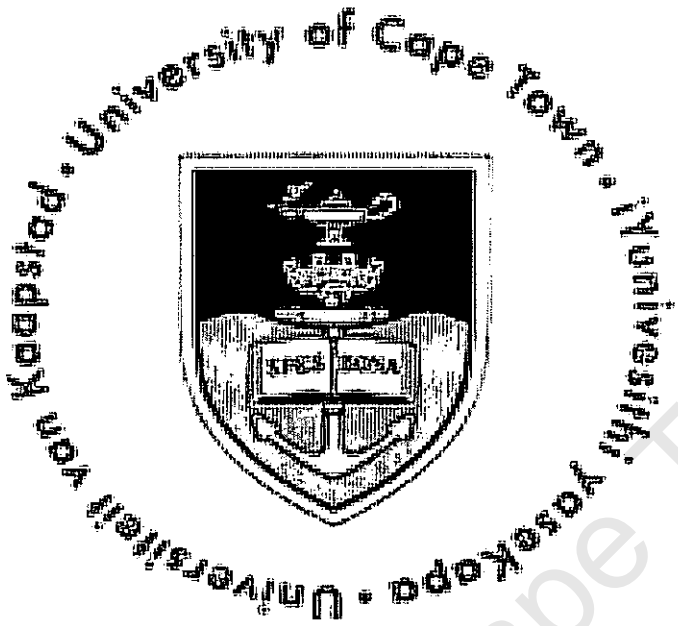

THE REALISATION OF THE RIGHT OF ACCESS TO HEALTH CARE SERVICES FOR REFUGEES AND ASYLUM SEEKERS IN SOUTH AFRICA.

Submitted as a requirement for the fulfilment of a Masters Degree in Human Rights Law

By

Melody Rumbidzai Kozah

Student Number: KZHMELOO1

Prepared under the Supervision of Professor Pierre De Vos

September 2010

DECLARATION

1. I know that plagiarism is wrong. Plagiarism is to use another's work and pretend that it is one's own.
2. I have used the **footnote*** convention for citation and referencing. Each significant contribution to and quotation in, this essay from the work(s) of other people has been attributed, and has been cited and referenced.
3. This essay is my own work.
4. I have not allowed, and will not allow, anyone to copy my work with the intention of passing it off as his or her own work.

Signed by candidate

Signature: Date: 27/09/2010

NB: No other convention of referencing is permitted in the law faculty.

ACKNOWLEDGEMENTS

Firstly I would like to express my gratitude to my mother, thank you mom for all the support and encouragement. I would also like to thank Ms Kelly Phelps, Dr Kudzai Chironga and the rest of my family and friends for their assistance. Lastly I would also like to thank Professor Pierre De Vos for his commitment and guidance.

TABLE OF CONTENTS

ABSTRACT

Human rights are universal, inalienable and inalterable therefore all persons should, by virtue of their essential humanity, enjoy all human rights.[1] The right to health is a fundamental part of our human rights. It contains freedoms such as the right to be free from non consensual medical treatment and entitlements.[2] The entitlements include the right to a system of health protection providing equal opportunity for everyone to enjoy the highest attainable level of health.[3] This dissertation focuses on the latter with regard to refugees and asylum seekers in South Africa whose health care needs are not met. The Office of the United Nations High Commissioner has emphasised that, 'exceptional distinctions, between citizens and non-citizens in the enjoyment of human rights can be made only if they serve a legitimate State objective and are proportional to the achievement of that objective'.[4] In South Africa refugees and asylum seekers are unable to assert their right of access to health care effectively. They experience xenophobia, language barriers, discrimination and they face difficulties in accessing information on available health care services.[5] The dissertation highlights that in practice there is a large gap between the rights that South African law read with international human rights law guarantees refugees and asylum seekers and the realities that they face.[6] The gap shows that South Africa is not fulfilling its obligations as set out by the law. South Africa has a duty to address this problem because according to the law it is bound to respect, protect and fulfil the right of access to health care of refugees and asylum seekers.

---

[1] D Weissbrodt 'The Rights of Non Citizens'. Available at *http://www.ohcr .org/Documents /Publications/noncitizensen.pdf* [Accessed 4 May 2010].
[2] Committee on Economic Social and Cultural Rights (CESCR), General Comment No 14 'The Right to the Highest Attainable Standard of Health' (2000) E/C.12/2002/11 at para 8.
[3] Ibid.
[4] Weissbrodt (note 1) at 5.
[5] R Schaeffer 'No Healing Here Violence, Discrimination and Barriers to Health for Migrants in South Africa'. Available at *http:// www.hrw.org/en/node/86959/section/11* [Accessed on 4 January 2010].
[6] Weissbrodt (note 1) at 5.

ABBREVIATIONS

ACRWC	African Charter on the Rights and Welfare of the Child
ART	Anti Retroviral Treatment
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	Committee on The Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CORMSA	Consortium for Refugees and Migrants in South Africa
CRC	Convention on The Rights Of The Child
DHA	Department of Home Affairs
DOH	Department of Health
DSS	Department of Social Services
FMSP	Forced Migration Studies Programme
HRW	Human Rights Watch
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic Social and Cultural Rights
IOM	International Organisation For Migration
LHR	Lawyers for Human Rights
NDOH	National Department Of Health
NGOs	Non Governmental Organisations
RHRU	Reproductive Health and HIV Research Unit
SAPS	South African Police Service
STDs	Sexually Transmitted Diseases
TAC	Treatment Action Campaign

TB	Tuberculosis
UNHCR	United Nations High Commissioner for Refugees

CHAPTER ONE

INTRODUCTION

1 Introduction

Access to health care is vital to all human beings resident in any state regardless of their immigration status.[7] Refugees and asylum seekers are vulnerable groups that have left their home countries in search for a place of safety. Access to health care is a major concern to them due to their living conditions which often make them more susceptible to various forms of diseases. Their presence in other countries is however, sometimes resisted by citizens due to negative perceptions and stereotypes associated with them. The two groups therefore depend upon the hosting state's protection in order to assert their rights. This dissertation will analyse the right of access to health care in South Africa in relation to refugees and asylum seekers. The aim of the dissertation is to show that refugees and asylum seekers do not receive the same health care services as citizens in South Africa which they are entitled to according to South African law, read with International law. I thus contend that South Africa has a duty to protect the right of access to health care services for these two groups. However, this is not at present the case as these two groups encounter challenges in attempting to assert their right. South Africa should address these challenges by embarking on campaigns and carrying out workshops that aim at educating and raising awareness of this right.

1.1 Definitions

In this thesis I focus on refugees and asylum seekers and it is therefore important to define these concepts to establish the subjects of the discussion. According to the 1951 Refugee Convention

> 'a refugee is a person owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his

[7] United Nations High Commissioner for Refugees (UNHCR) 'Fact Sheet No 31: The Right to Health'. Available at *http://www.ohcr.org/Documents /Publications/Fact Sheet 31.pdf* [Accessed 28 April 2010].

> former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[8]

An asylum seeker is 'a person who has left their country of origin, has applied for recognition as a refugee in another country, and is awaiting a decision on their application'.[9] I focus on refugees and asylum seekers due to their vulnerability as non citizens whose rights are undermined and not prioritised. I have decided to not only look at the position of refugees but also at that of asylum seekers. This is due to the fact that in as much as asylum seekers have not attained refugee status, the South African Refugee Act[10] recognises that they have similar rights to refugees. Moreover the United Nations High Commissioner on Refugees (UNHCR) recognises them and provides assistance to them because they are in similar desperate circumstances as refugees.[11] This dissertation does not look at undocumented migrants.

1.2 What is the problem?

Despite the fact that South African law read together with international law, imposes an obligation to provide access to health care services to refugees and asylum seekers this is practically speaking not the current state of affairs. Refugees and asylum seekers do not get the same treatment as citizens when attempting to access health care services. Since refugees and asylum seekers are non citizens they can easily be identified by their documentation which is issued by the Department of Home Affairs (DHA).[12] There is a large gap between the rights that South African law, read with international law, guarantees them and the realities that they face. These two groups fail to assert their right of access to health care as a result of the various challenges that they encounter. These challenges include xenophobia, discrimination, language barriers, the lack of adequate information and resources, excessive charges of hospital fees and facility level policy decisions.

---

[8] Convention relating to the Status of Refugees, 189 UNTS 150,adopted 28 July 1951 entered into force 22 April 1954.
[9] UNHCR 'Definitions and Obligations - Basic Definitions'. Available at *http://www.unhcr.org.au/basicdef.shtml* [Accessed on 15 February 2010].
[10] No 130 of 1998.
[11] UNHCR 'Definitions and Obligations - Basic Definitions'. Available at *http://www.unhcr.org.au/basicdef.shtml* [Accessed on 15 February 2010].
[12] The 1998 Refugee Act requires the Department of Home Affairs to issue documents known as Section 22 cards to asylum seekers, after the section of the Act providing for them. These indicate the bearers' rights to remain in the country but they are valid for only 30 days and applicants must renew them constantly. Refugees are issued with a section 24 permit.

1.3 Methodology

In this thesis I rely on existing studies on the access to health care for migrants in South Africa undertaken by several Non Governmental Organisations (NGOs). These include Human Rights Watch (HRW), Forced Migration Studies Programme (FMSP), Lawyers for Human Rights (LHR) and Consortium for Refugees and Migrants in South Africa (CORMSA). The aim of the research undertaken by these organisations has been to highlight the barriers that inhibit the full realisation of the right of access to health care of migrants in general. The thesis relies on the research and reports of these organisations in order to highlight the factual situation in South Africa. This thesis focuses specifically on refugees and asylum seekers as mentioned above and focuses on whether South Africa is fulfilling its obligations as set out by the law.

The research and reports of these NGOs are an invaluable contribution to academic writings. These NGOs work closely with refugees and asylum seekers and their research and reports highlight their experiences with the two groups on the ground. Therefore they give personal accounts of the experiences of refugees and asylum seekers as well the observations of these organisations. The NGOs deal with migrant's rights and have a common mandate to monitor national and local policies and laws governing the rights of refugees and asylum seekers. I rely on the constitution and international law to determine the government's legal commitments and then measure these obligations against what actually happens in reality by relying on studies by NGOs. Therefore such organisations have a very important and significant role to play in ensuring that the human rights of vulnerable minority groups are upheld. This role should certainly not be underestimated.

1.4 What is the argument?

In this thesis I argue that refugees and asylum seekers have a right of access to health care services according to the South African Constitution read with international law. According to section 27(1) (a) of the Constitution, 'everyone has the right to have access to health care services including reproductive - health care'. My argument is that the South African Constitutional Court has given a purposive

interpretation to the term 'everyone' particularly in the *Khosa*[13] case thereby including refugees and asylum seekers within the ambit of this right. Given such an interpretation, the right of access to health care of these two groups is guaranteed. I submit that section 27(1) (a) is interrelated to sections 1 and 9 of the Constitution. According to section 9 (1), 'everyone is equal before the law and has the right to equal protection and benefit of the law'. I argue that section 9 protects the rights of refugees and asylum seekers and imposes an obligation upon South Africa to ensure the full realisation of the right enshrined in section 27(1)(a). Furthermore I highlight the significance of section 9 (3) which prohibit direct and indirect unfair discrimination against anyone on various grounds. I submit that the main challenge that refugees and asylum seekers face is discrimination which is interrelated or forms the basis of all the other challenges that these two groups encounter. I argue that the discriminatory conduct of the health care providers contravenes this provision read with section 27 and is therefore prohibited.

Section 1 of the South African Constitution provides for the seminal values upon which the country is founded.[14] The values relevant to this thesis are human dignity, equality and the rule of law. I submit that these values inform the interpretation of the right of access to health care services and should not be undermined in applying the law. Equality and human dignity are not only values but are rights that are justiciable and can be enforced whilst the rule of law is a value that demands that the law as it stands should be applied diligently. Therefore I argue that by denying refugees and asylum seekers their rights of access to health care services South Africa not only violates this right, it also undermines the values of human dignity and equality upon which the constitution is based. Furthermore by failing to apply the relevant legislation diligently South African officials are contravening the rule of law.

South Africa has a duty to respect, protect, promote and fulfil the right of access to health care according to section 7(2). In order to fulfil these obligations South Africa has adopted and promulgated legislation protecting the right of access

---

[13] *Khosa and Others v Minister of Social Development and Others; Mahlaule and another v Minister of Social Development and Others* 2004 (6) BCLR 569 (CC).
[14] A Chaskalson 'Human Dignity as a Value of Our Constitutional Order' (2000) 16 *South African Journal on Human Rights* 193 at 203.

to health care services for everyone. These include the following; The National Health Act[15], Occupation Health and Safety Act[16], South African Immigration Act[17], the HIV and AIDS and STI Strategic Plan for South Africa[18], the National Department of Health (NDOH) memorandum of 2006[19], the NDOH memorandum of 2007[20] and the Gauteng Department of Health Letter of 2008.[21] I argue that the legislation and the policies explicitly guarantee the right of access to health care services of refugees and asylum seekers. Therefore the conduct of health care providers should be consistent with the legal rules and principles set out by the legislation. I argue that South Africa has a duty to address any obstacle that inhibits the full realisation of the right of access to health care services of these two groups.

International law also protects the right of access to health care services. It informs the interpretation of South African law according to section 39 (1) (b) of the Constitution. Section 39 (1) (b) reads 'when interpreting the Bill of Rights, a court, tribunal or forum must consider international law'. Article 12 of the International Covenant on Economic Social and Cultural Rights[22] (ICESCR) guarantees the right to the highest attainable standard of health. It is important to note that there is a difference between the right of access to health care guaranteed by the constitution and the right to the highest attainable standard of health care guaranteed by the ICESCR. The dissertation focuses on access to health care which forms part of the right to the highest attainable standard of health care.

Relevant to the thesis is General Comment No. 14 which was adopted by the Committee on Economic, Social and Cultural Rights (CESCR) in 2000.[23] I submit that the general comment is a useful guideline for the interpretation of the right to

---

[15] No 61 of 2003.
[16] No 85 of 1993.
[17] No 13 of 2002.
[18] The HIV and AIDS and STI Strategic Plan for South Africa 2007-2011. Available at http://*www.doh.gov.za/docs/misc/stratplan-f.html* [Accessed 24 June 2010].
[19] National Department of Health Memorandum of February 2006.
Available at *http://www.iom.org.za/site/index* [Accessed 24 June 2010].
[20] National Department of Health Memorandum BI 4/29 REFUG/ASYL 8 2007, 19 September 2007. Available at *http://www.iom.org.za/site/index* [Accessed 24 June 2010].
[21] Gauteng Department of Health Letter, 4 April 2008. Available at *http://www.iom.org.za/site/index* [Accessed 24 June 2010].
[22] International Covenant on Economic, Social and Cultural Rights (ICESCR) GA Res 22000A(XXI), 21 UN GAOR Supp (No.16) at 49, UN, Doc A/6316(1966),993 UNTS 3, adopted 16 December 1966, entered into force 3 January 1976.
[23] CESCR, General Comment No 14 (note 2).

health guaranteed in international law and in section 27 of the South African Constitution. The right to health is also guaranteed by other international and regional conventions and treaties that impose obligations and are binding upon South Africa. These include; article 12 of the Convention on the Elimination of All forms of Discrimination against Women[24] (CEDAW), article 6 of the International Covenant on Civil and Political Rights[25] (ICCPR), article 24 of The Convention on the Rights of the Child [26](CRC) and article 5(e) (iv) of The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).[27] The regional treaties and conventions include article 16 of the African Charter on Human and People's Rights of 1981[28] and article 14 of The African Charter on the Rights and Welfare of the Child (ACRWC).[29] Of particular significance is the principle of non discrimination which is similar to section 9 (3) of the Constitution discussed above. This principle has attained the status of customary international law and is therefore binding upon South Africa. It is central to the realisation of the right of access to health care and promotes the enjoyment of the rights on an equal footing. Furthermore international law also imposes an obligation to respect, protect, promote and fulfil rights which is similar to section 7 (2) of the Constitution discussed above. I submit that by undermining the right of access to health care South Africa contravenes international law. International law also imposes a duty upon South Africa to address and deal with the obstacles that inhibit the full realisation of the rights.

1.5 Overview of the Chapters

As shown above the opening chapter of the dissertation gives a summary of the thesis. It defines the subjects of the thesis and outlines the problem that the

---

[24] Convention on the Elimination of All Forms of Discrimination against Women 34/180, GA Res, adopted 18 December 1979, entered into force 3 September 1981.
[25] The International Covenant on Civil and Political Rights GA Res 2200A (XX1), 21 UN GAOR Supp (No.16) at 52, UN Doc A/6316 (1966), 999 UNTS 171, adopted 16 December 1966, entered into force 23 March 1976.
[26] Convention on the Rights of the Child, GA Res 44/25, UN Doc A/REX/44/25, adopted 20 November 1989, entered into force 2 September 1990.
[27] International Convention on the Elimination of All Forms of Racial Discrimination, GA Res 2106 (XX), Annex, 20 UN. GAOR Supp (No. 14) at 47, UN Doc A/6014 (1966), 660 UNTS 195, adopted 21 December 1965, entered into force 4 January 1969.
[28] African [Banjul] Charter on Human and Peoples' Rights, OAU Doc CAB/LEG/67/3 rev 5, 21 ILM 58 (1982), adopted June 27, 1981, entered into force 21 October 1986.
[29] African Charter on the Rights and Welfare of the Child, OAU Doc CAB/LEG/24.9/49 (1990), adopted 11 July 1990, entered into force 29 November 1999.

thesis addresses. It furthermore outlines the methodology adopted to address the problem and the arguments that I make in the thesis. Chapter two analyses the right to health in international law and the obligations that it imposes upon states. This chapter draws attention to the various international conventions, treaties and customary international law governing the right to health that are binding upon South Africa. The Chapter also focuses on the relevant regional treaties and conventions and highlights that the rules and principles they set out are consistent with international law. This chapter examines the principle of non discrimination and its relevance to the thesis. Chapter three focuses on the South African law position. It analyses the meaning of section 27(1) (a) of the Constitution and the beneficiaries of the right. Furthermore it examines the relationship between section 27 (1) (a) and section 9 of the Constitution. It also highlights the relationship between the right of access to health care and section 1 of the Constitution in particular equality, human dignity and the rule of law as a value. The chapter outlines the legislation as well as the supporting policies governing the rights of these two groups. Most importantly the Chapter outlines the legal obligations imposed by the right of access to health care. Chapter four deals with the challenges that refugees and asylum seekers encounter when attempting to access health care services. The chapter illustrates that South Africa is not fulfilling its obligations as set out by South African law read with international law. The final chapter concludes that the right of access to health care of refugees and asylum seekers has not been effectively realised due to the barriers that they encounter. It therefore offers some recommendations as to how best the right of access to health care of refugees and asylum seekers can be realised effectively.

CHAPTER TWO

INTERNATIONAL AND REGIONAL OBLIGATIONS

2 International law

International law is that body of law which binds or regulates states in terms of their relationship with other states.[30] International law also binds the state to act in a certain way towards not only its citizens but non citizens present in the state. It has been considered to be very important in assisting in the interpretation of social and economic rights because it is more developed and more nuanced than equivalent domestic law.[31] There are four sources of international law, namely the international conventions otherwise known as treaties, customary international law, and the general principles of law recognised by civilised nations, and judicial decisions and the teachings of the most highly qualified publicist.[32] Sections 39 and 233 of the South African constitution determine the kind of influence international law has on the interpretation of domestic law. Section 231 governs the manner in which international law is incorporated or adopted into domestic law to form part of substantive law.[33] According to section 39(1) (b) of the Constitution in interpreting the Bill of Rights courts must consider international law.[34] For the purposes of section 39, international law has been understood to mean both binding and non binding law as well as customary international law.[35]

South Africa has adopted a dualistic approach in respect of treaties and a monolistic approach in respect of customary international law.[36] Customary international law is automatically incorporated into domestic law without a specific act of adoption.[37] Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.[38] Treaties, on the other hand are only applicable in South African domestic courts if they have been

---

[30] H Strydom and K Hopkins 'International law' in S Woolman et al (eds) *Constitutional Law of South Africa* (2009) at 1.
[31] P De Vos 'Right to Housing'. Available at http://www.chr.up.ac.za/centre_publications/.../Chapter%203-Housing.pdf [Accessed 13 May 2010].
[32] Article 38 of the Statute of International Court Of Justice.
[33] Strydom (note 30) at 6.
[34] Constitution of the Republic of South Africa, 1996.
[35] *S v Makwanyane* 6 BCLR 665 (CC) at para 35.
[36] Strydom (note 30) at 2.
[37] Ibid.
[38] Section 232, The Constitution of the Republic of South Africa, 1996.

adopted.[39] A treaty is adopted when it is enacted into law by national legislation.[40] It becomes binding only after is has been approved by a resolution in both the National Assembly and the National Councils of Provinces.[41] Article 26 of the Vienna Convention on the Law of Treaties[42] places an obligation upon states that have become a party to a treaty to execute the treaty in good faith. In as much as South Africa has not ratified the ICESCR, the international law on health is applicable and relevant to the South African context in terms of section 39(1) (b) of the Constitution. The right to health which is referred to as the right to the highest attainable standard of health is guaranteed by various international human rights treaties that have been adopted by South Africa. The treaties impose various obligations on the state and of much relevance to the topic under discussion is the principle of non discrimination which guarantees the rights for all on an equal footing.

2.1 International and Regional Treaties and Conventions recognising the right to health

International human rights instruments have not been consistent in the formulation of the right to health.[43] What is commonly called the right to health is a mere convenient shorthand expression of the human rights protection of various aspects of health.[44] Despite the differences in formulation most international and regional instruments some of which are discussed below converge on the point that the right consists of both curative and preventive health care services and the protection of underlying determinants of health.[45] The ICESCR is widely considered as the central instrument of the protection for the right to health which is guaranteed in Article 12. South Africa has signed but not ratified the ICESCR therefore it is not binding upon it.[46] The ICESCR remains an important guide under section 39(1) (b) to interpreting the socio economic provisions in the South African Constitution.[47] This is because non binding law can be considered by the courts as mentioned above and

---

[39] Strydom (note 30) at 7.
[40] Section 231(4), The Constitution of the Republic of South Africa, 1996.
[41] Section 231(2), The Constitution of the Republic of South Africa, 1996.
[42] Vienna Convention on the law of Treaties 1969, United Nations Treaty Series, vol 1155.
[43] D M Chirwa 'International Law: Its Implications for the Obligations of State and NonState Actors in ensuring Access to Essential Medicine' (2003) 19 *South African Journal on Human Rights* 541 at 544.
[44] Ibid.
[45] Chirwa (note 43) at 544.
[46] Signed on 3 October 1994.
[47] S Liebenberg 'Interpretation of Socio-economic Rights' in S Woolman et al (eds) *Constitutional Law of South Africa* (2009) at 6.

according to article 18(a) of the Vienna Convention by signing South Africa undertakes to respect the object and purpose of the treaty. Furthermore the South African Constitutional court has explicitly considered the ICESCR in interpreting the scope of social and economic rights guaranteed in the constitution.[48]

In 2000 the CESCR adopted General Comment No. 14 which outlines in great deal the various dimensions of the right to health. This general comment also informs the interpretation of the right of access to health care guaranteed in the South African Constitution.[49] The right to health in the covenant applies to everyone including non-nationals such as refugees and asylum-seekers.[50] It embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life.[51] It extends to the underlying determinants of health, which include food and nutrition, housing, access to safe and potable water, adequate sanitation, safe and healthy working conditions, and a healthy environment.[52]

It contains four interrelated and essential elements the precise application of which will depend on the conditions prevailing in a particular State party.[53] All services, goods and facilities must be, 'available, accessible, acceptable and of good quality'.[54] The term available means that functioning public health and health-care facilities, goods and services, as well as programmes, have to be available in sufficient quantity within the State party.[55] Accessible means that health facilities, goods and services have to be accessible to everyone without discrimination, within the jurisdiction of the State party.[56] Accessibility has four overlapping dimensions which are non discrimination, physical accessibility, economic accessibility and information accessibility.[57] It is this second element that is of concern in this dissertation. In South Africa refugees and asylum seekers encounter discrimination in attempting to access health care services. Moreover majority of refugees and

---

[48] *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) at para 26.
[49] CESCR, General Comment No 14 (note 2).
[50] Committee on Economic Social and Cultural Rights (CESCR), General Comment No 20 'Non-discrimination in economic, social and cultural rights (art. 2, para. 2) (2009) E/C.12/GC/20 at para 30.
[51] CESCR, General Comment No 14 (note 2) at para 4.
[52] Ibid.
[53] CESCR, General Comment No 14 (note 2) at para 12.
[54] Ibid.
[55] CESCR, General Comment No 14 (note 2) at para 12(a).
[56] CESCR, General Comment No 14 (note 2) at para 12(b).
[57] CESCR, General Comment No 14 (note 2) at para 12(b).

asylum seekers lack the relevant information necessary for accessing health care services. This is made difficult by the language barriers since majority of refugees and asylum seekers cannot speak any of the South African languages. This issue will be dealt with further in Chapter four.[58] The term acceptable means that all health facilities, goods and services must be respectful of medical ethics and culturally appropriate and lastly health facilities, goods and services must also be scientifically and medically appropriate and of good quality.[59] State parties should take steps to the extent of their available resources to achieve progressively the full realisation of the right to health.

Article 25(1) of the Universal Declaration of Human Rights (UDHR) guarantees everyone including refugees and asylum seekers a right to a standard of living adequate for the health of himself and of his family.[60] South Africa has ratified several human rights instruments that guarantee the right to health for everyone without any distinction and these are discussed in this section. Article 12 of CEDAW (ratified 15 December 1995) provides that State Parties must take steps to eliminate discrimination against women in the field of health care.[61] It also provides that state parties should promote unhampered access to health care services; including family planning measures.[62] I submit that the convention applies to refugee and asylum seeker women who often face particular forms of discrimination in their attempt to access health care services. Redressing discrimination in all its forms, including in the provision of health care and ensuring equality between men and women are fundamental objectives of treating health as a human right.[63] Article 6 of the ICCPR (ratified 10 December 1998) which stresses that State parties are under an obligation to protect every human being's right to life has been referred to with regards to the right to health.[64] The Human Rights Committee has explained that the rights in the ICCPR apply to everyone irrespective of nationality and that each one of the rights

[58] See Chapter 4 , section 4.1.5.
[59] CESCR, General Comment No 14 (note 2) at para 12(b) and (c).
[60] Universal Declaration of Human Rights GA res. 217A (III), UN Doc A/810 at 71 (1948).
[61] CEDAW (note 24).
[62] CEDAW (note 24).
[63] UNHCR (note 7) at 12.
[64] E Riedel 'The Human Right to Health: Conceptual Foundations'. Available at *http://www.swisshumanrightsbook.com* [Accessed 24 May 2010].

must be guaranteed without discrimination between citizens and aliens.[65] Therefore the right of access to health care services of refugees and asylum seekers in South Africa is also protected by the ICCPR.

The CRC (ratified 16 of June 1995) accords all children the right of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health in Article 24.[66] The convention imposes an obligation on state parties to ensure that no child is deprived of his or her right of access to such health care services.[67] Special mention of children considered as refugees or seeking refugee status is made in article 22. The article imposes an obligation on State parties to ensure that such children receive appropriate protection and humanitarian assistance in the enjoyment of the applicable rights set forth in the Convention. The ICERD (ratified 10 December 1998) guarantees the right to health in article 5(e) (iv)[68] and the Committee on The Elimination of Racial Discrimination, (CERD) adopted a general recommendation that focuses on non citizens in 2004.[69]

According to the general recommendation States parties should remove obstacles that prevent the enjoyment of socio-economic rights by non-citizens, notably in the area of health amongst other things.[70] South Africa therefore has a duty to deal with the barriers that refugees and asylum seekers encounter when attempting to access health care services. South Africa should respect the right of non citizens to an adequate standard of physical and mental health by inter alia refraining from denying or limiting their access to preventive, curative and palliative health services.[71] The Special Rappourteur on the right to health has also stressed that sick asylum seekers are some of the most vulnerable persons within a population and should therefore not be denied their human right to medical care.[72]

The right to health is also recognised by several regional instruments that South Africa has ratified. Article 16 of the African Charter on Human and People's

---

[65] Human Rights Committee, General Comment No 15 'The position of aliens under the Covenant' (1986) 1986/04/11 at para 2.
[66] CRC (note 26).
[67] Article 24.
[68] ICERD (note 27).
[69] Committee on The Elimination of Racial Discrimination (CERD), General Recommendation No.30 'Discrimination Against Non Citizens' (2004), 2004/10/01 at para 29.
[70] Ibid.
[71] (CERD), General Recommendation No.30 (note 69) at para 36.
[72] UNHCR (note 7) at 20.

Rights of 1981 (ratified 9 June 1996) provides that every individual shall have the right to enjoy the best attainable state of physical and mental health.[73] The ACRWC (ratified 7 January 2000) in article 14 states that every child shall has the right to enjoy the best attainable state of physical, mental and spiritual health.[74] These two regional instruments are consistent with the international conventions mentioned above and equally apply to refugees and asylum seekers.

2.2 Obligations imposed by the right to health

All human rights generate the duties to respect, protect, promote and fulfil on the state.[75] The South African Constitution also imposes similar obligations upon the state with regards to the Bill of Rights which provides for the right to health and this will be highlighted in Chapter three.[76] The duty to respect requires states to refrain from law or conduct that directly or indirectly interferes with people's enjoyment of the right.[77] It also obligates the state to abstain from preventing and impairing access to human rights.[78] One can argue that with regard to health care the duty to respect entails addressing the barriers that refugees and asylum seekers face in accessing health care. The duty to respect means that the state should desist from denying or limiting equal access to both preventive and curative health care services.[79] South Africa is failing to respect the right of access to health care services of refugees and asylum seekers. Refugees and asylum seekers are sometimes denied access to health care services and the challenges that they encounter limit their right. The duty to protect places a duty on states to take legislative and other measures including provision of effective remedies to protect vulnerable groups against violations of their rights.[80] Refugees and asylum seekers are vulnerable and depend on the state's protection.

The duty to promote requires states to ensure that individuals are able to exercise their rights and freedoms by taking educational measures and raising

---

[73] African Charter (note 28).
[74] ACRWC (note 29).
[75] Chirwa (note 43) at 558.
[76] See Chapter 3, section 3.1.3.
[77] Liebenberg (note 47) at 6.
[78] Ibid.
[79] CESCR, General Comment No 14 (note 2) at para 34.
[80] Liebenberg (note 47) at 6.

awareness.[81] In the case of refugees and asylum seekers the duty entails training hospital staff and appointing the required interpreters. The duty to fulfil requires states to take positive measures to ensure that those persons who currently lack access to the rights gain access to them.[82] This duty has two aspects firstly a duty to enable and assist communities to gain access to socio economic rights. In order to meet this duty states parties should adopt legislation and enabling policies that facilitate and regulate access to the health care services.[83] The second duty is to provide services directly whenever an individual or group is unable to access rights for reasons beyond their control.[84] This can be achieved by targeting vulnerable groups. By highlighting the barriers encountered in realising the right of access to health care services Chapter four will analyse whether South Africa is meeting these obligations.

2.2.1 The principle of non discrimination

The principle of non discrimination is central to the realisation of the right of access to health care services for refugees and asylum seekers in South Africa. Refugees and asylum seekers are unable to assert their right of access to health care effectively because they are discriminated against. As non citizens they are identified by their documents and the fact that they are unable to communicate effectively in the local language. It is important to discuss this principle in the context of health because discrimination is linked to the marginalisation of specific population groups. Moreover it is generally at the root of fundamental structural inequalities in societies.[85] Discrimination means

> 'any distinction ,exclusion ,restriction or preference which is based on any ground such as race, colour ,sex, language ,religion ,political or other opinion , national or social origin , property ,birth or other status which has the effect or purpose of nullifying or impairing the recognition, enjoyment or exercise by all persons, on equal footing , of all human rights and fundamental freedoms.[86]

---

[81] Ibid.
[82] Liebenberg (note 47) at 6.
[83] Liebenberg (note 47) at 7.
[84] Ibid.
[85] UNHCR (note 7) at 7.
[86] Human Rights Committee, CCPR, General Comment No. 18: Non-discrimination, 10 November (1989), 1989/11/10. See also CESCR, General Comment No 20: Non-discrimination in economic, social and cultural rights (note 50) at para 2 and 15.

Non-discrimination is not only a human right of its own but it is also a constitutive element of all human rights. The principle of non- discrimination has attained the status of customary international law. Customary international law is that source of international law developed through state custom or practice.[87] A custom will become a rule of customary international law where it is a sufficiently widespread practice adopted by states out of a sense of legal obligation.[88] There are two elements to customary international law, settled practice (usus) and opinion iuris et necessitatis (the psychological element of acceptance of an obligation to be bound).[89] Yacob J writing for the majority in the *Grootboom* case on the issue of considering the value of international law stated that, relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary.[90] He also stated that where the relevant principle of international law binds South Africa, it may be directly applicable.[91] Therefore I submit that the principle of non discrimination is binding upon South Africa and is directly applicable.

Furthermore the principle is interrelated with equality and it implies that States must recognise and provide for the differences and specific needs of groups that face particular health challenges. Refugees and asylum seekers fall into such a group which need special protection. The principle of non-discrimination protects the enjoyment on an equal footing of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.[92] According to article 2(1) of the UDHR 'everyone is entitled to all the rights and freedoms set forth in the Declaration, without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. The provision applies to everyone including non citizens such as refugees and asylum seekers.[93] The use of the words 'such as' in article 2(1) indicates that the list of the prohibited grounds is not exhaustive and it makes it clear

---

[87] Strydom (note 30) at 4.
[88] Ibid.
[89] Strydom (note 30) at 4.
[90] Grootboom (note 48) at para 26.
[91] Ibid.
[92] CERD, General Recommendation No. 32 'The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination' (2009), 2009/09/24.
[93] Weissbrodt (note 1) at 36.

that the operative phrase is 'without distinction of any kind'.[94] Although the list omits nationality the omission is not fatal as the list is intended to be illustrative and not comprehensive.[95] Therefore I submit that nationality also falls into the category of distinction of any kind.[96] Other treaties that recognise this principle have adopted similar wording of section 2 (1) and can be therefore applied to refugees and asylum seekers.

The Convention Relating to the Status of Refugees (acceded to on 12 January 1996) contains important standards and norms that apply to refugees and asylum seekers.[97] In article 3, the convention obliges state parties not to discriminate against refugees on the basis of religion, race or country of origin. Moreover the Convention Governing the Specific Aspects of Refugee Problems in Africa [98] (ratified 15 December) calls on state parties to apply the provisions of the convention without discrimination.[99] The ICCPR in article 2(1) also states that State parties subject to their jurisdiction should ensure that the rights enshrined in the covenant will be respected and ensured without distinction of any kind. The ACRWC and the African Charter on Human and People's Rights both provide for the non discrimination principle which should be taken into account in the interpretation of the rights they provide for. Furthermore the CESCR has stated that the principle of non discrimination mentioned in article 2(2) of the Covenant is important in relation to the full realisation of the right to health and is understood as imposing an immediate obligation of non discrimination.[100]

2.3 Conclusion

The right of access to health care for refugees and asylum seekers is recognised by the treaties that guarantee the right to health for all. The right is protected by the principle of non discrimination which ensures that all rights are extended to everyone on an equal basis. As noted above non- discrimination is a key principle in human rights and is crucial to the enjoyment of the right to the highest

---

[94] Ibid.
[95] Weissbrodt (note 1) at 36.
[96] Ibid.
[97] Refugee Convention (note 8).
[98] Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 UNTS 45, adopted 10 December 1969, entered into force June 20 1974.
[99] Article 4.
[100] CESCR, General Comment No 14 (note 2).

attainable standard of health.[101] The principle is binding upon South Africa therefore it has a duty to uphold it in the application of its health care policies with regards to refugees and asylum seekers. It also demands that states adopt positive measures to ensure that specific individuals and groups are not discriminated against.[102] States should also disaggregate their health laws and policies and tailor them to those most in need of assistance rather than passively allowing seemingly neutral laws and policies to benefit mainly the majority groups. [103]

[101] UNHCR (note 7).
[102] UNHCR (note 7) at 11.
[103] Ibid.

CHAPTER THREE

THE SOUTH AFRICAN LAW POSITION

3 Introduction

The aim of this chapter is to outline the South African law governing the right of access to health care of refugees and asylum seekers. It is important to note that in interpreting the South African law in particular the Bill of Rights, the relevant international law outlined in Chapter two must be considered. In this chapter I analyse the meaning of section 27(1) (a) and argue that refugees and asylum seekers are entitled to this right. I outline the state's obligations in relation to the right of access to health care as provided by section 7(2) of the Constitution. I highlight the relationship between section 27(1) (a) and section 9 of the Constitution and argue that these sections must be read together with the rule of law. I also highlight the value of human dignity in the interpretation of the right of access to health care. South Africa has a refugee policy that facilitates individuals' freedom and protection through enabling the temporary integration of refugees into local communities.[104] Refugees and asylum seekers within the country are therefore expected to become self sufficient by earning a living and temporarily integrating within the South African community.[105] It is within such a context that the right of access to health care for these two groups is discussed.

Refugees and asylum seekers in South Africa are mainly protected by the South African constitution[106] and the Refugee Act.[107] The preamble of the South African constitution highlights that South Africa belongs to all who live in it united in diversity.[108] Moreover the Bill of Rights enshrines the rights of all people in the country.[109] Consequently, refugees and asylum seekers who are within the borders of South Africa are protected by the constitution. Socio-economic rights are

---

[104] International Organisation for Migration (IOM) 'Migration and Health in South Africa: Background paper for the National Consultation on Migration Health in South Africa: Working Document of April 2010'. Available at *http://*www.migration.org.za [Accessed on 24 May 2010].
[105] Ibid.
[106] Constitution of the Republic of South Africa, 1996.
[107] No 130 of 1998.
[108] Preamble of the Constitution of the Republic of South Africa, 1996.
[109] Section 7(1), Constitution of the Republic of South Africa, 1996.

expressly included in the Bill of Rights and the state is required to respect, protect, promote and fulfil these rights.[110] At the heart of the Bill of Rights lie the founding values of the constitution which inform the interpretation of many other rights.[111] The founding values relevant to this thesis are human dignity, equality and the rule of law.[112] These founding values must be promoted when interpreting the right of access to health care.

The right to have access to health care services is provided for by section 27(1) (a) which is further qualified by section 27(2).[113] It is interrelated to the right to equality enshrined in section 9.[114] Of particular significance to this thesis is section 9(3) which provides that the state may not unfairly discriminate directly or indirectly against anyone on various grounds. Citizenship is not amongst the listed grounds and in this chapter I argue that it is an analogous ground following the *Larbi-Odam*[115] and *Khosa*[116] cases. Section 27(g) of the Refugee Act also gives effect to the right enshrined in the constitution. According to this section a refugee is entitled to the same basic health services and basic primary education which the inhabitants of the Republic receive from time to time. Furthermore the right of access to health care is protected by health legislation and policies.[117] These include; The National Health Act[118], Occupation Health and Safety Act[119], South African Immigration Act[120], the

---

[110] Section 7 (2), Constitution of the Republic of South Africa, 1996.
[111] Section 1 (a)-(e), Constitution of the Republic of South Africa, 1996.
[112] *Khosa* (note 13) at para 85.
[113] Section 27 reads
(1)Everyone has the right to have access to -
(a) health care services, including reproductive health care;
(b) sufficient food and water ; and
(c) social security , including, if they are unable to support themselves and their dependants, appropriate social assistance.
(2)The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
(3)No one may be refused emergency medical treatment.

[114] Section 9 (1) reads
Everyone is equal before the law and has the right to equal protection and benefit of the law.
[115] *Larbi-Odam and Others v Member of The Executive Council For Education and Another* 1997 12 BCLR 1655.
[116] *Khosa (*note 13).
[117] The legislation and policies provide substance to the right of access to health care and their role is discussed further in section 3.1.7 below.
[118] No 61 of 2003.
[119] No 85 of 1993.
[120] No 13 of 2002.

HIV and AIDS and STI Strategic Plan for South Africa[121], the National Department Of Health (NDOH) memorandum of 2006[122], the NDOH memorandum of 2007[123] and the Gauteng Department of Health Letter of 2008.[124]

3.1 The meaning of section 27(1) (a)

The formulation of the right in 27(1) (a) is fairly narrow as it only provides for a right to have access to health care services. It does not provide for the general resources necessary to preserve and maintain health and certainly does not provide for the right to be healthy.[125] In the *Treatment Action Campaign*[126] (TAC) case the court held that section 27(1) does not give rise to a self standing and independent positive right that is enforceable irrespective of the considerations mentioned in section 27(2).[127] Therefore the right of access to health care does not entitle one to immediate benefits in the absence of legislation that does provide for such benefits.[128] In the *New Clicks*[129] case the court held that the right of access to health care includes the right of access to quality medicines that are affordable and accessible.[130] This in turn imposes an obligation upon the state to promote access to medicines that are affordable.[131] Related to this obligation is the duty to ensure that the right of access to health care is economically accessible as mentioned in Chapter one.[132]

The use of the word access means that one has the right to seek, receive and impart information and ideas of health care services.[133] Health care services must be within safe physical reach for all parts of the population especially for vulnerable or marginalized groups.[134] Accessibility also has an economic facet that ensures that

---

[121] See note 18.
[122] See note 19.
[123] See note 20.
[124] See note 21.
[125] D Bilchitz 'Health' in S Woolman et al (eds) *Constitutional Law of South Africa* (2009) at 5.
[126] *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 721 (CC).
[127] Ibid at para 39.
[128] See *Soobramoney v Minister of Health (KwaZulu-Natal)* 1997 12 BCLR 1696 at para 11 at which the court held that the obligation imposed by section 27 is dependent upon the resources available and therefore limited by the lack of them.
[129] *Minister of Health and Another v New Clicks (Pty) Ltd and Others* 2006 (8) BCLR 872 (CC).
[130] *Minister of Health and Another v New Clicks* at 514.
[131] New Clicks (note 129) at 514.
[132] See section 2.1.
[133] M H Cheadle et al 'Health' in South African Constitutional Law: The Bill Of Rights. Available at *http://butterworths.uct.ac.za/* [Accessed on 12 March 2010].
[134] Ibid.

poorer members of the community should not be disproportionately burdened with health expenses.[135] In the *TAC* case, by limiting the supply of nevirapine to research and training sites the government was excluding the poor members of the community who were outside the catchment areas of these sites.[136] The right of access to health care services of the poor community who could not afford to pay for health care services was being limited. In addressing this issue the court held that there is a difference in the positions of those who can afford to pay for health care services and those who cannot and that state policy must take account of these differences.[137] In the *TAC* case in considering whether the state policy of limiting nevirapine to certain research and training sites was reasonable the court stated that the needs of the most urgent must not be ignored.[138] Therefore I thus contend that in order to fulfil this right the state should consider refugees and asylum seekers who are vulnerable and depend on the state to address the challenges that limit or deny their right of access to health care. Section 27(1) (a) also provides for access to reproductive health care. Access to reproductive health care also entitles both women and men to have the freedom to decide when to begin a family as well as counselling services in relation to safe, effective, affordable and acceptable family planning.[139]

The *Grootboom* case also considered what 'access to' means. In interpreting the meaning of the right of access to adequate housing, Yacob J held that housing entails more than brick and mortar.[140] He went on to state that, 'access to adequate housing means that there should not only be land but appropriate services such as financial resources , the provision of water and the removal of sewage'.[141] Therefore I submit that section 27(1) (a) provides for the underlying determinants of health. Section 27 (1) (a) appears together with the right to have access to sufficient food and water, the right to have access to social security and a right to emergency treatment.[142] These rights are interrelated and are underlying determinants of the

---

[135] Cheadle (note 133) at 8.
[136] TAC (note 126) at para 70.
[137] Ibid.
[138] TAC (note 126) at para 43.
[139] Cheadle (note 133) at 8.
[140] Grootboom (note 48) at para 35.
[141] Ibid.
[142] Cheadle (note 133) at 8.

right to health. For example social security ensures that one has access to health care services, food and water which are essential for life.[143] The right of access to health care cannot therefore be considered in isolation from other rights. The right is closely related to the right to dignity therefore all health care services should be provided in such a way that persons are able to maintain full respect for their rights and dignity.[144] According to section 39(1) (a), when interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity amongst other values.[145]

Recognising the right to dignity is an acknowledgement of the intrinsic worth of human beings who are entitled to be treated as worthy of respect and concern.[146] Dignity is not only a founding value of the constitution; it is a justiciable and enforceable right that must be respected and protected.[147] Section 1 (a) of the Constitution provides for human dignity as a value whilst section 10 provides for the right to human dignity. Dignity is a fundamental right that one has by virtue of being human. Liebenberg highlights the importance of the value of human dignity in relation to social and economic rights.[148] She states that human dignity can be used to justify claims against social resources when certain groups lack the material conditions necessary for the development of their capabilities as human beings.[149] Human dignity is inherent in every human being regardless of any membership of a particular group. It is undermined by unfair treatment premised upon personal traits or stereotypes which do not relate to individual needs, capacities or merits.[150] Therefore with regard to section 27 (1)(a), where certain groups are denied their right of access to health care one can invoke dignity in order to hold the state accountable for not giving effect to the right.[151] Human dignity protects the right of individuals to access health care services therefore I submit that limiting or denying

---

[143] Bilchitz (note 125) at 6.
[144] Cheadle (note 133) at 8.
[145] Section 39 (1) (a).
[146] Chaskalson (note 14) at 7. See *S v Makwanyane* 1995 (3) SA 391 (CC) at para 328.
[147] *Minister of Home Affairs and Others v Dawood and Another* 2000 (1) SA 1074 (C) at para 35.
[148] Liebenberg (note 47).
[149] Ibid at 18.
[150] Chaskalson (note 14) at 203.
[151] The preamble to the ICCPR asserts that fundamental rights derive from the inherent dignity of the human person. Moreover according to Article 1 of the UDHR all human beings are born free and equal in dignity.

certain groups access to health care services undermines the value and the right to human dignity.

According to Liebenberg in interpreting social and economic rights the value of human dignity requires an approach that considers the impact of deprivation on the actual needs and circumstances of the individuals and groups concerned.[152] Access to health care is vital to a human being's life and the denial of this right has an adverse impact on the group or individuals' affected since the end result is death. Adopting an approach that considers the impact of depriving one the right of access to health care is undoubtedly useful. Such an approach will prompt the state to take urgent action to address any challenges that inhibit the realisation of the right. In the *Dawood* case the court held that human dignity informs the interpretation of many, possibly all, other rights in the constitution.[153] I therefore submit that dignity informs the interpretation of the right of access to health care. Consequently, since South Africa is a society that respects human dignity it should be committed to redressing the social and economic conditions for those who are disadvantaged.[154] The denial of health care services to certain individuals or groups undermines the foundations of the constitution and is inconsistent with the rule of law discussed below.

3.1.1 The Internal Limitation- Section 27(2)

In the *Khosa*, *Grootboom* and *TAC* cases the court held that section 27(1) and section 27(2) cannot be viewed as separate or discrete rights creating entitlements and obligations independently of one another.[155] Consequently, section 27(1) (a) must be read together with section 27(2) hence it is necessary in this thesis to discuss the internal limitation.[156] The inclusion of internal limitations in the South African Bill of Rights is an acknowledgement that not all rights can be immediately

---

[152] Liebenberg (note 47) at 18.
[153] Dawood (note 43) at para 35.
[154] Liebenberg (note 47) at 12.
[155] *Khosa (*note 13) at para 43. See *Grootboom* (note 48) at para 34. See *TAC* (note 125) at para 39.
[156] The *New Clicks* case confirms that the right of access to health care is comprehended in section 27(1) a and 27 (2). In the *same* case the court held there is no dispute that the Constitution imposes an obligation on the state to take reasonable legislative and other measures, within available resources in order to achieve the progressive realisation of everyone's right to have access to health care services. See para 514. Section 27(2) exists as an internal limitation on the content of section 27(1), See *Khosa* (note 13) at para 43.

and completely fulfilled by the state.[157] The obligations imposed on the State by section 27(1) (a) are dependent on the resources available for such purposes and the right itself may be justifiably limited because of a lack of resources.[158] The extent of the state's obligation is defined by three key elements that are considered separately: (a) the obligation to 'take reasonable legislative and other measures'; (b) 'to achieve the progressive realisation' of the right; and (c) 'within available resources.'[159] The concepts of progressive realisation and resource availability are based on article 2 of the ICESCR as mentioned in chapter two directing our courts towards a legitimate international resource for the interpretation of these rights.[160] In *Grootboom* the court analysed section 26(2) of the constitution and this analysis is equally applicable to section 27(2) given that the sections are similarly worded.

The phrase 'reasonable legislative and other measures' requires the State to develop a comprehensive and workable plan to meet its obligations.[161] The state is under an obligation to immediately take deliberate and concrete steps targeted towards the full realisation of the right of access to health care.[162] In the *Grootboom* case the court held that,

> 'what constitutes reasonable legislative and other measures must be determined in the light of the fact that the Constitution creates different spheres of government: national government, provincial government and local government.[163]

Therefore reasonable measures must clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available.[164] Such divisions in the functions of the different spheres of government are reflected in the national health system. The power to make national legislation, set norms and standards as well as monitor the delivery of services is vested in the national government.[165] The provinces are

---

[157] P De Vos 'Pious Wishes or Directly Enforceable Human Rights: Social and Economic Rights in South Africa's 1996 Constitution' (1997) 13 South *African Journal on Human Rights* 67 at 93.
[158] Bilchitz (note 125) at 3.
[159] Section 27(2),Constitution of the Republic of South Africa, 1996
[160] S.Liebenberg (note 47) at 4.
[161] *Soobramoney v Minister of Health (KwaZulu-Natal)* 1997 12 BCLR 1696 (CC) at para 31.
[162] CESCR, General Comment No 14 (note 14) at para 30.
[163] *Grootboom* (note 48) at para 39.
[164] Ibid.
[165] Department of Health 2001 District Health System in South Africa Progress Made and Next Steps at 4. Available at *http://www.doh.gov.za/docs/policy/dhsystem.html* [Accessed on 12 July 2010].

charged with planning, regulating and providing health services whilst the local government or municipalities are responsible for the rendering of municipal health services.[166] Of much concern in this thesis is the implementation of the policies developed by the NDOH to support legislation and ensure its effective implementation regarding access to health care services for refugees and asylum seekers. In as much as these policies highlight the right of access to health care of refugees and asylum seekers in practice these two groups continue to face some challenges which will be highlighted in chapter four. Given the context of the Bill of rights as a whole which promotes a society based on human dignity, freedom and equality South Africa must ensure that the right of access to health care be provided to all.[167] In order for the measures adopted to pass the test they must meet the needs of the most urgent and vulnerable such as refugees and asylum seekers.

Progressive realisation of the right to health should not be interpreted as depriving the State's obligations of all meaning and content.[168] Instead the state is required to move as expeditiously and effectively as possible towards the full realisation of the right.[169] It also means that accessibility to health care should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and where possible, lowered over time.[170] Available resources refer to the real resources of the country and those available from the international community through international cooperation and assistance.[171] The state is not expected to do more than what is achievable within its available resources. The allocation of health care service resources must therefore include effective access to health care services by the most vulnerable members of the community.[172]

3.1.2 Who is entitled to such rights?

Section 27(1) (a) read with section 27 (2) provides that *everyone* has the right to have access to health care services including reproductive health care taking into account the available resources. It is important to establish who the beneficiaries of

---

[166] Department of Health (note 164) at 4.
[167] *Grootboom* (note 48) at para 44.
[168] CESCR, General Comment No 14 at para 31.
[169] Ibid.
[170] *Grootboom* (note 48) at para 45.
[171] Limburg Principles on the Implementation of the ICESCR E/CN.4/1987/17 at 26.
[172] Cheadle (note 133) at 8.

the right are and the answer to this question lies in the interpretation afforded to the word "everyone". Relevant to this question is the *Khosa*[173] case in which the applicants were challenging the constitutionality of the Social Assistance Act[174] that limited social assistance to South African citizens. The applicants argued that Section 27(1) (c) guarantees the right to social security to everyone including permanent residents therefore by excluding permanent residents the Social Assistance Act was unconstitutional. Even though the *Khosa* case dealt with a situation where legislation provided a benefit to a group and excluded others from that benefit what is applicable to this thesis is the interpretation that was afforded to the word everyone in section 27.

In interpreting the word everyone the court held that there are certain rights that have been expressly limited to citizens such as political rights in section 19 and the right to have access to land in section 25(5).[175] Since section 27 does not contain such a modification Mokgoro J held that everyone could not be construed to refer only to citizens.[176] The *Lawyers for Human Rights v Minister of Home Affairs*[177] case also supports the fact that section 27 should be interpreted to include refugees and asylum seekers. This case dealt with the constitutionality of the detention and deportation provisions of the Immigration Act.[178] The court held that persons within the territorial boundaries of South Africa have protection of the South African courts.[179] Refugees and asylum seekers fall into the group of immigrants who have been formally admitted into the country and issued with documents therefore the Bill of Rights applies to them. The court in this case reiterated that unless specifically restricted to South African citizens the Bill of Rights provisions do apply to foreign nationals. [180] Therefore following these two judgements the word 'everyone' in section 27 should be interpreted to mean both citizens and non citizens.

---

[173] *Khosa* (note 13).
[174] No 59 of 1992.
[175] *Khosa* (note 13) at para 68.
[176] Ibid at para 47.
[177] *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC).
[178] No 13 of 2002.
[179] *Lawyers for Human Rights (*note 177*)* at para 27.
[180] Ibid.

3.1.3 What are the state's obligations?

The sections discussed above establish the meaning and the beneficiaries of the right of access to health care services enshrined in section 27(1) (a). Since the focus of the thesis is to show that the state is failing to fulfil its obligations in terms of section 27(1)(a) read with section 27 (2), with regards to the rights of refugees and asylum seekers, it is important to outline what these obligations are. The state has a constitutional duty to respect, promote, protect and fulfil the right of access to health care. These obligations are not any different from those imposed by international law mentioned in Chapter two.

The duty to respect requires the state to refrain from infringing on the right of access to health care by subjecting it to unjustified interference.[181] The state is under an obligation to abstain from enforcing discriminatory practices as a state policy.[182] This duty also entails addressing the barriers or challenges that specific individuals or groups face in accessing health care as mentioned in chapter one. The duty to protect entails taking measures in order to protect vulnerable groups against the violation of their rights. The state has an obligation to protect individuals by creating a framework in which they will be able to realise their protected rights without interference from others.[183] Refugees and asylum seekers given their living conditions are a vulnerable group dependent upon the state for the protection of their right of access to health care. The duty to protect in the case of refugees and asylum seekers includes ensuring that hospital staff is not discriminatory. This obligation does not only impose a duty to enact laws but the state is entitled to take steps to ensure that the laws are implemented properly.[184] This obligation does not require the state to provide money or resources directly to individuals.[185] The duty to promote and fulfil places an obligation upon the state to assist in creating the conditions in which the rights can be realised by the individual.[186] The state has an obligation to take steps which will make access to these facilities easier for

---

[181] De Vos (note 157) at 83.
[182] CESCR, General Comment No 14 at para 34.
[183] De Vos (note 157) at 83.
[184] *Grootboom* (note 48*)* at para 67.
[185] Ibid.
[186] De Vos (note 157) at 86.

individuals.[187] In Chapter four I analyse whether the state is fulfilling these obligations in practice.

In considering whether these legal obligations are being met it is important to briefly discuss the context against which they should be evaluated. Refugees and asylum seekers in South Africa in their attempt to integrate stay under undesirable conditions. Such conditions often include the lack of access to water making them susceptible to water borne diseases such as cholera, diarrhoea and bilharzia. They also suffer from other diseases such as HIV, tuberculosis and those fleeing from war suffer from trauma and require counselling services. The right of access to health care is therefore vital to them.

However given their financial circumstances they lack enough finances to cover their health expenses.[188] This is remedied to some extent by the fact that South Africa has a public health care system that includes free primary health care at the point of use. Moreover in September 2007 the NDOH issued a revenue directive stating that refugees and asylum seekers with or without a permit should be assessed according to the 'MEANS' test.[189] The means test is a fixed financial allocation or entitlement to free service and the funding is from general taxes.[190] Basically those refugees and asylum seekers whose income falls below the means test are entitled to free primary basic health care whilst those whose income exceeds it are required to pay the full amount.[191] The directive also highlighted that refugees and asylum seekers are protected by section 27(g) of the Refugee Act as mentioned before.

3.1.4 Legislation governing the right of access to health care services

In order to give effect and fulfil the obligations discussed above the right of access to health care has been operationalised by legislation. According to the *Khosa* case once legislation provides for the right in concrete ways there can be no

---

[187] Ibid.
[188] Since they are in a foreign country they are less likely to secure proper jobs even if they have skills hence they are forced to resort to employment in the informal sector.
[189] See note 19.
[190] HD Mc Leod 'Mutuality and Solidarity in Health Care in South Africa'. Available at http://www.actuarialsociety.org.za [Accessed on 10 August 2010].
[191] See note 18.

discrimination against anyone in the provision of the benefit or service.[192] Legislation regarding the provision of health services are therefore of utmost importance. The following legislation provides for the right of access to health care. The National Health Act assures everyone in the country regardless of immigration status access to life saving care.[193] The Occupation Health and Safety Act demands that employers provide for the health and safety of persons at work and that they ensure the protection from any hazards in the workplace.[194] The HIV & AIDS and STI Strategic Plan for South Africa, 2007-2011 sets out the free national ART programme in the public health sector and specifically include non-citizens groups.[195] One of the guiding principles to the successful implementation of the plan is ensuring equality and non-discrimination against marginalised groups.[196] Furthermore in 2006, The NDOH issued a memorandum stating that patients do not need to be in possession of a South African identity booklet in order to access ART.[197] Lastly as mentioned before in 2007 the NDOH also issued a revenue directive confirming that refugees and asylum seekers with or without a permit have the same rights as South Africans to access free basic healthcare and ART in the public sector.[198]

3.2 The relationship between section 27(1) (a) and section 9

The legislation outlined above governs the rights of access to health care in concrete ways and maintains that this right is for everyone including refugees and asylum seekers. Therefore, no discrimination is tolerated in applying this law. However in practice South African law read together with international law is not being applied diligently. Even though the right is conferred on everyone refugees and asylum seekers are discriminated against when it comes to the provision of health care regardless of the fact that section 9 prohibits such discrimination. It is therefore useful to discuss the relationship between section 27 and 9 of the constitution in order to establish that such discriminatory behaviour is prohibited.

---

[192] *Khosa* (note 13).
[193] I argue that this is highlighted in the preamble which makes reference to section 7(2) which must be read together with section 27(1).
[194] Refugees and asylum seekers are entitled to work in South Africa therefore are protected by this Act.
[195] See note 18.
[196] Ibid.
[197] See note 19.
[198] See note 20.

In the *Khosa* case the court held that the socio economic rights in the Constitution are closely related to the founding values of human dignity, equality and freedom.[199] Not only is equality a foundational value, it also informs constitutional adjudication and it is a justiciable and enforceable right enshrined in section 9.[200] The right of access to health care and the right to equality intersect and reinforce each other.[201] The right to equality protects the rights of refugees and asylum seekers by providing for the full and equal enjoyment of their rights and freedoms as well as equal protection and benefit of the law.[202]

The *Khosa* case also held that in respect of access to socio economic rights equality is implicit in the reference to everyone being entitled to have access to the rights in section 27.[203] Therefore health care and services that are provided in terms of legislation and policies to South African citizens should also be provided on an equal footing to asylum seekers and refugees. Any denial of these services will therefore amount to unfair discrimination as provided for by section 9(3). Citizenship although not listed in section 9(3) has been considered as an analogous ground.[204] Non- citizens have been identified as a vulnerable group since citizenship is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons.[205] In the *Larbi-Odam* case the court held that, "the characteristic of citizenship is one typically not within the control of the individual".[206] The court went on to argue that this general lack of control over one's citizenship has particular resonance in the South African context, where individuals were deprived of benefits.[207]

Therefore I submit that refugees and asylum seekers are equally entitled to access health care services provided to South African citizens and any discrimination against them is prohibited by the law. Their rights are protected by equality both as a right and as a value. 'At the heart of the prohibition of unfair discrimination lies the recognition that the purpose of the constitution is the

---

[199] *Khosa* (note 13) at para 40.
[200] Ibid at para 42.
[201] *Khosa* (note 13) at para 41.
[202] See section 9.
[203] *Khosa* (note 13) para 42.
[204] Ibid at para 79.
[205] *Larbi-Odam* (note 115) at para 19.
[206] Ibid.
[207] *Larbi-Odam* (note 115) at para 19.

establishment of a society in which all human beings will be accorded equal dignity and respect regardless of membership of a particular group'.[208] Discriminating against refugees and asylum seekers on the basis of citizenship will not only contravene section 9(3) but will also contravene the goal of the Constitution.

Chapter four outlines the practical problems that refugees and asylum seekers encounter and highlights that state officials in the health sector do not act according to the South African law read with international law. It is therefore important to highlight the significance of the value of the rule of law in this thesis. The rule of law requires that state officials apply law diligently therefore by failing to do so the state officials undermine this legal principle. Section 1 of the Constitution prescribes the rule of law as one of the seminal values on which the Constitution is founded. As a value that underlies "an open and democratic society based on dignity, equality and freedom", the rule of law must be promoted when interpreting the provisions of the Bill of Rights in the Constitution.[209] The rule of law has achieved dual status in South African constitutional law.[210] It is not only a value informing the interpretation of various constitutional clauses but it is also a self- standing justiciable and enforceable claim.[211]

In *De Lange v Smuts*[212] the court held that in a constitutional democratic state which is under the rule of law citizens as well as non-citizens are entitled to rely upon the State for the protection and enforcement of their rights.[213] The state therefore assumes the obligation of assisting such persons to enforce their rights.[214] Consequently I argue that as one such state, South Africa has a duty to assist refugees and asylum seekers to assert their right of access to health care. It also has a duty to protect them against any form of discriminatory conduct that will inhibit or limit their access to health care. Therefore actions of state officials in the health sector should be consistent with the rule of law. Any conduct that is inconsistent with

---

[208] *Khosa* (note 13) at para 74.
[209] Reference Works, Indexes Dictionaries and Diaries 'The rule of law'. Available at http://www.lexisnexisbutterworths.co.za [Accessed on 30 August 2010].
[210] F I Michelman 'The Rule of law, Legality and The Supremacy of the Constitution' in S Woolman et al (eds) *Constitutional Law of South Africa* (2009) at 3.
[211] Ibid at 3.
[212] *De Lange v Smuts 1998* (3) SA 785 CC.
[213] Ibid at para 31.
[214] *De Lange v Smuts* (note 212) at para 31.

the law as it stands will undermine the rule of law read together with section 27(1) (a) and section 9 of the Constitution.

3.3 Conclusion

Section 27(1) a) is indeed guaranteed to everyone including non citizens. This chapter illustrates that South Africa has an excellent and progressive legal framework that protects the rights of refugees and asylum seekers. The memorandums that have been issued by the NDOH illustrate the efforts that the government has taken to establish that the right of access to health care of refugees and asylum seekers is protected. However in reality these two groups face hostile social and practical realities in asserting their rights. The result is that the policies aimed at improving the situation of refugees and asylum seekers have not been effectively transformed into protective practices. This is contrary to the concept of access to health care which implies a prohibition on any form of action which deters rather than enables access.

CHAPTER 4

PRACTICAL PROBLEMS ASSOCIATED WITH THE RIGHT OF ACCESS TO HEALTH CARE SERVICES FOR REFUGEES AND ASYLUM SEEKERS IN SOUTH AFRICA.

4 Introduction

The South African constitution has been widely praised as being amongst the most progressive and inclusive in the world.[215] Not only does it guarantee the rights and freedoms of citizens, it also extends these rights to everyone living in the country including refugees and asylum seekers. As mentioned above the rights of refugees and asylum seekers are furthermore guaranteed by the Refugee Act and other supporting legislation which gives effect to the principles enshrined in international law. In this chapter I draw attention to the fact that there is a gap between what the law requires and what is happening in reality. South Africa is failing to fulfil its obligations as set out by the law. In practice refugees and asylum seekers face various obstacles in their attempt to assert their right of access to health care.

This is clear from the available research done on the access of health care for migrants in South Africa by several NGOs. The organisations are as follows; the International Organisation for Migration (IOM), HRW, CORMSA, LHR, FMSP and RHRU at Witwatersrand University. This chapter draws on the existing research and studies done by these organisations in order to highlight the factual situation in the country. These organisations identify the gaps that exist between the obligation to protect migrant's rights and the implementation by the government. The available literature on this topic focuses on the challenges associated with the realisation of the right of access to health care for migrants in general. I however focus specifically on refugees and asylum seekers and in addition I argue that South Africa is failing to fulfil its obligations as set out by the law and it has a duty to address the challenges that inhibit the realisation of the right.

---

[215] J Crush 'The Dark Side of Democracy: Migration, Xenophobia and Human Rights in South Africa' (2001) 38 *International Migration* 103 at 110.

4.1 Challenges that refugees and asylum seekers face in their attempt to access health care services in South Africa

Refugees and asylum seekers live in hazardous conditions characterised with limited sanitation and insufficient water.[216] They often stay in large numbers and in cramped conditions so as to cut down rental costs making them susceptible to various types of diseases requiring treatment. However, in their attempt to access health care services they encounter difficulties. Even though there are some refugees and asylum seekers who have not encountered any obstacles in accessing health care services a large group has been facing challenges. Some refugees and asylum seekers report being refused access to treatment at public clinics and hospitals.[217] Many of them face discrimination and ignorance when they try to access health care services.[218] Several challenges have been identified as prohibiting the implementation of the policy protecting the right of access to health care of refugees and asylum seekers. These include xenophobia which is related to discrimination, facility level policy decisions, user fees, language, insufficient resources, and the lack of adequate information on health care services. I shall discuss each of these challenges in turn.

4.1.1 Xenophobia in South Africa

Xenophobia is often described as an intense and irrational dislike or fear of foreigners based on unfounded myths and stereotypes.[219] It is very significant in this discussion since it is not only a barrier to obtaining health care services but also creates an environment that promotes a risk to refugee and asylum seekers health.[220] A survey done into the measure of xenophobia revealed that a large percentage of South Africans perceive foreigners, almost exclusively black foreigners as a direct threat to their economic well being and responsible for the

---

[216] Schaeffer (note 5) at 4.
[217] CORMSA 'Protecting Refugees and Asylum Seekers in South Africa, 2007'. Available at *http://www.cormsa.org.za*. [Accessed 24 May 2010]. CORMSA was formerly known as the National Consortium for Refugee Affairs. It is a non profit or non governmental organisation committed to the promotion and protection of refugees and migrant rights. It is comprised of member organisations and individuals dedicated to protecting the life and welfare of refugees.
[218] Ibid.
[219] National Consortium for Refugee Affairs 'Summary of Key Findings: Refugee Protection in South Africa, 2006.' Available at http: *http//www.cormsa.org.za* [Accessed 24 June 2010].
[220] Schaeffer (note 5) at 2.

increase in crime rates.[221] Another survey of the South African Police Service (SAPS) showed that 78.4% of police believe that foreigners, regardless of their legal status cause a lot of crime.[222] It is partly because of such negative perceptions that non citizens are treated differently in their attempt to access public services in the country. The May 2008 xenophobic attacks which started in Alexandra Township in Johannesburg and spread to other parts of the country confirmed the high levels of intolerance and hostility amongst South Africans. These attacks suggested that many South Africans are prepared to go to some extremes to deny some foreigners from other parts of Africa the enjoyment of their right to dignity. Most refugees and asylum seekers were attacked and sustained injuries from the beatings whilst some women and girls were raped.[223]

With regards to health care there is a common perception that most migrants are sick and are in the country in order to get treatment. However research done by FMSP has revealed that refugees and asylum seekers migrate to South Africa for reasons other than gaining access to health care.[224] According to the Public Information Officer for the DOH of Limpopo Province the biggest problem the province has faced in providing health services to migrants is not that they require too much care but that they wait too long and seek care when the disease has already progressed.[225] Despite the fact that the perceptions are based on unfounded stereotypes they are still entrenched in the communities and are the basis and or justification for disregarding the rights of non citizens. Some health care workers working at public hospitals and clinics bear xenophobic attitudes and disregard the rights of refugees and asylum seekers to access health care services. They fail to acknowledge the fact that they have the same rights as citizens Such health care workers undermine the legal principles governing the right of access to health care of

---

[221] Crush (note 215) at 106.

[222] Ingrid Palmary 'For Better Implementation of Migrant Children's Rights in South Africa'. Available at http*://www.globalmigrationgroup.org* [Accessed 24 June 2010].

[223] Such attacks have been ongoing for a long time and they started long before 2008 See Crush (note 215) at 106. See CORMSA 'Protecting Refugees and Asylum Seekers in South Africa' 2008 at 26. Available at *http://www.cormsa.org.za*. [Accessed 24 May 2010]. After the 2010 world cup some foreigners were also attacked in Kaya sands. See News-South Africa: Ten arrested for xenophobic violence *Available at http://www.iol.co.za/index* [Accessed 1 August 2010].

[224] J Veary 'Foreign Migrants and the South African Health Care System: Ensuring the Right to Health is Upheld for All'. Available at *http:// www.cormsa.org.za* [Accessed 24 June 2010].

[225] Human Rights Watch Interview with Seloba Phuti, Public Information Officer, Limpopo Provincial Department of Health April 3, 2009 in Schaffer(note 5) at 27. Crush (note 215) at 106. See also CORMSA (note 223) at 26.

refugees and asylum seekers. By permitting and not addressing such xenophobic attitude South Africa fails to fulfil its legal obligations outlined in Chapters two and three.[226] Moreover it contravenes the Durban Declaration which was issued in 2001.[227] This declaration was issued at a world conference hosted in the country, against racism, racial discrimination, xenophobia and related tolerance. According to the declaration any persecution against any identifiable group on racial, national, ethnic or other grounds...constitutes serious violations of human rights and in some cases qualifies as crimes against humanity.[228] Xenophobia is regarded as a form of discrimination which constitutes a serious violation of human rights and is therefore prohibited.[229]

4.1.2 Relationship between xenophobia and discrimination

Xenophobia is directly related to the discrimination suffered by refugees and asylum seekers and this poses another challenge for refugees and asylum seekers who need to access health care in South Africa's public health system. As a result of the xenophobic attitudes set out in the previous section, individual health care workers discriminate against refugees and asylum seekers. The discrimination is furthermore exacerbated by the fact that refugees and asylum seekers are easily identified by their documents. Refugees are identified by either section 24 permits or a maroon identity book issued by the DHA whilst asylum seekers are identified by a section 22 permit.[230] Both groups do not possess a South African green bar coded identity document used by citizens. Therefore, health care workers bearing xenophobic attitudes exclude refugees and asylum seekers by requesting the South African green bar coded identity document for a patient to be treated.[231] It is frontline personnel such as clerks and nurses who are most likely to turn refugees and

---

[226] See section 2.2 and 3.1.3.
[227] The Durban Declaration of 2001. Available at http://www.un.org/WCAR/durban.pdf [Accessed 24 June 2010].
[228] Ibid.
[229] The Durban Declaration of 2001 (note 227).
[230] These documents are issued in accordance to the Refugee Act No 130 of 1998.
[231] CORMSA 2007 (note 217) at 36. The CORMSA report of 2007 is based on in depth interviews conducted in person and on the telephone with officials in Johannesburg, Pretoria, Durban, Cape Town, and Port Elizabeth and in border areas near Mozambique and Zimbabwe. Among other things the report reviews compliance with recommendations of the 2006 report which highlighted the gaps between the obligation of the state and the implementation of the policies.

asylum seekers away because once contact with a doctor has been made treatment is easily accessed.[232]

In its annual report of 2007, CORMSA exposed the discriminatory practice of health care workers.[233] Following the NGO reports highlighting differentiation between citizens and non citizens, the South African government took some action. In fulfilling its obligation to respect the right of access to health care the NDOH issued a memorandum in 2007 clarifying that possession of a South African identity booklet is not a pre-requisite for eligibility for ART.[234] However in as much as the NDOH issued this memorandum in 2007, the 2008 and 2009 CORMSA report highlighted that the discriminatory practice is still being carried out at several health facilities.[235] According to the HRW report of 2009 asylum seekers are refused care for basic and emergency treatment, including patients with acute TB and women in labour because they lack South African identity documents or simply for being foreign.[236] HRW also interviewed women with high risk pregnancies, children with diabetes, young men with acute TB whose conditions worsened because health care was difficult to assess.[237]

LHR also observed that front line staff and nursing staff is generally discriminatory and highlighted that some of their clients refuse to go to certain hospitals because of such treatment.[238] One of the conditions of legal status as an asylum seeker is a prohibition to return to home countries. Research has shown that asylum seekers are prepared to go home when they fall sick which is a strong indication of the fact that they lack faith in health care services in South Africa.[239]

---

[232] CORMSA 2007 (note 217) at 36.
[233] CORMSA 2007 (note 217).
[234] See note 19.
[235] HRW report of 2009 and the CORMSA report of 2008. The CORMSA report of 2008 highlights that the challenges presented in the 2006 and 2007 report persist despite the introduction of the NDOH 2007 directive.
[236] Schaeffer (note 5) at 8. HRW conducted research in Musina, Pretoria, Cape Town and surrounding municipalities between October and November 2008 and again in Musina and Johannesburg for two weeks in March to April 2009. They interviewed refugees, asylum seekers researchers, lawyers, government workers and officials working at health facilities. Refugees and Asylum seekers interviewed were from Zimbabwe, Somalia, democratic Republic of Congo, Ethiopia, Rwanda, Uganda and Burundi.
[237] Ibid.
[238] Kaajal Ramjathan-Keogh (LHR) 'Observations RE Migrants Access To Health Care' in J Veary *Challenges to the Implementation of policy to protect the right of access to health for all in South Africa*. Available at http://www.cormsa.org.za [Accessed 24 May 2010].
[239] CORMSA (note 223) at 40.

Furthermore it was reported that the hospital staff refuses to treat the children of refugees and asylum seekers despite the fact that their parents are in possession of a permit.[240]

Anecdotal evidence has also pointed to several instances of verbal harassment. A medical student at Witwatersrand University witnessed nursing staff at the Hilbrow Community Health Care clinic shouting at foreign mothers who had brought their babies for immunization.[241] At the same clinic a Congolese patient in labour was instructed to stay in a chair despite extreme discomfort and was only allowed onto the bed minutes before she delivered.[242] Refugees and asylum seekers are also pre maturely discharged, deliberately made to wait longer queues in order to accommodate citizens and sometimes referred to as 'makwerekwere'.[243] The fact that these discriminatory practices are still being practiced at some public hospitals shows that the legal principles governing the right of access to health care are not being applied diligently. The conduct of the health care workers is inconsistent with the rule of law discussed in Chapter three.[244] The health care workers arbitrarily use their power to deprive refugees and asylum seekers their right and undermine the rule of law. At the core of the rule of law is the principle of legality which requires that any exercise of public power be authorized by law. [245] South Africa has a duty to ensure that the rule of law is upheld.

4.1.3 Facility level policy decisions

The continuous practice of discrimination against refugees and asylum seekers is a result of the fact that some public health facilities generate their own guidelines and policies that counter national legislation. This is yet another obstacle that refugees and asylum seekers encounter in their attempt to access health care services. The effect of these facility level policy decisions is that there is no uniform

---

[240] Keogh (note 238) at 15.
[241] Statement from a Witwatersrand University in J Veary, 'Challenges to the Implementation of policy to protect the right of access to health for all in South Africa'.
Available at *http://www.cormsa.org.za* [Accessed 24 May 2010].
[242] Ibid.
[243] Schaefer (note 5) at 55.
[244] See Chapter 3, section 3.2.
[245] David Dyzenhaus 'The Pasts and Future of the Rule of Law in South Africa'. Available at http://*www.yale.edu/macmillan/apartheid/dyzenhausp2.pdf* [Accessed 24 August 2010].

application of the policies protecting refugees and asylum seekers in South Africa.[246] South Africa is failing to comply with the law as set out by legislation and supporting policies. These public health facilities continue to demand South African identity documents denying refugees and asylum seekers access to health.[247] Refugees and asylum seekers are referred to NGO's creating a dual health care system of which NGO's can only assist them to a certain extent as their facilities cannot parallel those of hospitals.[248] These facility level policy decisions create another rule of law problem since existing rules, laws and policies are ignored and replaced with made up ones. One of the principles inherent in the rule of law is the principle of uniformity.[249] It requires that the law should be applied consistently and as it stands.

4.1.4 User Fees

Related to discrimination are the foreign fees that refugees and asylum seekers are charged at health care facilities. As mentioned before, health care workers identify refugees and asylum seekers by their documents. It is therefore easy for them to demand that refugees and asylum seekers pay foreign fees in order to be treated. These foreign fees are a barrier to the full realisation of the right to access health care services. The right of the two groups is limited since they have to raise money demanded at the public health facility which may vary from one facility to another in order to get treatment. Those who cannot raise enough money are therefore excluded from accessing health care services. These foreign fees are in contravention of section 27(g) of the Refugee Act which guarantees refugees and asylum seekers the same right of access to health care services as that of citizens.

In 2007, in their attempt to protect the right of these two groups the NDOH issued a revenue directive confirming that refugees and asylum seekers with or without a permit have the same rights as South Africans to access free basic healthcare and ART in the public sector.[250] According to this directive refugees and asylum seekers with or without a permit shall be accessed according to the MEANS

---

[246] Cormsa (217) at 42.
[247] Migration and Health in South Africa (note 104) at 23.
[248] Cormsa (note 217) at 39.
[249] G Devenish 'The rule of law revisited with special reference to South Africa and Zimbabwe' (2004) *TSAR* at 675.
[250] See note 20.

test.[251] The MEANS test was briefly described in the previous chapter. This MEANS test takes into account the type of care and the income level of the patient.[252] Patients are divided into full paying patients who are charged the full cost of care and subsidized patients who are provided a range of subsidies and fee waivers according to a means based test.[253] A limited number of services are provided free of charge on a statutory basis and these include HIV, TB, sexually transmitted diseases [STDs], cholera, malaria, meningitis, malnutrition, pre-natal and early childhood health care.[254] Refugees are eligible for subsidized health care on the same fee schedule as South African citizens and the directive also reiterated this fact.

Despite the fact that this directive was issued in 2007 it has been reported that some health care providers continue to charge refugees and asylum seekers foreign fees. In 2008 in its report on the observations of migrant's access to health care LHR reported that refugees and asylum seekers with permits are still being asked to pay foreign fees at state hospitals. The NGO reported that they are asked to usually pay a deposit of R 1 800 which can increase depending on the kind of treatment required.[255] In its 2009 report on the humanitarian crisis in Musina, CORMSA highlighted the fact that many Zimbabwean nationals are charged excessive fees of R500 as though they are private patients.[256] Even though concerns have been raised this practice continues to exist within public hospitals. HRW also interviewed refugees and asylum seekers who reported being charged R20-R1800 for basic consultation fees.[257] This shows that what is happening on the ground is not what the legal principles demand. The continuous demand of these foreign fees also raises a rule of law problem as mentioned in the previous section. Health care

---

[251] Ibid.
[252] South Africa Department of Health, Explanation of the Current Policy Regarding Classification of Patients for the Determination of Fees June 14 2005. Available at *http://www.doh.gov.za programmes/upfs/docs/annexureH.pdf* [Accessed 24 August 2010].
[253] Ibid.
[254] South Africa Department of Health (note 252).
[255] Keogh (note 238) at 15.
[256] CORMSA 2009, 'Report to the government of the Republic of South Africa on the Humanitarian Crisis in Musina, South Africa 23 February 2009 at 15 Available at *http://www.cormsa.org*. [Accessed 25 May 2010]. The 2009 report is based on a visit to Musina from the 10th to the 12th of February 2010 during which CORMSA met other civil society organisations including Lawyers For Human Rights, Musina Legal Advice Office, international organisations including United Nations High Commission for Refugees (UNHCR), IOM, Doctors without borders as well as provincial and national Offices of the South African Human Rights Commission.
[257] Schaeffer (note 5) at 68.

workers continue to make up their own hospital fees despite the existing policy thereby undermining the rule of law.

4.1.5 Language

Refugees and asylum seekers in South Africa originate from many different countries including Somalia, Democratic Republic of Congo, Rwanda, Ethiopia and Zimbabwe. The majority cannot speak any local language and have difficulties expressing themselves in English. The lack of effective communication inhibits the full realisation of the right of access to health care for these two groups. Language is interrelated to discrimination, once health care providers become aware that the patient in front of them cannot speak any local language they treat them differently. It is used as a marker of belonging, an indicator of who belongs to the country and from the first interaction refugees and asylum seekers are positioned as not belonging to the country.[258] Therefore when they call for an ambulance they experience delays or no response at all.[259] Such delays or lack of responses as well as the other problems discussed in the sections below also occur with South Africans especially poor South Africans. However I submit that with regard to refugees the problem is exacerbated by xenophobia and the discrimination that goes with it.

Due to the lack of effective communication there is a risk that the doctor may misunderstand the patient and may thereby fail to correctly diagnose them. Likewise the patient may also fail to understand the doctor's questions and concerns to establish what he or she is suffering from. The risks associated with the lack of effective communication are acute in emergency situations.[260] Some refugees and asylum seekers are accompanied by interpreters, however given the long queues at the hospitals getting an interpreter who will be willing to wait the whole day is difficult.[261] A Canadian case, *Eldridge v. British Columbia*[262] dealt with the need to provide sign interpreters to deaf patients in order to treat people with disabilities

---

[258] Migration and Health in South Africa (note 104) at 23.
[259] Human Rights Watch Interview with Tsonga, founder, African Bureau of HIV/AIDS, Cape Town November 2008 in Schaefer (note 5) at 54.
[260] *Eldridge v. British Columbia* [1997] 3 S.C.R. 624 at para 69.
[261] Some of these interpreters will need to report for work.
[262] *Eldridge v. British Columbia* (note 260). South African courts can take foreign case into account when interpreting the Bill of Rights according to section 39(1) (b) of the Constitution.

equal when it comes to the provision of health care. In this case the court found that sign language interpreters were necessary for effective communication in the delivery of medical services and that the failure to provide them constitutes a denial of the right to equality.[263] I submit that effective communication is an integral part of the provision of health care services in South Africa. Interpreters are necessary as they enable refugees and asylum seekers to assert their right effectively. The lack of interpreters creates a situation whereby refugees and asylum seekers are unable to communicate effectively. Given that they cannot communicate effectively refugees and asylum seekers do not receive the same health care services as citizens which they are entitled to. For citizens an effective means of communication is readily available. In order for the refugees and asylum seekers to receive health care services they have to bear the burden of paying someone. The failure to provide interpreters constitutes a violation of the right to equality.

Moreover asking any ordinary person without training to be an interpreter can hinder effective access to health care services where confidential issues are concerned. Interpreters have to be sensitive to the patient's issues and some women are not comfortable discussing their reproductive health issues with a male person. Furthermore some of the cultures of these refugees and asylum seekers will hinder discussing health related issues with outsiders. South Africa has a duty to address this problem in order to enable refugees and asylum seekers to assert their right of access to health care. Without an interpreter there is no meaningful access to health care services for the two groups.

4.1.6 Insufficient Resources.

Another obstacle that is encountered in attempting to assert the right of access to health care is the lack of sufficient resources. Public health care facilities are overstretched and under resourced in terms of the staff and budget. The lack of sufficient resources also forms the basis of the perceptions and the negative attitude that is adopted towards non citizens. Refugees and asylum seekers are harassed due to the frustration of the health care providers. Refugees and asylum seekers are seen as getting a share of what does not belong to them since they form the population that is unaccounted for in health budgeting. According to the Public

[263] *Eldridge v. British Columbia* (note 260) at para 95.

Information Officer for Musina Hospital the provincial government gives them a budget based on an estimated population but with foreigners the population becomes twice as large hence there is a need to increase the resources.[264]

Hospitals with large migrant populations have unexpected duties since their budgets and services fail to meet the demands of changing and often growing populations.[265] HRW reported that front line health care staff describe their workload as too great and perceive cross border migrants as the cause.[266] Since South African citizens already have difficulties accessing health care due to the resource and capacity constraints refugees and asylum seekers are discriminated against. Citizens are prioritised and refugees and asylum seekers are sometimes discharged early in order to accommodate citizens. In other cases they are not treated immediately when they seek treatment but are only diagnosed later. I submit that when the state provides a benefit it must not do so in a discriminatory manner. It is important to note that when treated well into the development of a disease care is more expensive and sometimes the treatment is less effective.[267] The effect is that refugees and asylums seekers end up being dependent upon the state which can be avoided by treating them at the appropriate time. Moreover allowing any segment of the population to remain marginalised and outside of social and legal protection puts everyone in the country at risk.[268]

4.1.7 Lack of adequate information

Another obstacle that hinders access to the right is the lack of information on health care services. It is important to note that some South Africans are faced with the same obstacle when accessing health care services. Despite this fact, this obstacle is relevant to this thesis considering that refugees and asylum seekers are migrants in a foreign country who are not familiar with the health care system and depend on the state's assistance. Some information is readily available to citizens and is written in English and the local languages. Since the citizens are able to communicate effectively they can easily ask for clarification on an issue that they do

---

[264] Human Rights Watch interview with Edward Malema, Public Information Officer, Musina Hospital, March 31, 2009 in Schaeffer (note 5) at 70.
[265] Migration and Health in South Africa (note 104) at 24.
[266] Ibid.
[267] Schaeffer (note 5).
[268] Cormsa (note 223) at 16. Communicable diseases such as TB will spread.

not understand. This obstacle for refuges and asylum seekers is exacerbated by the fact that they cannot read the local language and communicate effectively. As mentioned in Chapter three in order to fulfil the right of access to health care services the state should consider those who are vulnerable and address the challenges that limit or deny their right.[269] Furthermore in order for the measures adopted to pass the test they must meet the needs of the most urgent and vulnerable such as refugees and asylum seekers.

Refugees and asylum seekers in South Africa lack knowledge of the health risks they face, the services available to them and the scope of their right to obtain them.[270] According to the Welfare Co-ordinator of Scalabrini Centre, in Cape Town some refugees and asylum seekers are not aware of the fact that they have a right of access to health care.[271] HRW highlighted that rape survivors are not even aware of the life-saving post-rape emergency medical care and emergency contraception and post-exposure prophylaxis that is available to them.[272] As a result many of them rely on the intervention of advocates from NGO's to obtain access to emergency care.

Some refugees and asylum seekers lack knowledge of how the health care system works and will avoid clinics where they can get treatment by going directly to hospitals.[273] This lack of knowledge also contributes to the negative perception they have about the public health care system whereby when told by hospital staff to go to a more appropriate facility they perceive that they are being denied treatment.[274] Language problems mentioned above together with inadequate information makes it difficult for the two groups to lodge complaints about the treatment which would actually help health care management to hold staff accountable.[275]

The health care providers are also not fully informed about the rights of refugees and asylum seekers and the policies governing these rights. There is no clarity and explanation of the MEANS test in relation to refugees and asylum

---

[269] TAC (note 126) at para 43.
[270] Schaeffer (note 5) at 8.
[271] Human Rights interview with Barbara Ngodwana, Welfare Coordinator, Scalabrini Centre, Cape Town, and November 17 2008 in Schaeffer (note) at 61.
[272] Schaeffer (note 5) at 9.
[273] At the public hospitals when genuinely asked for a referral letter they conclude that they are being turned away without any assistance.
[274] Human Rights interview with Jo Veary FMSP at the University of Witwatersrand in Schaeffer (note 5) at 62.
[275] Schaefer (note 5) at 63.

seekers.[276] Useful guidelines for the ART provision among displaced population have been produced as a result of collaboration between UNHCR and the South African HIV Clinicians Society to supplement the NDOH- ART guidelines. However in practice knowledge of these guidelines is currently limited.[277] Some health care providers are not familiar with the different documentation that non citizens possess hence there is confusion.[278] Furthermore, the 2007-2011 National Strategic Plan (NSP) for HIV & AIDS and STI's, use the terms "asylum seeker", "refugee" and foreign migrant interchangeably which is an additional source for confusion.[279]

In 2006 the National Consortium for Refugee Affairs stated that there was continuous ambiguity surrounding the rights of refugees and asylum seekers to access anti-retroviral treatment (ART) for HIV/AIDS. CORMSA also highlighted that this was still problematic in its report of 19 June 2007.[280] Confusion exists amongst health care providers as to the rights and the fees that refugees and asylum seekers are entitled to pay. In order to clear this ambiguity in September 2007 the NDOH issued a memorandum stating that the criteria used to identify patients eligible for ART must be applied to all cases individually without discrimination and that patients without an identity document should not be denied such treatment.[281]

Despite this memorandum in its 2008 report the CORMSA report highlighted that non-citizens in need of ART including refugees and asylums seekers were still facing challenges in accessing ART within the public sector much as they did in 2006. According to the FMSP research in 2008 foreign patients reported being illegally denied ART and being charged extra legal and prohibitive user fees.[282] Following these reports the Gauteng Department of Health issued a letter reiterating that such a practice is unacceptable and emphasised that no patient should be denied access to health care services including access to ART irrespective of whether they have a South African identity or not.[283] Even after the letter was issued

[276] Keogh (note 238) at 15.
[277] CORMSA (note 223) at 42.
[278] Migrant and Health (note 104).
[279] Ibid at 34.
[280] CORMSA (note 217) at 36.
[281] See note 19.
[282] Veary (note 224).
[283] See note 21.

the practice is still being carried out which shows that South Africa is failing to comply with the law as it stands and contravening the rule of law.

4.2 Is South Africa fulfilling its legal obligations?

In Chapter two and three I stated that South Africa has an obligation to respect, protect, promote and fulfil its obligation according to South African law read with international law.[284] In this section it is important to highlight what South Africa is doing and what it is not doing in order to establish whether it is in contravention of its duties. With a view to meet its obligations as mentioned above the South African government issued the 2006 and 2007 memorandum which aim at respecting and protecting the right of access to health care. The 2006 memorandum that addresses access to health care services including ART regardless of whether or not one has a permit is an attempt to respect the right in accordance with section 7(2) of the Constitution. This memorandum was issued in order to ensure that discriminatory health care service providers desist from infringing the right and exposing it to unjustified interference.

Efforts have also been made to ensure that the right of access to health care of refugees is protected in terms of section 7(2). This is shown by the 2007 directive that was issued in order to clarify that refugees and asylum seekers should be assessed according to the means test. This directive ensures that refugees and asylum seekers are able to assert their right of access to health care effectively. I submit that the Gauteng letter that was issued in 2008 is an attempt to promote and fulfil the rights of refugees and asylum seekers. By stating that the practice of denying patients without a South African document access to health care services is prohibited the state took steps to ensure that refugees and asylum seekers can assert their rights easily. Therefore on paper South Africa has attempted to guarantee the rights of refugees and asylum seekers and its efforts should be acknowledged.

However South Africa cannot hide behind these good laws because in practice refugees and asylum seekers are denied their right which is guaranteed by the law as shown by the challenges mentioned above. The efforts of the South

[284] See section 2.2 and 3.1.3.

African government have not resolved the challenges as there has not been any implementation of the policies as will be shown in this section. Despite steps taken in Gauteng problems remain there and exist in all the other provinces as highlighted by the research of the NGOs undertaken in different provinces. The different challenges show its failure to respect, protect, promote and fulfil the rights of access to health care of refugees and asylum seekers. The conduct of health care providers is inconsistent with the law and I argue that by not addressing such conduct South Africa contravenes the rule of law.

The duty to respect[285] the right of access to health care of refugees and asylum seekers is not fulfilled given the xenophobic attitudes that some health care providers are reported to adopt towards refugees and asylum seekers. By discriminating against the refugees and asylum seekers seeking treatment the health care providers infringe on the right of these two groups. Furthermore by demanding that refugees and asylum seekers pay foreign fees the health care workers directly interfere with the realisation of this right. Any interference with the right of access to health care contravenes the duty to protect the right discussed in Chapter three.[286]

South Africa fails to create a framework within which refugees and asylum seekers can assert their right effectively without any interference. Refugees and asylum seekers as well as the hospital staff do not have adequate information pertaining to the right. The staff is not familiar with the documentation used by refugees and asylum seekers neither are they clear about the interpretation of the MEANS test upon which the fee schedule is based. Since 2006 NGO's have highlighted these challenges and the non compliance with the policies but these obstacles have not been addressed. Therefore the obligation to promote and fulfil the right of access to health care of refugees and asylum seekers is not met. The state fails to make access to the right of access to health care facilities for refugees and asylum seekers easier. No attempt is made to address the lack of effective communication which puts refugees and asylum seekers at a disadvantage.

[285] See Chapter 3 , section 3.1.2.
[286] See Chapter 3 , section 3.1.2.

As mentioned in Chapter three South Africa also has an obligation to uphold the rule of law[287] and ensure that everyone has equal access to the right of access to health care on an equal footing. [288] The fact that health care workers have continued to discriminate against refugees and asylum seekers despite the issuing of the memorandums clarifying the law raises a rule of law problem. Moreover some health care providers have gone to the extent of creating their own polices as mentioned in section 4.1.3 which shows that there is a disjuncture between laws and regulations and policies on one hand and its implementation on the other. The South African government has not addressed the discriminatory practices and non compliance with the law and policies protecting the right despite the reports of NGOs. Consequently, it has failed to comply with the rule of law and has in fact undermined it. Moreover the right to equality which is related to section 27(1) (a) as mentioned in Chapter 3 is not upheld. The state fails to ensure that refugees and asylum seekers are treated in the same way as citizens. By failing to address the language problem that refugees and asylum seekers face these two groups are not placed at an equal footing with citizens. South Africa fails to take steps to ensure that these disadvantaged groups benefit equally from services offered to the general public.

Refugees and asylum seekers in South Africa do not have full and equal enjoyment of their right of access to health care. Most of the obstacles mentioned above seem to be based on discrimination. The discrimination is as a result of the differentiation between citizens and non citizens which triggers the enquiry on unfair discrimination. The enquiry on unfair discrimination has been raised in cases which concern challenges to legislation considered to be discriminatory. In this case it is not the legislation that is discriminatory but the conduct of health care providers. The discriminatory conduct is based on citizenship which though not a listed in section 9(3) is analogous ground according to the *Khosa*[289] and the *Larbi Odam* [290]case as

[287] See Chapter 3 ,section 3.2.
[288] See Chapter 3 , section 3.2.
[289] *Khosa* (note 13).
[290] *Larbi-Odam* (note 115).

mentioned in the Chapter 3.[291] I submit that the discriminatory conduct against refugees and asylum seekers is prohibited by section 9 (3).

4.3 Conclusion

South Africa is failing to fulfil its legal obligations because what is happening in reality is not what the legal principles demand. The law is not being applied consistently and diligently. The challenges mentioned above undermine and reduce the right of access to health care services envisaged in section 27(1) read with section 9. Once the right has been infringed the end result can be death and to allow someone to die or suffer merely because they are non citizens is contrary to the values on which the South African constitution is based. South Africa is a state founded on the value of the rule of law amongst other values.[292] By failing to apply the law diligently the health care providers undermine the rule of law read together with section 27 and 9 of the Constitution. According to the *De Lange* case the rule of law requires that non citizens rely on the state for protection of their rights. Moreover the dignity of refugees and asylum seekers is undermined. South Africa is therefore failing to protect the rights of refugees and asylum seekers. It has a duty to address all the challenges mentioned in the chapter. Mere policies supporting legislation are not enough there is a need for the implementation.

---

[291] See Chapter 3 , section 3.

[292] Clipsal Australia (Pty) Ltd and Two Others v Gap Distributors (Pty) Ltd and Four Others 2008 Bip 339 (W) at para 21.

CHAPTER 5

RECOMMENDATIONS

5 Introduction

In this chapter I share my reflections on the realisation of the right of access to health care of refugees and asylum seekers in South Africa. I analyse the steps that the government has taken to ensure that this right is upheld and offer some recommendations as to how best it can be realised. Overall it has been difficult for refugees and asylum seekers to assert their right of access to health care due to the negative perceptions about them entrenched in the community. Their presence in the country is misunderstood if not for one reason then another. There is a lack of awareness of the fact that these two groups have been formally admitted in the country which means their presence is legal. In as much as refugees and asylum seekers are dependent upon the state for the protection of their rights their contribution to the country should not be underestimated. These two groups bring valuable skills and resources to South Africa and if these are properly managed they can promote the welfare of all living in the country as is done in other countries with a large migrant population.[293]

5.1 The steps that the government has taken

South Africa has an excellent and progressive legal framework that protects the rights of refugees and asylum seekers. In addition to the South African law read with international law the South African government has also issued supporting policy documents to protect the right of access to health care of refugees and asylum seekers. However, given the challenges that these two groups face, the two memorandums issued to support the legislation have not facilitated the full realisation of the right. In *Grootboom* the court held that merely adopting legislation and policies is not sufficient but that reasonableness requires that such laws and policies must be implemented in a reasonable manner.[294] The challenges encountered by these two groups show that their rights are protected and guaranteed on paper and yet in practice that is not the current state of affairs.

---

[293] CORMSA (note 223) at 8.
[294] *Grootboom* (note 48) at para 42-44.

Addressing this gap between legal norms and rules on the one hand and practice on the other, is not easy as it relates – at least partly – to the entrenched xenophobia that is also prevalent amongst health care workers who have to apply the legal norms and rules. Therefore in this chapter I offer some recommendations as to how best the right of access to health care for refugees and asylum seekers can be achieved. I offer ways in which the challenges addressed in the previous chapter can be addressed.

5.2 In response to xenophobia and discrimination

Xenophobic attitudes are deeply entrenched in the community and to be realistic such attitudes cannot easily be removed. Like any other social attitude or stereotype it will be a long time before such attitudes cease to exist. However it is important to note that not every health care worker bears such a xenophobic attitude towards refugees and asylum seekers.[295] In order to address xenophobia, staff from the DOH should be made aware of the Durban Declaration which prohibits xenophobia and discrimination. Knowledge of the Declaration will ensure that the staff becomes aware of the fact that xenophobia constitutes a serious violation of human rights and contravenes the law. Therefore the government should carry out workshops and campaigns aimed at combating xenophobia and discrimination in the health sector in order to establish new perceptions. By educating these health care workers the South African government will ensure that the rights of refugees and asylum seekers are not infringed thereby fulfilling its obligation to respect and protect the right of access to health care.

The right of access to health care is interrelated with other rights as mentioned in the previous chapters. Therefore staff from other departments including DHA, SAPS and the Department of Social Services (DSS) should also participate in these workshops. Targeting such groups who work closely with refugees and asylum seekers will result in an overall positive change since these individuals can in turn also educate other people in their social circles. This will ensure that the right of access to health care is promoted as required by the law.

---

[295] For example research revealed that the Helen Joseph hospital was found to be treating all patients foreign and local in the same manner with regards to access to ARV services.[295] See Keogh (note 238).

Furthermore the staff should also be educated about the legal status of refugees and asylum seekers who are entitled to the full and equal enjoyment of their rights according to section 9 of the constitution. There is also a need to highlight that discriminating on the basis of citizenship contravenes the constitution. This will ensure that the staff becomes aware of the fact that these two groups are protected by the constitution and that all conduct should be consistent with the rule of law and respect their right to human dignity mentioned in Chapter three.[296]

The significant role that NGO's have in combating xenophobia should not be underestimated. Protecting and promoting the rights of refugees and asylum seekers is definitely in their interest as this is their common mandate. Moreover given the heavy reliance on these civil society organisations by the two groups for the protection of their rights the government should maintain a good relationship and work together with these organisations.[297] NGO's as highlighted in Chapter 1 [298] can offer useful insights into the areas of concern from their experiences with the refugees and asylum seekers. Moreover they can also offer resources necessary to educate and train the DOH staff.

5.3 In response to Facility Level Policy Decisions and User Fees

By denying refugees and asylum seekers their right of access to health care South Africa fails to fulfil its obligations as set out by South African law read with international law. Chapter four highlights that there is no consistency in the application of the legal principles governing the right of access to health care of refugees. Facility level policy decisions that are inconsistent with legal principles have been adopted despite the issuing of the memorandums affirming the rights of refugees and asylum seekers. The rule of law is undermined as refugees and asylum seekers are continuously charged foreign fees which vary from one health care facility to another despite the policy directive. In order to ensure that South Africa fulfils its obligation to promote and fulfil the right, health care providers should be held accountable for their actions. Within the health sector disciplinary committees should be formed in order to address non compliance and any

[296] See Chapter 3, section 3.2.
[297] CORMSA (note 223) at 2008.
[298] See Chapter 1, section 1.3.

contravention of the law.[299] These committees can set procedures on how they operate and make this information available to the management. They can also establish a complaints mechanism which they can follow up and make investigations as well as consider the reports of NGOs. Furthermore there is need for the implementation of the policy hence health care providers can be requested to submit reports every month and a monitoring body can be established to oversee the activities of the facilities.[300] By taking these steps the South African government will ensure that the rule of law is upheld and will also fulfil its duty to protect the right of access to health care.

5.4 In response to insufficient resources

Since the rights of refugees and asylum seekers are guaranteed by the constitution I argue that the resources within the country are also meant for them. The needs of refugees and asylum seekers should therefore be taken into account in the national budget. However in reality South Africa experiences resource constraints, the resources are not even enough for the citizens themselves.[301] The number of refugees and asylum seekers continuously changes which presents a problem with regard to the national budget. In order to have an effective health care system it is definitely unwise to deny refugees and asylum seekers their right of access to health care. Restricting their ability to access health care services which are interrelated with other socio economic rights only makes refugees and asylum seekers more dependent upon the state putting a constraint on the limited resources that are available.[302] Considering that diseases can spread easily it is in the interest of South Africans to prioritise, increase and improve health care services given to refugees and asylum seekers as well as developing treatment mechanisms.[303]

In order to fulfil its obligation to respect the dignity of refugees and asylum seekers resources have to be shared amongst everyone in the country and those with migrant based populations for example Musina, should be provided with

---

[299] Jo Veary (note 224).
[300] Schaefer (note 5) at 8.
[301] South African citizens as mentioned before also experience long queues at the public hospitals. The 2007 NDOH directive was issued to also help those citizens without documents.
[302] Schaefer (note 5) at 8
[303] Ibid.

financial resources.[304] The allocation of health care service resources must include effective access to health care services by the most vulnerable members of the community.[305] By taking urgent action in addressing this obstacle the government will meet its duty to promote and fulfil the right of access to health care services. Consequently, when considering health care services budget the enquiry should not be limited to the immediate cost of the treatment but also must concern the duration of the treatment and the long term savings if it's successful.[306]

5.5 In response to the lack of adequate information

It is a well known fact that knowledge is power. Therefore in order for the South African government to fulfil its legal obligation to promote and fulfil the right of access to health care it has to take the following steps. All health care workers in particular front line staff should be trained and educated about the rights of refugees and asylum seekers. They should be able to access all the relevant information pertaining to this right. Information including the different forms of permits used and guidance on how to interpret the MEANS test and its application to refugees and asylum seekers should be made available at the front desk.[307] A fee schedule highlighting the fees and the type of treatment it applies to can also be made available to ensure the promotion of the right. The information pertaining to the rights of these two groups should also be made available to the other departments working closely with them.

Not only should the information be made accessible to service providers, refugees and asylum seekers also require it in order to assert their rights. Pamphlets highlighting the rights of these two groups should be made available to them in languages common to them.[308] Moreover useful contact numbers can also be included on these pamphlets in case of any difficulties. Refugees and asylum seekers play an important role in ensuring that the government fulfils its obligations as set out by the law. Mechanisms allowing them to lodge complaints which the

---

[304] Schaefer (note 5) at 71.
[305] Cheadle (note 133) at 8.
[306] Ibid.
[307] Schaefer (note 5) at 8.
[308] Schaefer (note 5) at 11.

NDOH can follow up on should be established which will ensure that policies are implemented and adhered to.

5.6 In response to the lack of effective communication

According to *Eldridge v. British Columbia* effective communication is an indispensable component of the delivery of medical services.[309] Effective communication is vital to realising the right of access to health care. A wrong diagnosis due to a lack of understanding of the patient's symptoms has an adverse impact upon a patients well being. In order to ensure that refugees and asylum seekers equally access health care services as required by section 9 read with section 27(1(a) the South African government should take the following steps. It should employ interpreters who are able to speak languages common to the refugee and asylum seeker community. These interpreters should be trained to take into account the different cultures, to be patient, sensitive and also sign confidentiality agreements. The South African government can also rely on NGO's whose work can hardly ever be achieved without the help of interpreters.

5.7 Conclusion

Having one of the most progressive constitutions that protect the rights of refugees and asylum seekers alongside those of citizens does not necessarily materialise into successful implementation of the rights. The legal framework governing the rights of refugees and asylum seekers looks good on paper and yet in practice the rights guaranteed are far from being achieved. Since 2006 NGO's have been highlighting the gaps between the law and what is happening in reality. Fortunately all the challenges that hinder refugee and asylum seeker access to health can be addressed in various ways. It is therefore time for South Africa to address the challenges experienced on the ground once and for all by embarking on a National Campaign to achieve the full realisation of the right of access to health care. This can certainly be achieved by working together with NGO's and any other interested organisations who are concerned with the rights of refugees and asylum seekers.

---

[309] Eldridge v. British Columbia (note 260) at para 72.

Bibliography

Primary Sources

South African Cases

Clipsal Australia (Pty) Ltd and Two Others v Gap Distributors (Pty) Ltd and Four Others 2008 Bip 339 (W).

De Lange v Smuts 1998 (3) SA 785 CC.

Government of the Republic of South Africa and Others v Grootboom and Others 2000 (11) BCLR 1169 (CC).

Khosa and Others v Minister of Social Development and Others; Mahlaule and another v Minister of Social Development and Others 2004 (6) BCLR 569 (CC).

Larbi-Odam and Others v Member of the Executive Council for Education and Another 1997 (12) BCLR 1655 (CC).

Lawyers for Human Rights v Minister of Home Affairs 2004 (4) SA 125 (CC).

Minister of Health and Another v New Clicks (Pty) Ltd and Others 2006 (8) BCLR 872 (CC).

Minister of Health and Others v Treatment Action Campaign and Others 2002 (5) SA 721 (CC).

Minister of Home Affairs and Others v Dawood and Another 2000 (1) SA 1074 (C).

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

Foreign Cases

Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624.

Statutes

Constitution of the Republic of South Africa Act No 108 of 1996.

Occupational Health and Safety Act No 85 of 1993.

South African Immigration Act No 13 of 2002.

Social Assistance Act No 59 of 1992.

The National Health Act No 61 of 2003.

The Refugee Act No 138 of 1998.

Secondary Sources

Books

Woolman, Stuart; et al Constitutional *Law of South Africa* volume 1 2ed (2009) Juta and Company Limited, Cape Town.

Woolman, Stuart; et al Constitutional *Law of South Africa* volume 2 2ed (2009) Juta and Company Limited, Cape Town.

Woolman, Stuart; et al Constitutional *Law of South Africa* volume 3 2ed (2009) Juta and Company Limited, Cape Town.

Journals

Chaskalson, Arthur 'Human Dignity as a Value of Our Constitutional Order' (2000) 16 *South African Journal on Human Rights* 193.

Chirwa, Danwood M 'International Law: Its Implications for the Obligations of State and Non State Actors in Ensuring Access to Essential Medicine' (2003) 19 *South African Journal on Human Rights* 541.

Crush, Jonathan 'The Dark Side of Democracy: Migration, Xenophobia and Human Rights in South Africa' (2001) 38 *International Migration* 103.

De Vos, Pierre 'Pious Wishes or Directly Enforceable Human Rights: Social and Economic Rights in South Africa's 1996 Constitution' (1997) 13 *South African Journal on Human Rights 67.*

Devenish, George 'The rule of law revisited with special reference to South Africa and Zimbabwe' (2004) *TSAR.*

Electronic Articles

Cheadle, M H et al 'Health' in South African Constitutional Law: The Bill Of Rights'. Available at http://butterworths.uct.ac.za/ [Accessed on 12 March 2010].

Consortium for Refugees and Migrants in South Africa, 'Protecting Refugees and Asylum Seekers in South Africa, 2007'. Available at http://www.cormsa.org.za [Accessed 24 June 2010].

Consortium for Refugees and Migrants in South Africa, 'Protecting Refugees and Asylum Seekers in South Africa, 2008'. Available at http://www.cormsa.org.za [Accessed 24 June 2010].

Consortium for Refugees and Migrants in South Africa , 'Report to the government of the Republic of South Africa on the Humanitarian Crisis in Musina, South Africa 23 February 2009'. Available at http://www.cormsa.org [Accessed 25 May 2010].

De Vos, Pierre 'The right to housing' Available at

http://www.chr.up.ac.za/centre_publications/.../Chapter%203-Housing.pdf [Accessed 13 May 2010].

Dyzenhaus, David 'The Pasts and Future of the Rule of Law in South Africa'. Available at http://www.yale.edu/macmillan/apartheid/dyzenhausp2.pdf [Accessed 24 August 2010].

International Organisation For Migration, Regional Office for Southern Africa (IOM) Pretoria) 'Migration and Health In South Africa: Background paper for the National Consultation on Migration Health in South Africa, Working Document April 2010'. Available at http://www.migration.org.za [Accessed on 24 May 2010].

Mc Leod, H D 'Mutuality and Solidarity in Health Care in South Africa'. Available at http://www.actuarialsociety.org.za [Accessed on 10 August 2010].

National Consortium for Refugee Affairs 'Summary of Key Findings: Refugee Protection in South Africa, 2006'. Available at http://www.cormsa.org.za [Accessed 24 June 2010].

Palmary, Ingrid 'For Better Implementation of Migrant Children's Rights in South Africa 2009'. Available at http://www.globalmigrationgroup.org [Accessed 24 June 2010].

Riedel, Eibe 'The Human Right to Health: Conceptual Foundations'. Available at http://www.swisshumanrightsbook.com [Accessed 24 May 2010].

Schaeffer, Rebecca 'No Healing Here Violence, Discrimination and Barriers to Health for Migrants in South Africa' by Human Rights Watch December 2009'. Available at http:www.hrw.org/en/node/86959/section/1 [Accessed on 4 January 2010].

United Nations High Commissioner for Refugees & World Health Organisation

'Fact Sheet No 31: The Right to Health'. Available at http://www.ohcr.org/Documents /Publications/Fact Sheet 31.pdf [Accessed 28 April 2010].

Veary J 'Foreign Migrants and the South African Health Care System: Ensuring the Right to Health is upheld for all'. Available at http://www.cormsa.org.za [Accessed 24 June 2010].

Weissbrodt, David 'The Rights of Non Citizens' Available at http://www.ohcr .org/Documents /Publications/noncitizensen.pdf [Accessed 4 May 2010].

Other Electronic Sources

Department of Health 2001 District Health System in South Africa Progress Made and Next Steps. Available at http://www.doh.gov.za/docs/policy/dhsystem.html [Accessed on 12 July 2010].

Gauteng Department of Health Letter, 04 April 2008.

Available at http://www.iom.org.za/site/index [Accessed 24 June 2010].

News-South Africa: Ten arrested for xenophobic violence. Available at http://www.iol.co.za/index [Accessed 1 August 2010].

National Department of Health Memo February 2006. Available at http://www.iom.org.za/site/index [Accessed 24 June 2010].

National Department of Health Memo BI 4/29 REFUG/ASYL 8 2007, 19 September 2007. Available at http://www.iom.org.za/site/index [Accessed 24 June 2010].

Reference Works, Indexes Dictionaries and Diaries 'The rule of law'. Available at *http://www.lexisnexisbutterworths.co.za* [Accessed on 30 August 2010].

South Africa Department of Health, Explanation of the Current Policy Regarding Classification of Patients for the Determination of Fees June 14 2005. Available at http://www.doh.gov.za/programmes/upfs/docs/annexureH.pdf [Accessed 24 August 2010].

The HIV and AIDS and STI Strategic Plan for South Africa 2007-2011. Available at http://www.doh.gov.za/docs/misc/stratplan-f.html [Accessed 24 June 2010].

The Durban Declaration of 2001. Available at http://*www.un.org/WCAR/durban.pdf*[Accessed 24 June 2010].

United Nations High Commissioner For Refugees 'Definitions and Obligations - Basic Definitions'. Available at www.unhcr.org.au/basicdef.shtml [Accessed on 15 February 2010].

Treaties and Conventions

African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October, 1986.

African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), adopted 11 July 1990, entered into force 29 November, 1999.

Convention on the Elimination of All Forms of Discrimination against Women 34/180, GA Res, adopted18 December 1979 ,entry into force 3 September 1981.

Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 UNTS. 45, adopted 10 December 1969 entered *into force* June 20, 1974.

Convention on the Rights of the Child, adopted November 20 1989,G.A.Res.44/25, U.N.Doc A/REX/44/25, entered into force September 2, 1990.

Convention relating to the Status of Refugees, 189 UNTS 150, adopted 28 July 1951, entered into force April 22, 1954.

International Covenant on Civil and Political Adopted December 16, 1966, G.A Res.2200A (XX1), 21 U.N .GAOR Supp. (NO.16) at 52,U.N.Doc.A/6316 (1966), 999 U.N.T.S .171,adopted 10 December 1966, entered into force March 23, 1976.

International Convention on the Elimination of All Forms of Racial Discrimination, GA Res 2106 (XX), Annex, 20 UN. GAOR Supp (No. 14) at 47, UN Doc A/6014 (1966), 660 UNTS 195, adopted 21 December 1965, entered into force 4 January 1969.

International Covenant on Economic, Social and Cultural Rights (ICESCR) adopted December 16, 1966, G.A. Res.22000A(XXI), 21 U.N GAOR Supp. (No.16) at 49, U.N, Doc A/6316(1966),993 UNTS.3, entered into force January 3,1976.

Statute of International Court Of Justice

Universal Declaration of Human Rights GA res. 217A (III), UN Doc A/810 at 71 (1948).

Vienna Convention on the law of Treaties 1969, United Nations Treaty Series, vol.1155.

Soft Law

Committee on the Elimination of Racial Discrimination (CERD), General Recommendation No.30 'Discrimination Against Non Citizens' (2004), 2004/10/01.

Committee on the Elimination of Racial Discrimination (CERD), General Recommendation No. 32 'The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination' (2009), 2009/09/24.

Committee on Economic Social and Cultural Rights (CESCR), General Comment No 14 'The Right to the Highest Attainable Standard of Health' (2000) E/C.12/2002/11

Committee on Economic Social and Cultural Rights (CESCR), General Comment No 20 'Non-discrimination in economic, social and cultural rights (art. 2, para. 2) (2009) E/C.12/GC/20.

Human Rights Committee, General Comment No 15 'The position of aliens under the Covenant' (1986) 1986/04/11

Human Rights Committee, CCPR, General Comment No. 18: Non-discrimination, 10 November (1989), 1989/11/10.

Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights E/CN.4/1987/17.