 1948 Universal Declaration of Human Rights.⁴⁸ The right to access health care services is also provided for in the International Covenant on Economic, Social and Cultural Rights.⁴⁹ South Africa ratified the above-mentioned instruments and this places an obligation on South Africa to ensure the realisation of the right to health care services.⁵⁰

⁴⁵ M Pieterse (Note 29 above) 127.

⁴⁶YA Vawda & BK Baker "Achieving Social Justice in the Human Rights/Intellectual Property Debate: Realising a Goal of Access to Medicines" (2013) 13 *African Human Rights Law Journal* 55 62.

⁴⁷ The World Health Organization Constitution of 2006, Article 1.

⁴⁸ Universal Declaration of Human Rights, Article 25.

⁴⁹ International Covenant on Economic Social and Cultural rights, Article 12.

⁵⁰ A E Yamin, the right to health and its relevance to the United States available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1449334>.

The incorporation of the right to health in international instruments has been seen to have a positive impact in the way that countries view this right. The incorporation of health care under international law as a fundamental law has led to the incorporation of health care services in several the states' constitutions. This is evidence that international law has played great role in the realisation of the right to health care services by states.

Chirwa believes; South Africa's obligation to protect the rights in the Bill of rights should be understood international law.⁵¹ This, shows the role that international law plays in enforcing domestic laws of the states including the laws relating to socio-economic rights including the right to access health care. The researcher believes that the international laws have played great roles in ensuring that the right to access health care is realised and protected by the state.

The above-mentioned opinion of the researcher is based firstly on the fact that the World Health Organisation has through its Constitution introduced and embraced the right to access health care as an obligation of each state. In this regard Frank P Grad credits the World Health Organisation for establishing health as a fundamental, inalienable right that states are obliged to protect and which right the states cannot abridge or do away with.

Secondly the opinion of the researcher in this regard is based on the cited development of International law which has occurred over years. Yamin, in his case study of the impact of international law on health in United States of America, stated that there have been considerable developments in international law governing health care. He stated that the right to access health is no longer based much on issues of quality but is now based on matters of social justice.⁵² This shows the role that international law has played in ensuring that the right to access health care is firstly incorporated in many domestic constitutions, realised and protected by the states.

⁵¹ DM Chirwa "The Right to Health in International Law: Its Implications for the Obligations of State and Non-State Actors in Ensuring Access to Medicines" (2013) 19 *South African Journal on Human Rights* 556.

⁵² A E Yamin "The Right to Health Under International Law and Its Relevance to the United States" (2005) 95 (7) *American Journal of Public Health* 1157.

1.7 DEFINITION OF KEY CONCEPTS

- a) **Socio-economic rights-** socio-economic rights are rights that grant people basic needs and enable them to lead a dignified life.⁵³ For the purposes of this study socio-economic rights refer to the socio-economic rights as provided for by the Constitution of the Republic of South Africa. These include access to housing, water, social assistance and health.
- b) **Access to health care-** access to health care exists if services are available and there is an adequate supply of services, then the opportunity to obtain health care exists.⁵⁴
- c) **Affordability-** affordability is defined as the percentage of income a household can devote to health care while still having sufficient income to address other necessities.⁵⁵
- d) **Health services –** for this study, health care services as provided for by section 27 of the Constitution of the republic of South Africa.⁵⁶
- e) **Public health sector-** this is a health care establishment established and run by the state.⁵⁷
- f) **Private health sector-** for this study private health care sector means a private health establishment which is defined as the health establishment which is not owned by the state.⁵⁸

⁵³(Note 28 above) 20.

⁵⁴ Gulliford M¹, Figueroa-Munoz J, Morgan M, Hughes D, Gibson B, Beech R, Hudson M. (2002) "What does 'access to health care' mean?" available at <http://www.ncbi.nlm.nih.gov/pubmed/12171751> (accessed 13 June 2016).

⁵⁵Barber C and Miller M "Affordable Health Care for All: What Does Affordable Mean?" available at http://www.communitycatalyst.org/doc-store/publications/affordable_health_care_for_all_apr07.pdf (Accessed on 13 June 2016).

⁵⁶ National Health Act, Section 1.

⁵⁷ (note 22 above) 3.

⁵⁸ National health Act, Section 1.

CHAPTER 2

THE IMPACT OF HEALTH CARE SERVICES ON DIGNITY, EQUALITY AND FREEDOM

2.1 INTRODUCTION

South Africa's history is characterised by gross violations of human rights. Rights were afforded based on colour and this amounted to unfair discrimination before the advent of the Constitution, there existed a well-established legal order which was not based on any constitutional values or inherent right.⁵⁹ The transformation from the era of discrimination to the Constitutional era has however brought significant change.

The Constitution should be restorative as it seeks to restore and to heal past violations of human rights. The intention behind the drafting of the Constitution was to surmount the afflictive history and build a society based on self-governing values, informative justice and indispensable human rights.⁶⁰ The Constitution is based on dignity, equality and freedom and these have impacted on the way in which rights are interpreted.

The constitutional values of dignity, equality and freedom has led to the emergence and incorporation of the socio-economic rights, one of which is the right to health.⁶¹ It is submitted that the connection between constitutional values and the right to health is because health is a socio-economic right. It affects the social and economic aspects of people's lives and therefore affects the rights to dignity, equality and the right to freedom.

⁵⁹ Carstens P (Note 17 above) 22.

⁶⁰ Preamble of the Constitution of the Republic of South Africa, Act 108 of 1996.

⁶¹ Choma H, "Constitutional Enforcement of Socio-economic Rights: A South African Case Study" (2009) Vol6, No 6, *US-China Law Review*, 41.

2.2 THE RIGHT TO ACCESS HEALTH CARE AND THE RIGHT TO DIGNITY

Dignity as a value upon which the Constitution is based has a philosophical and universal impact on the way in which the other rights and the law in general is interpreted or applied in South Africa. In the case of *S v Makwanyane*,⁶² it was held that the Constitution makes it particularly imperative for courts to develop the entrenched, fundamental rights in terms of a cohesive set of values. These values comprise dignity.

The right to health care is one of the rights entrenched in the Constitution. It is closely linked to dignity. Human dignity is based on the treatment of people with respect and deserved worth. Dignity has long been prominent in the discourses of health. It is submitted that ensuring dignity means, firstly ensuring the availability of health care resources and then treating the people with respect.

The right to health care is a fundamental right and is essential for both life and human dignity. The significance of health lies in the fact that poor health leads to the diminishing of both life and health. At the basis of a person's welfare is his dignity. The right to afford dignity is the duty of health care provider. It is submitted therefore that in offering health care services, one must ensure that he or she treats patients with utmost respect and dignity.⁶³

Several groups of people are subjected to disrespectful treatment which may be equated to a violation of the right to dignity. It has been stated that the respect for dignity is manifested or shown in the way in which patients are treated. It is however apparent that in South Africa a lot of groups of people are treated unfairly based on their social status or economic status.⁶⁴

⁶² 1995 (3) SA 391 at paragraph 20.

⁶³ NW Dicket and N E Kass "Understanding Respect: Learning from patients" (2009) available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3110664/> (accessed at 17 June 2016).

⁶⁴ (Note 23 above) 48.

One of the groups of people which have been treated without dignity or respect due to their status are the HIV positive patients. The respect of dignity requires that the patients be treated with empathy. However, in the world that there is a lot of stigma surrounding the HIV epidemic, the HIV positive patients find themselves being subjected to human rights violations which include being treated without respect.⁶⁵

Reproductive health incorporates the choice to decide whether to take contraception, decisions about fertility and infertility, prenatal care and other choices that may be taken with regards to sexual and reproductive health.⁶⁶ In all these instances health care services must be provided with due regard to dignity. The right to reproductive health is explicitly provided for in the Constitution of South Africa. It. The inclusion of reproductive health care has triggered several debates, one of which concerns the fact that that provision means that women have the choice to decide whether to terminate pregnancy or not.

The conundrums with regards to the choice of women to terminate pregnancy was seen in the case of *Christian Lawyers Association v Minister of Health*.⁶⁷ In this case the Constitutional validity of the Choice on Termination of Pregnancy Act,⁶⁸ a statute which permits women to terminate pregnancy was challenged. The court dismissed this case. The case strengthens and supplements the rights that women have with to regard to their reproductive life.

It is submitted that the protection of the choice to terminate pregnancy by statute does not automatically guarantee that the women who make this choice will be treated with respect. Many at times, the women who choose to terminate pregnancy are treated with less respect and this is a violation of their dignity.⁶⁹ Dignity in these instances entail that women should be treated with sympathy and must be advised fully on their reproductive rights and sexual rights. When it comes to health care it is submitted that

⁶⁵ (note 23 above) 147.

⁶⁶ Carsten (Note 17 Above) 250.

⁶⁷ 1998 (4) SA 1113 (T).

⁶⁸ Act 38 of 2004.

⁶⁹ Hall KS, Moreau C, Trussel J "Determinants of Disparities in Reproductive Health Services among Adolescent and Young Adult Women in the USA" (2012) Vol102 No2 *America Journal of Public Health* 360.

dignity equates to quality of life. When a person's quality of life is not of standard, it can therefore be said that his dignity is impaired.

2.3 THE RIGHT TO HEALTH CARE SERVICES AND THE RIGHT TO EQUALITY

Prior 1994 human rights did not enjoy constitutional protection; ensuing equality was therefore never anyone's priority. Since the coming into force of the Constitution, equality and non-discrimination have been prioritised in South Africa and the world at large in many facilities. Similarly, in health care sectors, whether public or private equality must be seen to guide the way in which patients are treated.

The Constitution of South Africa provides for equality,⁷⁰ and in addition prohibits discrimination based on the grounds listed therein.⁷¹ Despite the efforts by the legislature to ensue non-discrimination and equality, the health care sector is still seen to be burdened by inequality and discrimination. In both the private and public health care sectors status still determines how services and consequently how patients are treated.

One of the grounds of discrimination listed, in terms of which discrimination is forbidden is sexual orientation. Gays, lesbians and bisexuals are one of the groups of people which are at risk of contracting HIV/AIDS and other sexually transmitted diseases.⁷² Most of health care providers have stigma and homophobia against the gays, lesbians and bisexuals and hence discriminate against them.⁷³

It is submitted that the stigma and discrimination with which the gays, lesbians and bisexuals are treated has an adverse or unfavourable effect on their health or their access to health care services.⁷⁴ This is because it affects the extent to which they seek health care services due to fear of being ridiculed or discriminated against. This will usually limit their access to appropriate health care services.

There are several ways in which their access to health care services may be limited by non-equality and discrimination. The first way in which non-equality affects access to

⁷⁰ The Constitution of the Republic of South Africa, Act 108 of 1996, section 9(1).

⁷¹ The Constitution of the Republic of South Africa, Act 108 of 1996, section 9(3).

⁷² Available www.gaystarnews.com/...11-biggest-hiv-myths-busted (Accessed on 17 June 2016).

⁷³ Available www.cdc.gov/msmhealth/stigma-and-discrimination.htm (Accessed on 17 June 2016).

⁷⁴ Hassim A (Note 1 Above) 90.

health care services by gays and lesbians is that it prevents them from disclosing information about their sexual activity which may be used to diagnose or treat them the second way is that it prevents them from seeking health care because of fear of being discriminated against.

Another group of people which are affected since they are not treated with equality and with non-discrimination are the sex workers. Sex workers are at risk too of contracting HIV and other sexually transmitted diseases. South Africa criminalises commercial sex work. It is submitted that this has not led to its end but rather to stigma and to unfair treatment against the sex workers.

South Africa is one of the countries in Africa that criminalises commercial sex work.⁷⁵ It is submitted that criminalization of sex work has led to more harm than good as it leads to the sex workers being treated with inequality and stigma. Discrimination towards the sex workers hinders them from seeking health care and this has an adverse impact on their health and welfare. Equality in this way plays an important role in the health sector and in the right to health care.

Gender inequality has also been seen to impact on the access to health care services by women. Several biological, social and economic reasons explain why women are vulnerable to contracting sexually transmitted diseases and HIV. Equality between men and women with regards to their sexual health and determination of sexual partners would demolish the health burden that exists on women. For women to fully access the health care services they must be given an opportunity to determine their reproductive health.

Because that equality has on the right to health care services, it is apparent that equality must be considered in the rendering of such services. This is one of the ways in which the Constitutional right to health may be upheld and protected.

⁷⁵ Sexual Offences Act 23 of 1957, section 20(1) (a).

2.4 THE RIGHT TO HEALTH CARE SERVICES AND THE RIGHT TO FREEDOM

The lack of resources to progressively realise the right to health care services and the continuous depletion of the resources to realise and protect the right to health care services affects the right to freedom of the patients, the freedom of choice.

Connected to the access to health care is the access to medicines which improve the quality of life of the patients, treat sicknesses or cure the diseases.⁷⁶ The development of health care facilities is not enough to realise the right to health care if people cannot afford the medicines that will improve their life, treat or cure sicknesses. Accessibility means both physically available and financially accessible. It is submitted that the fact that most medicines are not affordable has an adverse impact on the right to freedom of choice of patients.

The non-affordability of medicine and health care facilities at large means that the patients are not free to choose where to get health care services but rather they are controlled by how much they can afford. Consequently, on one hand, the rich population finds itself getting quality health care services from private facilities which are usually not regulated to accommodate the poor. On the other hand, the poor population finds itself burdened with health care problems and facilities of poor quality which are usually free or affordable and under resourced.

The Constitution of South Africa provides that everyone has the right to access to health care services.⁷⁷ The wording of the Constitution for example the mention of the word 'everyone' shows an element of equality and freedom. The fact that to a part of the population, health care services is either affordable and of low quality or of high quality and expensive affects the freedom that everyone must access the health care services. It is therefore concluded in this regard that health care and access thereof is not based on the founding principle of freedom.

⁷⁶ Berger J.M. 'Tripping Over Patents: AIDS, Access to Treatment and Manufacturing of Scarcity' (2002) Vol 17 No 2 *Connecticut Journal of International Law* 157.

⁷⁷ Constitution of the Republic of South African, Act 108 of 1996, Section 27(1) (a).

2.5 THE CONNECTION BETWEEN THE RIGHT TO HEALTH AND OTHER RIGHTS

In addition to the connection between the right to health care and other rights, it is an undeniable fact that the right to health care is closely linked to other human rights. The socio-economic nature of health care makes it apparent that it can never be separated from other fundamental rights which necessitate the existence of health care.

Health, it should be noted is based on well-being and welfare of people. Health, due to this can be classified as an issue that affects everyone and which can be named a public issue. It should be noted however that traditionally, health care was regarded as a private issue rather than a public one.⁷⁸ The position changed however as the relationship between other fundamental rights was established between the right to health care and other fundamental rights.

It is submitted that the right to health is connected to the right to sufficient food and water which are provided for in the Constitution of the South Africa.⁷⁹ The ability to access clean water and healthy foods will obviously reduce the burden of health care issues. These issues, it is submitted, are elevated by the lack of access to clean water and healthy foods. Health care issues consequently are a burden to the part of population which cannot afford both clean water and healthy food.

It is also submitted that the right to health care is also closely linked to the right to life which was expounded by the South African Constitutional Court in the case of *S v Makwanyane*.⁸⁰ In addition, the South African Constitution provides that everyone has the right to life.⁸¹ It is submitted that good health means quality life. And the protection of the right to access health consequently means the protection of the right to life.

2.6 CONCLUSION

The right to access health care services is one of the rights in the Constitution that cannot be separated from the founding principles of the Constitution and other fundamental rights. This on its own means that the right to health care is a fundamental

⁷⁸ Available at <https://www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module14.htm> accessed on 19 June 19, 2016.

⁷⁹ The Constitution of the Republic of South Africa, Act 108 of 1996, Section 27 (b).

⁸⁰ 1995 (3) SA 391 at paragraph 57.

⁸¹ The Constitution of the Republic of South Africa, Act 108 of 1996, Section 11.

right on its own which if violated may also lead to the violation of other fundamental rights which are protected and justiciable under the Constitution.

CHAPTER 3

THE COMPARATIVE ANALYSIS OF HEALTH CARE SERVICE PROVISION IN THE PUBLIC SECTOR AND IN THE PRIVATE SECTOR

3.1 INTRODUCTION

In South Africa, health care services are provided by both the state (public sector) and the private sector. Reading between the lines, one may perceive that the two sectors exist in parallel.⁸² Noteworthy, however is that the provision of services by the two sectors, the composition and the functioning of the two sectors are different. It is therefore submitted that it is imperative to understand the two sectors as this will help in determining how the two may be harmonised to ensure the realisation of the right to access to health care services as provided for by the Constitution of South Africa.

Several factors differentiate the functioning and the composition of the two sectors. These distinctions have also affected the way in which the right to healthcare services is interpreted and applied. In addition to this the gap that exists between the two sectors has also led to controversy, debates and questions as to whether the government of South Africa is taking all necessary measures to ensure progressive realisation of the right to access to health care services.

A gap exists between the private health care and the public health care with regards to affordability, accessibility, and quality. In order to fully recognise the right to access to health care full, it is imperative to bridge this gap. This work seeks therefore to bridge the gap that exists between the two sectors. However, it is submitted that before this is done an analysis of the two sectors be done and the two sectors be compared.

⁸² Health care in South Africa available at https://en.wikipedia.org/wiki/healthcare_in_South_Africa (Accessed on 19 June 2016).

3.2 THE PUBLIC HEALTH CARE SECTOR

The department of health is responsible for ensuring that the right to access to health care is realised.⁸³ It has a specific responsibility over the public health sector. The public health care sector accommodates most of the people in South Africa. Its accommodation of the larger part of the population is necessitated several social and cultural and economic factors which are imperative to study and analyse.

It has been argued that even though the public health care sector accommodates the larger part of the population of South Africa at an affordable price, it is less reliable, not efficient, and not sustainable and usually lacks accountability as compared to the private health care sector. It should be noted in this regard that public health care services are usually provided by the government.⁸⁴ Through national health care systems. It is submitted that the aim of the public health care is not the making of profit.

3.2.1 AFFORDABILITY

Before the inception of the Constitution, issues of health were regarded as private issues. However, when the Constitution came into play in South Africa, health care also emerged as a socio-economic right. Access to health care, from this time proved to be justiciable.⁸⁵ The state then made it a point to take all necessary steps to ensure the realisation of the right to access to health care. One of the state's way to ensure the realisation of this right was to provide health care services at a very affordable price and sometimes for free.

The provision of affordable health care services is in line with the South African Constitution which provides that the state must take all necessary steps to ensure progressive realisation of the socio-economic right.⁸⁶ It is also in line with the National Health Act.⁸⁷ It is submitted that once commodity is affordable, one may argue that it is accessible. The fact that a person can afford a health care means that they can easily

⁸³ Available at www.gov.za/about-sa/health Accessed on 20 June 2016.

⁸⁴ Sanjay B, Andrews J, Kinshore S, Panjabi P & Stuckler D, "Comparative Performance of Private and Public Healthcare Systems in Low and Middle Income Countries: A Systematic Review" available at www.ncbi.nlm.nih.gov/pmc/articles/PMC3378609.

⁸⁵ *Mazibuko and Others v The City of Johannesburg High Court of South Africa (Witwatersrand Local Division)* Case No: 06/13865.

⁸⁶ The Constitution of the Republic of South Africa, Act 108 of 1996, Section 27(2)

⁸⁷ The National Health Act 61 of 2003.

access it. In South Africa, the issue of affordability has never been an issue as most of the health care services are free or at a cheap and affordable price.

Even though the South African Public health care sector has no problems related to affordability, several debates have emerged because of this. On one hand, it is argued that because of its affordability the public health care sector tends to be under resourced with less professional to serve a greater population.⁸⁸ On the other hand, the affordability of the health care services means nothing but progressive realization of the socio-economic realization of the health care services as provided by the South African Constitution.

It is submitted that South Africa is burdened by a lot of health issues and affordability should be accompanied by other factors which would at the end of the day necessitate the realisation of the access to health care services.

3.2.2 ACCESSIBILITY

The question that seeks to be answered in this regard is whether the people who are dependent on public health care services can access the facilities. Accessibility involves the physical proximity of facilities to the people dependent on it, the availability of emergency health care services and the cost of travelling to the health care facilities. These factors could all influence the outcome of the service of health care.

In South Africa accessibility, has often been seen as a problem which has in turn led to problems with outcome of health and the health care seeking behaviour. While the availability of emergency health care has not been seen to be an issue, geographic proximity of health care facilities to the people have always been seen to be a factor affecting the usage of the clinics available. Despite therefore that the public health care services are said to be available and affordable, it is argued that public health care services are not accessible as most people dependent on them cannot afford transport money to get to the health care facilities. In addition to this it has been concluded that the public health care services are, in most cases overcrowded and this has led to

⁸⁸ Plaks S & Butler MBJ 'Access to Healthcare in South Africa' (2012) 129 South African Actuarial Journal, 132.

people having problems with accessing the health care facilities.⁸⁹ This is evident as many people make visits to public clinics and hospitals and come back without having had been attended to due to overcrowding at the facilities.

3.2.3 AVAILABILITY

The public health care sector provides health care services to 70 percent of its population. This percentage of the population depend entirely on public health care services.⁹⁰ The above statistics shows the extent to which the public health care sector is burdened with issues of health. Furthermore, the public health care sector, due to the large number of people dependent on it, has been seen to be affected adversely in terms of availability of resources to care for those people.

Even though since the inception of the Constitution in 1994 the availability of resources to realise the right to access of health improved, there are still disparities in the public health care sector of South Africa. Health issues like the HIV/AIDS epidemic, Tuberculosis and diabetes have burdened the South African health care sector.⁹¹ While access to basic health care is a highly desirable goal, it has been difficult to fulfil this goal because of non-availability of resources.

The public health care sector in South Africa is under-resourced. This is evidenced by the fact that it has fewer health care providers as compared to the private health care sector. In addition to that, the public health care sector does not have as much equipment which is enough to cater for the large number of people dependent on it. In the case of Soobramoney a man who suffered from heart disease and cerebrovascular diseases was denied access to a dialysis program because of severe shortage of dialysis machines and trained staff.

The case of Soobramoney show to a great extent that the public health care sector is usually dysfunctional because of its lack of machines, space, sufficient medicine,

⁸⁹ "Department of health, South Africa, National Health Care Insurance, Health Care for all South Africans" available at www.doh.gov.za/list.php?type-National-Health-Insurance (accessed on 20 June 2016).

⁹⁰ Plaks S & Butler MBJ (Note 65 Above) 130.

⁹¹ Benatar S 'The Challenges of Health Disparities in South Africa' (2013) Vol 103 no. 3 *The South African Medical Journal* 90.

infrastructure and trained staff. As a result of this, the public health care sector has been regarded as less efficient and less reliable as compared to the private sector.

3.3 THE PRIVATE HEALTH CARE SECTOR

In countries with fast growing economies and growth of the free-market system for example South Africa, health care has become a marketable commodity.⁹² In this regard, health care is now provided by the private health care sector which is based on profit-making. The private health care sector ensures that it strikes a balance between the cost of equipment, infrastructure, medicine, well trained practitioners etc. and the extent to which the services it provides will be affordable.

The private health sector provides services to about 35 percent of South African population.⁹³ This is relatively a smaller percentage compare to the percentage that is catered for y the public health care sector. One of the reasons why most people opt for public health care as opposed to private health care sector is that the private health care services are more expensive.

Due to the cost of receiving public health care services, the only people who can afford it are the rich, those who are covered by medical schemes or aid or those who have medical insurances.⁹⁴ Because of this the private health care sector is able to manage its functioning and it is not usually overcrowded of dysfunctional because of lack of equipment or infrastructure. In addition to this the private health care sector is able in most of the circumstances to pay its employees. Thus, the private health care sector is more efficient, reliable and despite its costs it ensures the realisation of the right to access to health care services as provided by the South African Constitution.

Despite the said efficiency and reliability, the private health care sector is not perfect. Several factors must be analysed. It is submitted that the analysis of other factors playing a part in the private health care sector will help in improving the way in which

⁹² Benatar S (Note 68 above) page 65.

⁹³ Biermann J "South Africa's Health Care under Threat" (2006) 7 available at http://www.healthpolicyunit.org/downloads/Health_Care_under_Threat.pdf (Accessed on 25 June 2016).

⁹⁴ Plaks S & Butler MBJ (Note 65 Above) 131.

the sector realises and protects the right to access to health care as provided for by the Constitution.

3.3.1 AFFORDABILITY

One of the issues that have led to debates which surround the private health care sector is the affordability. The question that is usually asked is whether the services under the private health care sector are affordable. Noteworthy in this regard is that the fact that private health care services are not affordable leads to the problem of whether there is fairness or equality in the provision of health care services in South Africa.

A reason for this is while it is praise worthy that the private health care sector provides quality services, these services come at a price that most South Africans cannot afford. On the other hand, it is praise worthy that the services that are by the public sector are affordable, they are usually of low quality.

As stated, private health care sector is influenced by the free-economy which is based on profit making. As a result of this the private health care services are not affordable to most if the South Africans.⁹⁵ As a result of its unaffordability, an inquiry was made y the Competition Commission in 2016. It was observed that medical inflation runs ahead of overall inflation. The commission therefore had to investigate whether the kind of competition conducted by the private health care sector was necessary when it comes to a basic human right like access to health care services.

As a result of the fact that most people cannot afford the private health care sector, it is submitted that the private health care services are not available to everyone as provided for by the South African Constitution. This contention follows from the fact that if one cannot afford something, they have no access to it.⁹⁶ To ensure the realisation if the Constitutional right to health care services by the private health care sector, the researcher submits that the private health care sector must be regulated.

⁹⁵ Inquiry into affordability of private health care in South Africa available at <https://www.enca.com/inquiry-affordability-private-healthcare-sa> (Accessed on 20 June 2016).

⁹⁶ The Private Health Care Sector and the Constitution: Ensuring Access to Affordable, Quality Health care for all available at <https://pulicintrestlawgathering.wordpress.com/proposed-panels-for-pilg-2014/the-private-healthcare-sector-the-constitution-ensuring-access-to-affordable-quality-health-care-for-all/> (Accessed on 24 June 2016).

Regulation of the private health care sector will ensure that it is affordable to most of the people in South Africa.

3.3.2 ACCESSIBILITY

Even though the non-affordability of the private health care sector attracts a lot of health care professional who are looking to make money, it clear that it chases most people to the hands of the public health care sector. Due to the high cost of private health care services, most people choose not to seek for medical help from the sector. It is submitted that the choice of people not to make use of the private health care services is influenced by the non-affordability as opposed to willingly or voluntary.

Accessibility is dependent on affordability and proximity. With regard to accessibility based on affordability it has been found that the private health care sector only caters for middle and high income earners who in most cases are part of medical schemes. Most the people in South Africa and who need the services are not catered for because they cannot afford. The private health care sector is therefore inequitable and inaccessible to the large population of South Africa.

While most people in South Africa stay in high-density townships, the private health care facilities are rarely found in these townships. Most of the private health care are found in shopping centres which are located far from the townships and high density suburbs where most the people in South Africa reside. Noteworthy is that the people in these townships are mostly affected by health affecting factors for example sanitation issues, poverty and nutrition however this part of the population is exclusively dependent on public health care services which in most cases are unreliable and inefficient.⁹⁷

While it is implausible that the private health care sector provides efficient and reliable services, the fact that it is not accessible because of high costs and proximity present a barrier to the access to health care as provided or by the South African Constitution. The obstacles related to private health care sector explains why the South Arica

⁹⁷Section 25: Catalyst for Social Justice available at section27.org.za/2016/02/make-private-healthcare-more-accessible (Accessed on 24 June 2016).

government has been trying to intervene into the running of the private health care sector.

3.4 COMPERATIVE ANALYSIS OF THE PRIVATE HEALTH CARE SECTOR AND PUBLIC HEALTH CARE SECTOR

From the above analysis, a lot of differences exist between the private health care sector and the public health care sector. It is submitted that the most fundamental issue at hand is not differentiating between the two sectors. The pressing issue is whether the two sectors are doing enough to provide access to health care as provided by the Constitution. In this regard, it is imperative to explore whether “everyone” is afforded access to health care service and whether these services are affordable and accessible.

Reading between the lines of the above comparisons of the two sectors, the division between the private health care sector and the public health care sector has done more harm than good. Firstly, it should be noted that even though these divisions exist, the burden of ensuring health care which is affordable has always been regarded as the duty of the state or the public health care sector.

Secondly, the division between the two sectors portray, the separation that exist between the poor and the rich with regards to accessing health care services. This is evident as the poor population relies on the state for health care services which are of low quality while the rich part of the population depends on the private health care sector which provides more sophisticated and more reliable treatment for its customers.

The public healthcare system continues to deliver services albeit with some inefficiencies, inadequate quality of care in some facilities and poor infrastructure in some places. But for those who can pay, the South African private health system is viewed amongst the top four in the world.⁹⁸ This shows that access to health care as a right is not in line with the constitutional value of equality. It is submitted that the

⁹⁸ Jobson M, “Structure of the Health System in South Africa” (2015) available at <http://www.khulumani.net/> (Accessed on 24 June 2016).

provision of health care services in South Africa is based on the social and economic status of a person which in the opinion of the researcher shows inequality.

Because the private and public sector discrepancies show inequality, it has over the years become the project of the state to bridge the gap that exist between these two sectors. However as already stated the effort by the state to regulate the private sector has led to court cases brought by the private entities claiming that their rights are negatively affected by the regulations placed by the public sector. It is therefore imperative to consider the competing rights that may be affected by the regulation of the private health sector by the public sector.

3.4.1 Health Care Practitioners' Right to Occupational Choices.

Pieterse believes many measures aimed at regulating the private sector and thereby facilitate the equitable access to health care services have an impact on the corporate profit interests in the private health care sector.⁹⁹ This follows that regulation of then private health care sector will have a negative impact on the livelihood of the health care professional in the health care sector. It has however been argued that the private interests of these professional are limited in the interest of community services,¹⁰⁰ and restriction on the geographic distribution of health care services.¹⁰¹

It is the researcher's submission that the limitation of the private interests of professionals in private health care sector can be justified. This is because, despite section 22 of the Constitution protecting everyone's right to choose their occupation or profession freely, the Constitution allows for some interference or limitation of such rights if the limitations are regulated by law. Furthermore, in the *Affordable Medicines Trust* case,¹⁰² where the regulation limiting the circumstances under which the professionals could dispense medicines was challenged, the court highlighted that it was not always a perquisite that all limitations to rights require justification in terms of section 36 of the Constitution.

⁹⁹ Pieterse (note 15 above) 137.

¹⁰⁰ C Heyns "Extended Medical Training and the Constitution: Balancing Civil and Political Rights and Socio-economic Rights" (1997) 30 *De Jure* (1) 5 15 .

¹⁰¹ HCJ Van Rensburg *et al* "Human Resources for Health and the Health Professionals" in Van Rensburg (Note 32 above) 372.

¹⁰² 2006 (3) SA 247 (CC).

The Court held that regulations would be said to comply with section 22 of the Constitution if they were rationally connected to governmental purpose. Measures aimed bridging the gap between the private and the public health sectors relate to governmental purposes of ensuring that there is equitable access to health care services and therefore are justifiable despite their likely to drive private entities out of business.

3.4.2 Patients' Right of Access to Health Care Services

Measures to ensure the equitable access to health care services may have an effect of diminishing the quality or access to the health care services. In this way, the right of the patients may be affected negatively in the government's effort to accommodate everyone. It has been argued, however it is unlikely that one will succeed in showing that through its regulatory measures to ensure equitable access of the health care services the state has infringed his right to access health care services.

Case law has however shown that measures directly diminish the right of the patients to access health care services will not be found valid or Constitutional. In the *New Clicks* case, the court held that the pharmaceutical price regulations and control were unconstitutional as they did not take into consideration the circumstances of rural pharmacies. It was further held that by failing to consider the interest of the rural pharmacies, the drafters of the measures placed the business of these pharmacies on the line and this affected the patient's rights to access medicines. It therefore follows that for the measures to ensure equitable access to health care services to be valid and constitutional, they should not diminish access to health care.

3.5 CONCLUSION

While there has always been reluctance in holding the private sector responsible in matters that involve human rights and socio-economic rights, it has been recognised that the private sector, in their involvement in the provision of basic services and other socio-economic rights assume the responsibility to comply with human rights

standards.¹⁰³ Therefore in this way the private sector may be supervised and regulated to bring about equitable access to health care services.

The constitution of South Africa provides for the right to access to health care services to everyone. While it is praiseworthy that the South African government together with the private health care sector have taken measures to ensure the protection and the realisation of this right, major improvements in both sectors are necessary to ensure that affordable, accessible, and efficient health care services are provided to everyone in South Africa.

The two different sectors which have one aim i.e. provision of health care services should work in commonality and this will help bring equitable access to health care services. In this regard the researcher submits that first, the private health care sector should be regulated. This will lessen the responsibility of the state and the burden of the state of dealing with health care issues to the larger population.

It is submitted that the duty to realise the right to health care services is not the duty of the state alone. The private sector, which has taken the responsibility to provide socio-economic services, in the same way it seeks to make profit and generate income should ensure affordability and accessibility. The attainment of harmony and solidarity between the two sectors providing health care services to South Africans will in the long run ensure that the right to access to health care is in conformity with Constitutional values of dignity, equality and freedom

¹⁰³S Liebenberg “The Application of Socio-economic Rights to Private Law” (2008) *Tydskrif vir die Suid-Afrikaanse Reg* 464 471.

CHAPTER 4

THE ROLE OF THE STATE TO ENSURE PROGRESSIVE REALISATION OF THE RIGHT TO ACCESS TO HEALTH CARE SERVICES

4.1 INTRODUCTION

The South African Constitution provides that the state has the duty to take all necessary measures and other legislative measure to ensure the realisation of the right to socio-economic rights therein.¹⁰⁴ One of the socio-economic rights provided for in section 27 of the Constitution is the right to health care. For one to understand and appreciate the meaning and the implication of section 27(2) of the Constitution which provides for the state's duty to ensure progressive realisation, one should understand what this section entails.

Under international law, several human right instruments also protect the right to access to health care. For example, the International Covenant on Economic, Social and Cultural Rights provides that each state party should take steps, within its available resources to achieve progressively the full realisation of the rights.¹⁰⁵ This means that the states are under a primary obligation to realise, protect and promote human rights.¹⁰⁶

It is submitted that the extent to which South African government is taking measures to realise the right to access to health care services should be understood against the availability of resources. It is also submitted that the limitation that justify non-compliance by the South African government should be studied. Study of these factors will ensure that improvements are brought to the way that the right to access to health care services is interpreted.

¹⁰⁴ The South African Constitution, section 27 (2) of the South African Constitution of 1996, act 108.

¹⁰⁵ Article 2 of the International Covenant on Economic, Social and Cultural Rights .

¹⁰⁶ World Health Organisation 'The Right to Health' Fact sheet 31.

4.2 THE IMPLICATION OF SECTION 27 OF THE SOUTH AFRICAN CONSTITUTION

The South African Constitution provides as follows:¹⁰⁷

The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

Several debates have emerged because of this provision of the constitution. The question has always been whether the state is taking all reasonable measures to ensure progressive realisation of the socio-economic rights which incorporate the right to health. For this research the pressing issue is whether the government of South Africa is doing all it can to ensure progressive realisation of the right to health.

During the certification of the Constitution, there were arguments that the socio-economic rights for example access to health care services should be incorporated.¹⁰⁸ The attempts to hinder the incorporation of socio-economic rights failed. This is evident as the socio-economic rights are part and parcel of the South African Constitution. The inclusion of socio-economic rights in the Constitution led to the creation of a society which is reliant on the socio-economic rights.

The Constitutional Court pointed out that the socio-economic rights enshrined in the Constitution are legitimate and justiciable, it nonetheless pointed out also that the incorporation of these rights may have unequivocal financial and budgetary implications.¹⁰⁹ These contradictory statements by the Constitutional Court have shown the controversy that exist in relation to section 27(2) of the Constitution.

To solve the questions that emerge from this provision, the implications of this provision and the controversy created by this provision, an analysis of this provisions wording is imperative.

¹⁰⁷ The Constitution of South Africa, Act 108 of 1996, Section 27(2).

¹⁰⁸ In re certification of the Constitution of the Republic of South Africa, 1996, 1996 (4) SA 744 (CC).

¹⁰⁹ Olivier M, 'Constitutional Perspectives on the Enforcement of Socio-economic Rights: A Recent South African Experience' (2002) *Victoria University of Wellington Law Review* 96.

4.2.1 CONCEPT OF PROGRESSIVE REALISATION

Despite the incorporation of the right to health care services in the South African Constitution and other human rights instruments, it is noteworthy that the justiciability of this right and the access to health care is always subject to the concept of 'progressive realisation'¹¹⁰ The concept of progressive realisation raises questions with regard to the extent to which the state is obliged to realise the right to health care and whether the society should expect immediate implementation from the state.¹¹¹

While progressive realisation of rights means the fulfilment of rights and obligations of the state over time or gradually, it does not mean that the state should use this concept as an excuse to escape its obligations that are provided for by the Constitution. Due to ambiguity that is seen in the wording of the Constitution in this regard, the concept of progressive realisation of the right to access health care is a subject of heated debate. Courts have tried to address the legal questions that emerge from the concept of progressive realisation.

The prominent issue of progressive realisation of health care was brought under severe scrutiny in the notorious yet landmark case of *Soobramoney*. In this case a one Mr Soobramoney, who as chronically ill and who needed emergency treatment was denied this right. Mr Soobramoney suffered from cerebro-vascular disease and required dialysis. Dialysis was however denied to him due to limitation of resources and because he had failed to meet the criteria that would make him eligible for dialysis.

The denial was based on the limitation of resources and on the fact that the right to access health care is subject to a limitation of the concept of progressive realisation.¹¹² This denial raises a lot of questions about what progressive realisation of the right to access health care means. It showed the ambiguity that exists in the concept of progressive realisation.

¹¹⁰ Lomahoza K "Monitoring the Right to Health Care in South Africa: An analysis of the Policy Gaps, Resource Allocation and Health Outcomes" (2000) available at http://spii.org.za/wp-content/uploads/2014/02/Policy-brief-2_Monitoring-rights_Healthcare.pdf (Accessed on 26 June 2016).

¹¹¹ Chenwi L "Unpacking "Progressive Realization" its Relation to Resources, Minimum Core and Reasonableness and Some Methodological Considerations for Assessing Compliance (2013) *Dejure* 39".

¹¹² Progressive Realization and Non-regression available at <https://www.escri-net.org/resources/progressive-realisation-and-non-regression> (Accessed on June 27, 2016).

Noteworthy in this regard is that; even though this case was brought by Mr Soobramone enforcing his Constitutional right to emergency treatment,¹¹³ the court held that this case was to be dealt with under section 27(1) and section 27(2) which deal with right to access health care services and the states obligation to ensure the progressive realisation of socio-economic rights within availability of resources, respectively.

After making the decision to deal with the case in terms of section 27(1) and section 27(2) the court justified the failure by the hospital to provide the dialysis for Mr Soobramoney. This means that the court, in this regard justified the failure by the state to protect the right to access health. The court in this case observed that the Constitution accepts that realisation of rights cannot occur instantly. The court then accepted that the realisation of socio-economic rights could occur over time.¹¹⁴

Even though the court in the case of *Soobramoney* made it clear that it accepted the concept of progressive realisation, the position if the case of *Treatment Action Campaign*¹¹⁵ was slightly different. In this case, application was made to the Constitutional Court to compel the respondents to provide nevirapine to pregnant women at public health facilities, and to compel the state to produce and implement an effective national programme to prevent or reduce mother-to-child transmission of HIV. The applicants therefore sought a declaratory order requiring the state to provide nevirapine to pregnant women where medically required, and further to roll out a national mother-to-child transmission programme.

In the case of *Treatment Action Campaign*, the court concurred with the court in the case of *Soobramoney* regarding progressive realisation, it however held that this should not be used as an excuse or justification not to protect the right of everyone to health care. In this regard the case of *Treatment Action Campaign* ensured the protection of the right access to health care as provided by section 27 (2) of the South

¹¹³ The Constitution of the Republic of South Africa, Act 108 of 1996, Section 27(3).

¹¹⁴ *Soobramoney v Minister of Health (KwaZulu-Natal)* 1997 12 BCLR 1696 (CC).

¹¹⁵ (2002) 5 SA 721 (CC).

African Constitution. The court finally held that the pilot projects set out by the government were not progressive or purposeful.¹¹⁶

From the analysis of the two cases which have divergent outcomes, while the concept of progressive realisation serves as a limitation to the right to health care, it should not be seen as a concept that exculpates the state from taking all necessary measures to ensure the realisation of the Constitutional right to access to health care.

4.2.2 THE CONCEPT OF AVAILABILITY OF RESOURCES

Another pressing concept involved in the protection of the right to health care is the concept of availability. In several cases where a person has tried to enforce his or her socio-economic rights, one of which is access to health care, the contention by the state has always been that there are no available resources to ensure the realisation of such rights. Just like the concept of progressive realisation, this concept also raises questions regarding the state's obligation to protect the Constitutional right of access to health care. It is therefore imperative to understand what this concept entails and when it can be applied.

The concept of availability of resources was also dealt with in the case of *Soobramoney*. In this case, the Constitutional Court took into consideration budgetary consideration. The court pointed out that the obligation of the state should be assessed against the availability of the resources at the state's disposal to fulfil its obligations of protection and realisation of the right to health. In the case of *Soobramoney* one of the reasons why the court agreed to the state's denial of dialysis service to Mr *Soobramoney* was the fact the hospital did not have enough resources or machinery to enable it to provide dialysis to everyone. This is also the reason why the hospital came up with a criterion to qualify patients for dialysis.

The concept of availability of resources was also dealt with in the case of *Treatment Action Campaign*. Again, in this case the court acknowledged the fact that the state does not always have resources to ensure the realisation of the right to health care

¹¹⁶ Choma H (Note 35 above), 47.

services especially in cases where the service required is expensive. The Constitutional Court however asserted that the state in fulfilling its obligation regarding health care it should be reasonable. The court held that with proper planning the state even though resources are always a problem, can ensure the realisation of the right to health care services.¹¹⁷

The researcher acknowledges that availability of resources and progressive realisation serve as valid limitation to the right of access to health care. It is however submitted that these two concept should not be used as tools to free the state from its obligation of realisation and protection of the right to health care. It is also submitted that; due to the fact the right to access health care is closely linked to other fundamental rights the state should take all necessary steps to ensure that it is protected. A violation of the right to health will undeniably lead to the violation of other rights like the right to life, dignity, equality and freedom.

4.3 THE EFFORTS BY SOUTH AFRICAN GOVERNMENT TO REALISE THE RIGHT TO ACCESS TO HEALTH IN BOTH THE PRIVATE AND PUBLIC SECTORS

After clarifying the concepts of progressive realization and availability of resources, one question remains. The question seeks to answer the question whether the South African government is making any efforts to ensure the realisation of the right of access to health care. The researcher in this regard seeks to assess the efforts taken by government to ensure the realisation of the right to health care both in the private health care sector and the public health care sector.

4.3.1 PRIVATE HEALTH CARE SECTOR

The private health care sector in South Africa plays a pivotal role in the realisation of the right to access to health care. Despite its praiseworthy efforts to provide health care services, it is submitted that is defending the private health care sector against unfounded or exaggerated charges by pointing out that it provides care for more people with fewer resources than its detractors claim is not sufficient.¹¹⁸

¹¹⁷ (2002) 5 SA 721 (CC).

¹¹⁸ Reforming Healthcare in South Africa: What Role for the Private Sector? (2011), available at <http://www.cde.org.za/wpcontent/uploads/2012/12/REFORMING%20HEALTHCARE%20IN%20SA%20full%20report.pdf> (Accessed on 27 June 2016).

The Government of South Africa has made efforts to ensure that the right to health care for everyone is realised and protected, even by the private sector. The private sector is usually unregulated and functions without intervention of the state. It has been observed that the private sector should work in solidarity with the public sector to serve the public.¹¹⁹ One of the praise worthy ways in which the government has made efforts in this regard is by the process of launching the National Health Insurance (NHI).

This is a scheme that seek, as one of its aims to provide for universal healthcare coverage.¹²⁰ It seeks to ensure that everyone, regardless of whether they are employed or not, gets quality health care service at affordable prices from both the private health care sector and the public health care sector. In this way, the government works in solidarity with the private sector to ensure that there is equality in the way that the right to access to health is protected and realised.

Furthermore, the Minister of health has asserted that section 27 of the Constitution places a duty on him to take all necessary steps ensure progressive realisation of the right to healthcare. He suggested strongly that the costs and functioning of the private sector should be placed under rigorous scrutiny. It has been observed that the cost of private health care services is too high and unreasonable and need to be regulated by the government to ensure that everyone has access to health care service.¹²¹

4.3.2 PUBLIC HEALTH CARE SECTOR

Several efforts have also been seen in the public sector towards realisation of the right to health care services. Even though the public sector is usually overcrowded and under-resourced, it has managed to achieve several goals which have improved the quality of health for most South Africans.

One of the goals that the public sector has achieved is attainment of the child health in South Africa. By ensuring that there are HIV testing sites in the Hospitals the

¹¹⁹Healthcare in South Africa available at <http://www.southafrica.info/about/health/health.htm#.V3MTvzb6vml> (Accessed on 27 June 2016).

¹²⁰ Matsoso M P "National Health Insurance: The First 18 Months" (2013) Vol 103 no. 3 p58.

¹²¹ Private Healthcare in South Africa Faces Government Intervention available at <http://businesstech.co.za/news/business/116576/private-healthcare-in-south-africa-faces-government-intervention/> (Accessed on 29 June 2016).

government has ensured that the transmission of the virus from the mother to the child is reduced. Furthermore, in 2014, the South African government launched a programme aimed at reducing mother-to-child transmissions of the HIV virus.¹²² This means that the life expectancy has increased and child mortality rate due to HIV has decreased since then.

Another implausible way in which the government has made efforts to realise the right of access to health care is by the way in which it has dealt with HIV through the administration of antiretroviral drugs. It has been observed that South Africa has rolled out the largest antiretroviral program and administers this medication to more than 2 million people. Antiretroviral drugs improve the quality of health and life of people living with HIV and the ability of the government to provide these drugs to patients free of charge in public facilities is a breakthrough.

In addition to this, the government has also made efforts to improve the infrastructure, the health care facilities and to train the more personnel to ensure proper functioning of the public health care sector and ensure that the public health care sector also renders quality health care.

4.4 CONCLUSION

The public health care sector together with the private health care sector have been seen to take necessary measures to ensure that there is a strong and efficient health care system in South Africa. It is submitted therefore that due to the imperativeness of the right to health, more can and should be done to ensure that the right to access to health care services is interpreted in line with the founding principles Constitution.

It is submitted that the current health care system still lacks conformity with the principles of equality, freedom and dignity. Therefore, there is need to reform the health care system so that it can cater for “everyone” as provided by the Constitution.

¹²² Available at <http://www.gov.za/about-sa/health> (Accessed on 30 June 2016).

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

5.1 CONCLUSIONS

The issue of access to health care obviously presents a conundrum in South Africa. The researcher has shown that there is a crisis in the South African Healthcare system. Neither the public health care sector nor the private health care sector meet the requirement of everyone being afforded the right to access health care services. It is submitted that the South African health care system should be subjected to scrutiny.

The whole system, public and private, needs well-planned and continuous reform. It is praiseworthy that in South Africa, there is co-existence of the public health care sector and the private health care sector. This means that if the two work in commonality, there could be enormous improvement in the way that the right to health care is realised and protected. It is therefore submitted that the harmonisation of the public healthcare sector and the private health care sector.

Several problems have been identified in this work. First, it has been observed that the right to health care as rendered by the public health care and the private health care sector is not consistent with the founding principles of the Constitution. This is evidenced by several loopholes that have been seen in the extent to which the right to access health care services is protected or afforded.

The first issue that the researcher looked at is the effect of impact of the right to health care on other rights. It was found in this research firstly that the right to access health care is inconsistent with the right to dignity. This is shown by the fact that the public health care sector which caters for more than 80 percent of the population of South Africa renders services that are of low quality. On the other hand, even though the private health care sector provides better services, less 20 percent of South Africa's population can access the services.

This in other words means that the right to access health care is not fully protected in South Africa. It is submitted that failure to protect the right to access health care means that the people of South Africa cannot have good quality of life and then this has an adverse impact on the right to dignity of most people in South Africa.

The right to equality is also affected by failure to protect the right to access health care. It was discovered that the right to access health care services which are of quality and which are reliable are only available to the ones who have means to pay for it. These are the services that are provided by the private sector. On the other hand, the greater population of South Africa relies on the Public sector which is usually under sourced and which provides low quality. This shows that there is inequality in the health care sector.

The second issue that the researcher considered was the comparative analysis of the public healthcare sector and the private health care sector. It was discovered that the two sectors represent two extremes of the health care system of South Africa. It is submitted that there is need to consider harmonising the two sectors improve the right to access health care

The third issue that was considered is the efforts by the state to ensure progressive realisation of the right to access health care services. Before looking at the duty of obligations of the state, the implications of the concept of progressive realisation and the availability of resources was considered. It was discovered that the two concepts are valid limitations to the right to access health care services. It was however strongly asserted that the two concepts should not be used as excuses to exculpate the state from its obligations.

The three issues as outlined in the work show to a great extent that there is need to reconsider the structure of the South African Health care system. Contrary to popular belief that after the inception of then Constitution health care services are accessible to everyone, it is submitted that quality health care services are only available to the minority while the majority suffers and lack access to proper health care services.

5.2 RECOMMENDATIONS

It is submitted that one of the reasons why the public sector usually fails is the assumption that can function, upgrade itself from its resources. The researcher on this issue recommends that the public health care sector obtain its funds by directly charging the patients. The amount that should be charged should be affordable and should be supplemented by the funds allocated to the public health care sector. This

will help the public sector render services which are of quality and which are sustainable, efficient and reliable.

It is submitted that despite the good quality of health care services provided by the private sector, their prices are exaggerated and they keep sky-rocketing each year. On this issue the researcher recommends that the private health care sector should be regulated to a certain extent by the state. This would lower the prices and make health care accessible to everyone not only those who can pay large amounts of money. It is submitted that the private health care sector should be broadened and should be able to cater for most people in South Africa.

Both the private healthcare sector and the public health care sector need rehabilitation. On one hand the private health care sector should be rehabilitated regarding the cost and prices. On the other hand, the public health care sector should be rehabilitated regarding the infrastructure. It is submitted that once this is done, the two sectors will be able to work in solidarity towards universal access to quality healthcare.

The rehabilitation of the private health care sector and the private health care sector will bring improvements to the inequality that is seen in the health care system. The improvement in the health care system will lead to the conformity of health care with the constitutional values of dignity, equality and freedom.

It is submitted that one of the ways to ensure affordability of the health care services especially the one provided by the private health care sector is to ensure that the healthcare is subsidised and everyone who cannot afford can afford. Subsidisation of the private health care and the private health care will harmonise the public health care sector and will help them work in solidarity. It should be noted that even if the two sectors differ in functioning, they have the same goal and they should therefore work together to achieve the right to access health care.

An important aspect of service delivery is not just availability of facilities or the range of services available, but also the quality of the care received. Although, health care services have been made available at some rural areas, there has still been extreme distress about the quality of the services thereof. These distress range from shortages of staff, bad staff attitudes, large distances to health facilities and services,

insufficient medication, lack of monitoring and evaluation, patient transport to, but no limited to, shortage of ambulance.

South Africa's public health management structure highlights centralisation of powers and functions in one administrative centre. Thus, the minimal authority and accountability for facility managers has impacted negatively on service delivery. There should be redistribution of powers and functions from one administrative centre to the other. Hence, decision-making powers relating to financial management and human resources district should be entrusted to district and facility managers. For purposes of managing the public health facilities, there has not been adequate skills audit of senior management, training and awareness campaigns to capacitate health personnel it is submitted also that the health care infrastructure should be improved.

It is tremendously arduous to provide universal access to quality healthcare in a highly-unequal society which is at the same time burdened with poverty and disease. To ensure the access to health care by everyone the state must use its remaining resources strategically and prudently to expand and reform the two health care sectors. Reformation of the South African Health care system is imperative therefore to ensure the realisation of the Constitutional Right to access health care services,

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