

Constitutional provisions for the right to health in east and southern Africa

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Executive summary

The extent to which health rights are neglected or promoted is a major factor in the promotion of public health and health equity in Africa. As a result, health and human rights have been incorporated in international and regional human rights treaties and in national laws, policies and strategies. Central to the recognition of health rights is the incorporation of the right to health in the national Constitutions. The national constitutions are the supreme laws of the country and any law that is inconsistent with the provisions of the constitution is, to the extent of the inconsistency, of no force or effect. This means that observing a right as a constitutional right provides a bench mark for the government obligations to respect, protect, fulfil and promote the right to health.

This report presents a desk review of the constitutional provisions on the right to health in 14 countries in east and southern Africa (ESA) covered by EQUINET: Angola, Botswana, Kenya, Lesotho, Madagascar, Malawi, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Uganda, Zimbabwe and Zambia, one other country Congo Brazzaville. It does not cover two countries in the region covered by EQUINET, DRC and Mauritius, due to difficulties with accessing information. The review was carried out within the Regional Network for Equity in Health in East and Southern Africa (EQUINET) by the Center for Health, Human Right and Development, and co-ordinated by Training and Research Support Centre.

This paper used the six core obligations as spelt out in General Comment 14 to assess the inclusion of the right to health in the constitutional provisions of the ESA countries:

- to ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalised groups;
- to ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone;
- to ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water;
- to provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs;
- to ensure equitable distribution of all health facilities, goods and services; and
- to adopt and implement a national public health strategy and plan of action

In general, the analysis suggests that, although some Constitutions expressly provide for the right to health, many do not and this right is rather inferred from other rights.. In some countries the right to health is restricted to principles of State policy and objective and thus excluded from enforcement by courts of law, as is the case with Lesotho. South Africa is a unique case in the region, as its Constitution combines the right to health with other rights critical for its realisation, such as the right to food, to water and to social security.

Some countries provide for the right to medical services and health care, rather than the right to health, as in the Constitution of Mozambique. Madagascar's constitution makes reference to international human rights instruments that spell out the right to health. This means that even if the Constitution is silent on the right to health, the provisions of these international instruments can be invoked to remind the State of its obligations.

Most of the constitutions in the region capture the right to life as one of the fundamental human rights. Some permit taking life when enforcing the death penalty. Most also permit the limitation of other rights to ensure protection of public health and safety. In fact, for some countries, this limitation of rights in the public interest was the primary mention of health in their Constitutions.

We suggest that countries in the region review how other ESA countries have crafted the provisions on the right to health in their constitutions and familiarise with the relevant international human rights instruments, to inform their constitutional reform processes. We suggest some 'best practice' examples below from the constitutions in the region as an input to constitutional review processes (see page 21 for full details):

:

- With regard to the right of **access to health facilities, goods and services on a non-discriminatory basis**, Article 116 of Mozambique's Constitution:
- On **access to food** that is nutritionally adequate and safe, and to ensure freedom from hunger to everyone, Uganda Constitution, Objective XXII
- The South African Constitution provides good provisions **access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water**. In Section 26
- Section 27 of the South African Constitution provides for **health care, food, water and social security**.
- In terms of **equitable distribution of all health facilities, goods and services**, Section 116(4) of the Constitution of Mozambique.
- Regarding the **national public health strategy** addressing the health concerns of the whole population, Article 13(c) of the Constitution of Malawi could be a reference point.
- Almost all constitutions have general provisions on **prohibition of conduct injurious to health**. There range from restricting other rights to the most extreme form in the death penalty.

This study reviewed the law as written. We thus recommend that further study be done in those countries that have express provisions on the right to health on how they have implemented and enforced this right, including how advocates of health rights have subjected constitutional provisions to court interpretation. We also recommend further review of how rights to health are being dealt with in countries where they are not explicitly provided for in the national constitutions.

1. Introduction

The Regional Network for Equity in Health in East and Southern Africa (EQUINET) promotes policies for equity in health and supports research, training, analysis and dialogue to strengthen knowledge and to support policy engagement on the implementation of comprehensive, universal, national health systems in the region, centred on the role of the people and of the public sector. Through its work on values, policies and rights, EQUINET recognises that human rights have gained increased attention in development discourse internationally, but may pose potential contradictions to policies that seek to promote health equity. EQUINET thus explores the kind of rights approaches that are best suited to an equity agenda. This study informs the work of EQUINET on the right to health by examining the provisions on the right to health in the Constitutions of fifteen countries in the east, central and southern African region.

Health and human rights have been incorporated in international and regional human rights treaties and in national laws, policies and strategies throughout Africa. Central to the recognition of health rights is the incorporation of the right to health in national Constitutions. The national Constitutions are the supreme laws of the country, so that any law that is inconsistent with the provisions of a country's Constitution is of no force or effect in respect of the area of inconsistency. Observing health as a constitutional right provides a benchmark for government's obligations to respect, protect, fulfil and promote the right to health. As with other economic, social and cultural rights, the right to health may be incorporated in national Constitutions either as a positive right or as a directive principle of government policies. When the right to health is recognised as a positive right, it can be enforced in a court of law, as in the case of civil and political rights. In contrast, when it is a directive principle, the right cannot be enforced by the courts and constitutes rather a socio-economic objective to guide the government's actions. It is important to determine how the relevant constitutional provisions in east and southern African (ESA) countries have been drafted so that we may understand how they have protected the right to health and whether they are enforceable.

Two-thirds of Constitutions in the world have a provision addressing health or health care and, in almost all of these Constitutions, the provisions regarding health and health care are universal, rather than limited to particular groups (Kinney and Clark, 2004). While some countries in the east and southern African region have incorporated the right to health in their national Constitutions, activists in other countries, such as Kenya and Zimbabwe, are still lobbying to influence their governments to incorporate the right to health. Where the right to health is not incorporated in a country's constitution, activists and courts of law have referred to provisions in regional and international human rights instruments to advance the right to health. The International Covenant on Economic and Social Rights (ICESR) is one example of such an international human rights instrument. The ICESR Committee noted that state parties are obliged to satisfy minimum essential levels of each of the rights enunciated in the ICESR, including to primary health care (OHCHR, 1985).

To help States to implement the ICESR and fulfil their reporting obligations, General Comment 14 of the Covenant highlights the core obligations with regard to the right to health. It notes that these core obligations should include:

- access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalised groups;

- access to the minimum essential food that is nutritionally adequate and safe, to ensure freedom from hunger to everyone;
- access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water;
- provision of essential drugs, as defined according to the World Health Organization's Action Programme on Essential Drugs;
- equitable distribution of all health facilities, goods and services; and
- adoption and implementation of a national public health strategy and plan of action that is based on epidemiological evidence, that addresses the health concerns of the whole population, and that shall be devised, and periodically reviewed, in a participatory and transparent process (United Nations, 2000).

Comment 14 on the right to the highest attainable standard of health, which is found under Article 12 of the ICESR, states that every human being is entitled to enjoy the highest attainable standard of health needed to live with dignity. It notes that health is a fundamental human right that is inextricably linked to the realisation of other human rights, including the right to food, housing, work, education, human dignity, life, non-discrimination, equality, privacy, access to information and freedom of association, assembly and movement, as well as a prohibition against torture (ibid). Governments are not allowed to directly violate rights and they are also legally responsible for ensuring that rights are respected, protected and fulfilled, according to any human rights document they may have ratified. The comment points out that the realisation of the right to health may be pursued through many complementary approaches, such as the formulation of health policies, the implementation of health programmes developed by the World Health Organization (WHO), or the adoption of specific legal instruments (ibid). In this respect, it is essential for the right to health to be incorporated in every nation's Constitution to support a national commitment towards ensuring access to quality and affordable health care for all people, and to ensure the recognition and implementation of the right to health in all countries (Kinney and Clark, 2004). Constitutional provisions on the right to health can also serve as points of reference and advocacy tools for organisations working on the right to health in the countries covered.

Comment 14 notes the obligation of the government to 'protect' the right to health. This obliges government to adopt laws that ensure equal access to health care and health-related services provided by third parties. The obligation to 'fulfil' the right to health also requires governments to give sufficient recognition to the right to health in their national political and legal systems, preferably by way of legislation. This process starts with recognising the right to health in the national Constitution, as it is the supreme law of any country.

All the countries covered in this study have signed and ratified the ICESR, except Botswana and Mozambique, while South Africa has signed the agreement but not ratified it (United Nations, 1976). Some have embedded the right to health in their Constitutions, which acts as a point of reference for official policies and as a basis for protecting the interests of public health over individual rights and commercial interests. The constitutional provisions vary across the region and cover the areas of the ICESR and:

- the prohibition of conduct and activities injurious to health, for example, by limiting alcohol exposure;
- provision for specific programmes and services, like medical services and emergency care;
- provisions for the production of health resources, such as drugs;

- provisions for social financing of health;
- regulation of the quality of care; and
- regulation of the rights and relationships between health professionals, the community and the State.

2. Objectives

This study reviewed the constitutional provisions regarding the right to health in fourteen of the countries in ESA that are covered by EQUINET: Angola, Botswana, Kenya, Lesotho, Madagascar, Malawi, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Uganda, Zimbabwe and Zambia, and in Congo Brazzaville. Information from Democratic Republic of Congo and Mauritius which are also covered by EQUINET was not obtained.

We used the core obligations from the ICESR as a starting point for our investigation, ie General Comment 14 in the ICESR list of the following core obligations of the State:

- to ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalised groups;
- to ensure access to the minimum essential food that is nutritionally adequate and safe, to ensure freedom from hunger to everyone;
- to ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water;
- to provide essential drugs, as defined according to the World Health Organization's Action Programme on Essential Drugs;
- to ensure equitable distribution of all health facilities, goods and services; and
- to adopt and implement a national public health strategy and plan of action that is based on epidemiological evidence, that addresses the health concerns of the whole population, and that shall be devised, and periodically reviewed, in a participatory and transparent process (United Nations, 2000).

We also broadened the scope of the study by considering areas found in the constitutions not found in the ICESR, including:

- the prohibition of conduct and activities injurious to health;
- access to the minimum essential food that is nutritionally adequate and safe, to ensure freedom from hunger to everyone;
- access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water;
- non-discrimination;
- access to information;
- access to services, including medical services, emergency care and access to health facilities, goods and services on a non-discriminatory basis, and of regulated quality, especially for vulnerable or marginalised groups;
- social financing of health;
- the balance between the rights and duties of health professionals, the community and the State;
- equitable distribution of all health facilities, goods and services;

- existing national public health strategies and plans of action that are based on epidemiological evidence, that address the health concerns of the whole population, and that are periodically reviewed in a participatory and transparent process; and
- fundamental rights, including the right to life, the right to dignity and the right to integrity.

3. Methods

We conducted a desk analysis of the existing constitutional provisions on the right to health, covering fifteen of the sixteen countries in the ESA region that are included in EQUINET. We excluded Mauritius and DRC because their Constitutions were not accessible. We collected materials by visiting libraries, searching the internet using “right to health” and “constitution” generally and also downloaded the specific national Constitutions. We also obtained electronic versions of documents through email communication.

We faced a constraint in verifying whether the constitutions we accessed were the most recent versions in terms of inclusion of all amendments. We tried to ensure comprehensiveness of and use of most up to date versions of materials through expert peer review of the draft co-ordinated through TARSC.

The paper is presented as an outline of the contents of the constitutions of each country reviewed, followed by a summary synthesis and discussion on the scope of provisions and recommendations for constitution inclusion of the right to health.

4. Constitutional provisions for the right to health in ESA countries

4.1 Angola

The clearest provision on the right to health in the Constitution of Angola is Article 47, which requires the State to promote the measures needed to ensure the right of citizens to medical services and health, including child, maternity, disability and old-age care and care in any situation causing incapacity (Republic of Angola, 1992). It requires that private and co-operative enterprise in health, social welfare and social security should be exercised accordance with the law.

- Article 22 requires the State to respect and protect the life of all persons and prohibits the death penalty.
- Article 23 prohibits acts of torture or any other cruel, inhuman or degrading treatment or punishment on the citizens of Angola.
- Under Article 24, all citizens have the right to live in a healthy and unpolluted environment. This Article requires the State to take the requisite measures to protect the environment and national species of flora and fauna throughout the national territory to maintain ecological balance. It also provides that an action shall be punishable by law if it damages or directly or indirectly jeopardises conservation of the environment.
- Article 46 provides for the protection of the health of workers at work.

4.2 Botswana

Botswana’s Constitution has no express provision on the right to health but it does make provisions for 'protection from conduct injurious to health' and Article 4 makes provisions for

the right to life (Republic of Botswana, 1966). Article 4 provides that no person should be deprived of their life intentionally, except under the law in execution of a sentence passed in a fair trial by a Court of competent jurisdiction in respect of a criminal offence and if the conviction and sentence have been confirmed by the highest Appellate Court. Here it should be noted that, from the perspective of the right to health, enforcing the death penalty constitutes conduct that is not only 'injurious to health' but takes away the entire right to health of a person.

The Constitution also justifies eroding other rights to protect public health:

- Article 8 provides that some one's right to property can be taken away in the interest of public health and safety where the property is in a dangerous state that threatens the health of others.
- Article 9 justifies taking away rights to privacy of home and property in the interests of public health, while other articles similarly allow for the suspension of other rights, such as freedom of conscience (Article 11), freedom of expression (Article 12), freedom of assembly and association (Article 13), and freedom of movement (Article 14).
- Section 15(3) focuses on protecting fundamental rights and freedoms, states that no person should be discriminated against upon the grounds of race, tribe, origin, political opinions, colour or creed (Republic of Botswana, 1966).

As can be seen from the above, Botswana's Constitution makes little or no provision for the right to health, but makes provisions to limit rights, such as the rights to property and privacy, in the interests of public health.

4.3 Congo-Brazzaville

The major article on the right to health in Congo-Brazzaville's Constitution is Article 34 (Republic of Congo-Brazzaville, 1992). This Article points to the State as the guarantor of public health in the country. Under this provision, every citizen should have the right to a level of life sufficient to assure their health and well-being, as well as that of their families, which includes food, clothing, shelter, medical care and necessary social services. Article 34(2) provides that the right to create 'private socio-sanitation establishments' should be guaranteed. The provision calls for specific measures of protection to be undertaken for 'aged and handicapped people, coinciding with their physical and moral needs'. Article 46 guarantees the 'right to a healthy, satisfactory, and enduring environment' for the citizens of Congo-Brazzaville and imposes a duty on the citizens to defend it.

The Constitution also provides that the human person is 'sacred' and has the right to life (Article 10). The State has an absolute obligation to respect and protect its citizens. It confers to all citizens the right to their free development and the full flowering of their persons in psychological, intellectual, spiritual, material and social dimensions in respect of the rights of others, public order and good mores.

4.4 Kenya

The current Constitution of the Republic of Kenya has no specific provision on the right to health. However, it indicates that there are circumstances where other rights can be violated or taken away to prohibit conduct injurious to public health or safety. For instance, Article 72 states that one's property can be possessed by the State in the interests of public safety or

public health (Republic of Kenya, 2001). Other rights that can be taken away in the interest of public safety or health include freedom of expression, freedom of assembly and freedom of movement. As with Botswana's Constitution, Kenya's Constitution limits other rights in the interests of public health, for example rights that protect individuals, such as the right to be protected from having one's property searched without one's consent, and the right protecting one from being compelled to take an oath that is contrary to one's religion or belief.

Article 71(1) provides that no person can be deprived of their life intentionally, except under the law in execution of a sentence passed in a fair trial by a Court of competent jurisdiction in respect of a criminal offence, and only when the conviction and sentence have been confirmed by the highest Appellate Court. It prohibits torture, inhuman or degrading punishment or other treatment (Article 74), prohibits discrimination and provides that no law should make any provision that is discriminatory either of itself or in its effect (Article 82).

The Constitution was updated in 2009 when a harmonised Constitution of Kenya was drafted to replace the current Constitution and published by the Committee of Experts on Constitutional Review pursuant to Section 32(1)(a)(i) of the Constitution of Kenya Review Act, 2008 (Republic of Kenya, 2009). This draft Constitution, which has yet to be passed, introduces the right to health in the substantive provisions of the Kenyan Constitution. Article 62 provides that every person has the right to health, which includes the right to health care services, including reproductive health care. It further provides that no person may be refused emergency medical treatment.

The draft Constitution also has specific provisions on the rights to education (Article 63), housing (Article 64), food (Article 65), water (Article 66), and a clean and healthy environment (Article 67).

4.5 Lesotho

In the Constitution of Lesotho, the right to health is not provided for under the part regarding fundamental human rights and freedoms, but it is recognised under the part on principles of State policy. The Constitution notes that the principles of State policy form part of the public policy of Lesotho but are not enforceable by any Court. However, Section 25 states that, subject to the limits of Lesotho's economic capacity and development, the State can guide the country's authorities and agencies (including public authorities), in the performance of their functions to help them achieve progressively, by legislation or otherwise, the full realisation of these principles (Republic of Lesotho, 1993).

Section 25 makes provision for the protection of health. Under this Section, Lesotho is required to adopt policies aimed at ensuring the highest attainable standard of physical and mental health for its citizens, including policies designed to: help reduce stillbirth and infant mortality rates and promote the healthy development of the child; improve environmental and industrial hygiene; provide for the prevention, treatment and control of epidemic, endemic, occupational and other diseases; create conditions to ensure that everyone receives medical services and attention in the event of sickness; and improve public health.

There are a number of health rights-related provisions covered under the part concerning the principles of State policy, such as ensuring the provision of education (Section 28), safe

and healthy working conditions (Section 30b), and a sound and safe environment adequate for the health and well-being of the people of Lesotho (Section 36).

Under the section on fundamental rights and freedoms, the Constitution provides for the right to life (Section 5) and freedom from inhuman treatment (Section 8). These are important in ensuring prohibition of conduct injurious to the right to health. It is also clear under the Constitution that some freedoms and rights can be taken away to prohibit conduct injurious to health. These include respect for private and family life (Section 11) and a number of freedoms, such as freedom of movement, freedom from arbitrary search or entry (Section 10), freedom of conscience (Section 13), freedom of expression (Section 14), freedom of association (Section 16) and freedom of peaceful assembly (Section 15).

4.6 Madagascar

The Constitution of Madagascar was adopted on 19 August 1992, and amended in 1995 and 1998. It has an express provision on the right to health under Article 19 (Republic of Madagascar, 1992). Under this Article, the State recognises that each individual has the right to the protection of their health, starting from conception. However, it should be noted that this provision of the Constitution is brief and does not explain how the right to health can be realised.

Under Article 17 the State guarantees the individual's right to integrity and to dignity of one's person, as well as the right to full physical, intellectual and moral development. It could be argued that other rights, including the right to food and shelter, are implied in this Article. The Constitution makes an express provision that every child has the right to instruction and education, under the responsibility of the parents, respecting their freedom of choice. (Article 23) The State is required to organise public education, free and accessible to all and primary education is obligatory for all.

The preamble to the Constitution adopts a number of international human rights instruments that support the right to health as part of Madagascar's own law. Under the preamble, the International Covenants on Human Rights (United Nations, 1976), the African Charter on Human and Peoples' Rights (ACHPR, 2005) and the conventions concerning the rights of women and children are all considered an integral part of Madagascar's positive law.

4.7 Malawi

The right to health in Malawi's Constitution may be found under the provisions on the right to development made under Article 30 (Republic of Malawi, 1994). Under this Article, everyone has the right to development, namely economic, social, cultural and political development. Women, children and the disabled, in particular, should be given special consideration in the application of this right. The Article requires the State to take all necessary measures for the realisation of the right to development and such measures should include, among other things, equal opportunities for all to access basic health services, food, shelter, employment and infrastructure. The State is further required to take measures to introduce reforms aimed at eradicating social injustices and inequalities, to respect the right to development and to justify its policies in accordance with this responsibility.

In the Constitution, health is included as one of the Principles of National Policy (Principle 13c). Under this Principle, the State undertakes actively promote the welfare and

development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at providing adequate health care, commensurate with the health needs of Malawian society and international standards of health care. The State also undertakes to ensure adequate nutrition for all and to promote good health and self-sufficiency. It is also required to provide a healthy living and working environment for the people of Malawi.

4.8 Mozambique

The right to health is provided for under Article 89 of Mozambique's Constitution, which states that all citizens have the right to medical and health care, within the terms of the law (Republic of Mozambique, 1990). This Article also imposes a duty on all citizens to promote and protect public health. In addition, Article 81 introduces the right of popular action for all citizens to advocate the prevention, termination or judicial prosecution of offences against the public health.

Article 116 provides a crucial detail on the provision of health in Mozambique when it states that medical and health care for citizens should be organised through a national health system, which shall benefit all Mozambican people. The Article states that, to achieve the goals of the national health system, the law should establish the ways in which medical and health care is delivered.

This Article requires the State to encourage citizens and institutions to participate in raising the standard of health in the community and to promote the expansion of medical and health care and the equal access of all citizens to the enjoyment of this right. The State is responsible for promoting, supervising and controlling the production, sale and use of chemical, biological and pharmaceutical products and other forms of treatment and diagnosis. The Article further requires that medical and health care activities run by collective and private entities should be carried out in accordance with the law and be subject to the supervision of the State.

- Article 40 makes provision for the right to life. Under this Article, all citizens have the right to life and to physical and moral integrity, and they should not be subjected to torture or to cruel or inhuman treatment. This Article provides that there should be no death penalty in the Republic of Mozambique.
- Article 45 creates a duty towards the community and requires that every individual has a duty to defend and promote health.
- Under Article 85, workers have the right to protection, health and safety at work.
- Article 91 refers to the individual's right to a suitable home, and notes that it is the duty of the State, in accordance with national economic development, to create the appropriate institutional, normative and infra-structural conditions.
- Article 92 stipulates that consumers have the right to quality in the goods and services that they consume, to education and information, to the protection of their health, to the safeguarding of their economic interests and to reparation for damage.

4.9 Namibia

There is no express provision on the right to health in the Constitution of Namibia. Article 95, however, makes a general provision on the promotion of the welfare of the people of Namibia and it requires the State to actively promote and maintain their welfare by enacting

laws that ensure that the health and strength of workers, men, women and children are not abused and that citizens are not forced by economic necessity to enter vocations unsuited to their age and strength (Republic of Namibia, 1990). This Article requires the State to ensure consistent planning to raise and maintain an acceptable level of nutrition and standard of living for all Namibians, as well as to improve public health.

The Namibia Constitution also makes provision for the protection of the right to life. Article 6 requires that the right to life should be respected and protected, and prohibits the death penalty.

The Constitution has provisions on rights of specific groups of people where it makes mention of their right to health. For instance, under Article 15, children are entitled to be protected from economic exploitation and should not be employed in or required to perform work that is likely to be hazardous or to interfere with their health or physical, mental, spiritual, moral or social development.

In contrast, Article 98 provides that the economic order of Namibia shall be based on the principles of a mixed economy with the objective of securing economic growth, prosperity and a life of human dignity for all Namibians. The Article recommends that Namibian economy should be based on a number of forms of ownership, including public, private, joint public-private, co-operative, co-ownership and small-scale family ownership. It may be inferred that health is included under the requirement of ensuring the right to human dignity and that the forms of ownership listed above are conducive to developing and maintaining an adequate health system.

4.10 South Africa

The South African Constitution probably has one of the strongest provisions on the right to health. The right to health is covered under Article 27, together with rights to food, water and social security (Republic of South Africa, 2005). The Article provides that everyone has the right to have access to: health care services, including reproductive health care; sufficient food and water; and social security, including appropriate social assistance if they are unable to support themselves and their dependents. The Article requires the State to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights. The Constitution further stipulates that no one may be refused emergency medical treatment in public health facilities.

The Constitution makes substantive provisions on other rights, including the right to housing and to a clean, healthy environment.

- Article 24 provides that everyone has the right to an environment that is not harmful to their health or well-being and it requires the State to take reasonable legislative and other measures to prevent pollution and ecological degradation.
- Article 26 provides for the right to housing, stating that everyone has the right to have access to adequate housing and calling upon the State to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. The Article also protects citizens from eviction and requires that no one may be evicted from their home, or have their home demolished, without an order of Court made after considering all the relevant circumstances. It outlaws any legislation that permits arbitrary evictions.

The Constitution also protects the right to health for specific groups. Under Article 28, every child has the right to basic nutrition, shelter, health care services and social services. Article 152 calls on the local government to promote a safe and healthy environment. It mandates the South African Human Rights Commission to require relevant organs of State to provide the Commission with information on the measures they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.

4.11 Swaziland

The Constitution of Swaziland has no specific provision on the right to health. However Article 32 of the Constitution requires Parliament to enact laws to provide for the right of persons to work under satisfactory, safe and healthy conditions (Republic of Swaziland, 2005).

The Constitution also has a provision on the right to life. Article 15 prohibits depriving someone of life intentionally, except under the law in execution of a sentence passed in a fair trial by a Court of competent jurisdiction in respect of a criminal offence and if the conviction and sentence have been confirmed by the highest Appellate Court. It restricts abortions only on medical and therapeutic grounds, for example when a pregnancy endangers the mother's life or if there is a serious risk that the child will suffer from a physical or mental handicap. It allows abortions where the pregnancy resulted from rape, incest or unlawful sexual intercourse with a mentally disabled female, or on any other grounds that Parliament may prescribe.

4.12 Tanzania

There is no express provision on the right to health in Tanzania's Constitution. However, Article 30(2)(b) calls for the enactment of laws to defend public health and Article 9i obliges the State to direct policies and programmes to use national resources for development, especially poverty and disease eradication (Republic of Tanzania, 1998).

The Constitution also has a provision on the right to life in the form of Article 14, which provides that every person has the right to life and to the protection of their life by society in accordance with law.

Article 13 makes provision for equality before the law. It provides that all persons are equal before the law and are entitled, without any discrimination, to protection and equality before the law.

4.13 Uganda

The Constitution of Uganda lacks a substantive provision on the right to health but makes mention of the right under other provisions. For instance, Objective XIV(b), which is found under the part concerning Uganda's national principles and objectives of national policy, sets out the State's duty to ensure that all Ugandans enjoy access to health services (Republic of Uganda, 1995). Objective XX expresses the State's commitment to take all practical measures to ensure the provision of basic medical services to the population.

- Article 39 affirms every Ugandan's right to a clean and healthy environment.

- Article 21(2) of the Constitution provides that no one should be discriminated against.
- The State is required to protect women and their rights, taking into account their unique status and natural maternal functions under Article 33(3).
- Children are protected under the Constitution. Article 34(3) provides that no child should be deprived by any person of medical treatment, while Article 34(4) provides that they are entitled to protection from social or economic exploitation and that they should not be employed in or required to do work that is likely to be harmful to their health.
- The Constitution also has provisions on restriction of rights to protect public health. Article 26(2) provides that a person can be deprived of property in the interest of public health.
- Similarly, under Article 23(1)d, a person can be deprived of their personal liberty to prevent spread of an infectious or contagious disease.

The Constitution has some provisions on the right to life. Article 21(1) provides that no person should be deprived of life intentionally except under the law in execution of a sentence passed in a fair trial by a Court of competent jurisdiction in respect of a criminal offence and if the conviction and sentence have been confirmed by the highest Appellate Court. Article 22(2) provides that no person has the right to terminate the life of an unborn child, unless authorised by law.

4.14 Zimbabwe

The current Constitution of Zimbabwe, as amended on the 30th of October, 2007, has no provision on the right to health. But it makes a provision on the right to life in the form of Article 12, which provides that no person should be deprived of their life intentionally, except under the law in execution of a sentence passed in a fair trial by a Court of competent jurisdiction in respect of a criminal offence and if the conviction and sentence have been confirmed by the highest Appellate Court (Republic of Zimbabwe, 2007).

4.15 Zambia

The Constitution of Zambia has no provision on the right to health, but in Article 12, makes provisions on the right to life (Republic of Zambia, 1991). Under this Article, no person should be deprived of their life intentionally, except under the law in execution of a sentence passed in a fair trial by a Court of competent jurisdiction in respect of a criminal offence and if the conviction and sentence have been confirmed by the highest Appellate Court. This Article also prohibits depriving an unborn child of life by terminating a pregnancy, except in accordance with any conditions that may be laid down by an act of Parliament.

Article 24 provides for the protection of young persons from exploitation. It prohibits young people from engaging in any occupation or employment that would prejudice their health or education or interfere with their physical, mental or moral development. The Constitution further makes provisions on protection from inhuman treatment and requires that no person should be subjected to torture, or to inhuman or degrading punishment or similar treatment.

5. Summary of constitutional provisions on the right to health

Tables 1 to 3 summarise the constitutional provisions on the right to health for the ESA countries covered in this review. The provisions are divided into five areas, based on the six core obligations from Article 12 of the ICESR:

- essential food which is nutritionally adequate and safe, (and freedom from hunger);
- access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water;
- equitable distribution of (and access to) health facilities, goods and services, including essential drugs;
- national public health strategy addressing population health concerns; and
- protection of public health and healthy environments.

Table 1: Constitutional provisions on food, shelter, safe water and sanitation

Country	Provisions related to the right to health	
	Minimum essential food that is nutritionally adequate and safe	Access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water
Angola	No express provision	No express provision
Botswana	No express provision	No express provision
Congo-Brazzaville	Under Article 34, every citizen shall have the right to a level of life sufficient to assure their health, their well-being and that of their family, notably with regard to food.	Under Article 34, every citizen has the right to a level of life sufficient to assure their health, their well-being and that of their family, including the right to shelter.
Kenya	Under Article 65 of the harmonised draft Constitution, every person has the right to be free from hunger and to adequate food of acceptable quality.	<ul style="list-style-type: none"> • Article 64 of the harmonised draft Constitution provides for every person the right to accessible and adequate housing and to reasonable standards of sanitation. • Article 66 of the harmonised draft Constitution provides for the right to clean and safe water in adequate quantities.
Lesotho	No express provision	No express provision
Madagascar	No express provision	No express provision
Malawi	<ul style="list-style-type: none"> • Under Article 30, the State shall take all necessary measures for the realisation of the right to development, including food. • Under Article 13, the State shall actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving adequate nutrition for all in order to promote good health and self-sufficiency. 	Under Article 30, the State shall take all necessary measures for the realisation of the right to development, including shelter.

Country	Provisions related to the right to health	
	Minimum essential food that is nutritionally adequate and safe	Access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water
Mozambique	No express provision	<ul style="list-style-type: none"> • Under Article 91, all citizens should have the right to a suitable home, and it should be the duty of the State, in accordance with national economic development, to create the appropriate institutional, normative and infra-structural conditions. • The Article provides that the State is responsible for funding and supporting the initiatives of the local communities, the local authorities and the people, to promote private and co-operative construction and promote access to the goal of home ownership for all.
Namibia	Under Article 95, the State is required to actively promote and maintain the welfare of the people by adopting, among others, policies aimed at consistent planning to raise and maintain an acceptable level of nutrition and standard of living of the Namibian people, as well as to improve public health.	No express provision
South Africa	Under Article 27, everyone has the right to have access to sufficient food and water.	<ul style="list-style-type: none"> • Under Article 26, everyone has the right to have access to adequate housing and the State is required to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. • Under Article 26, no one may be evicted from their home, or have their home demolished, without an order of Court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions. • Under Article 27, everyone has the right to have access to sufficient food and water.
Swaziland	No express provision	Under Chapter XIII there cannot be private ownership of water naturally found in Swaziland.

Country	Provisions related to the right to health	
	Minimum essential food that is nutritionally adequate and safe	Access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water
Tanzania	No express provision	No express provision
Uganda	Objective XXII requires the State to take appropriate steps to encourage people to grow and store adequate food, establish national food reserves and encourage and promote proper nutrition through mass education and other appropriate means to build a healthy State.	Under Objective XXI, the State is required to take all practical measures to promote a good water management system at all levels.
Zambia	No express provision	No express provision
Zimbabwe	No express provision	No express provision

As can be seen from the table above, five constitutions provide for the right to shelter, but eleven do not. South Africa provides detailed provisions on the right to housing, which extends obligations on the state to take measures to protect this right. Five constitutions provide for rights to food, which are more detailed in the Constitutions of Uganda and Malawi. *Table 2* present findings on provisions on health care and public health.

Table 2: Constitutional provisions on health care and public health

Country	Provisions related to the right to health	
	Equitable distribution of health facilities, goods and services	National public health strategy addressing population health concerns
Angola	Article 47 provides that the State shall promote the measures needed to ensure the right of citizens to medical and health as well as child, maternity, disability and old-age care, and care in any situation causing incapacity to work. It requires that private and co-operative enterprise in health, social welfare and social security shall be exercised in accordance with the law.	Under Article 9, the State shall guide the development of the national economy, with a view to guaranteeing harmonious and balanced growth of all sectors and regions of the country. It shall also ensure the rational and efficient use of all productive capacity and national resources, as well as heighten the well-being and quality of life of all citizens.
Botswana	No express provision	No express provision
Congo-Brazzaville	Under Article 34, the State is the guarantor of public health. Every citizen has the right to a level of life sufficient to assure their health, their well-being and that of their family, notably food, clothing, shelter, medical care and necessary social services.	No express provision
Kenya	Under Article 62(1) every person has the right to health, which includes the right to health services, including reproductive health care.	No express provision
Lesotho	No express provision	No express provision
Madagascar	No express provision	No express provision

Country	Provisions related to the right to health	
	Equitable distribution of health facilities, goods and services	National public health strategy addressing population health concerns
Malawi	<ul style="list-style-type: none"> Under Article 30, all persons and peoples have a right to development and therefore to the enjoyment of economic, social, cultural and political development. In particular, women, children and the disabled shall be given special consideration in the application of this right. Article 30 also requires that the State should take all necessary measures for the realisation of the right to development. Such measures shall include, among other things, equality of opportunity for all in their access to basic health services. 	Under Article 13, the State should actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at, among other things, providing adequate health care that is commensurate with the health needs of Malawian society and complies with international standards of health care.
Mozambique	<ul style="list-style-type: none"> Under Article 116, the State is required to promote the expansion of medical and health care and the equal access of all citizens to the enjoyment of this right. Article 116 also requires that medical and health care activities run by collective and private entities shall be carried out in accordance with the law and be subject to the supervision of the State. 	No provision
Namibia	No express provision	No provision
South Africa	Under Article 27, everyone has the right to have access to health care services, including reproductive health care and no one may be refused emergency medical treatment.	No provision
Swaziland	No express provision	Under Article 27 the State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right to health.
Tanzania	No express provision	No provision
Uganda	Under Objective XX, the State should take all practical measures to ensure the provision of basic medical services to the population.	No provision
Zambia	No express provision	Under the Sixth Schedule, the government is responsible for formulating a health policy.
Zimbabwe	No express provision	No provision

As can be seen from *Table 2*, most Constitutions address the aspect of equitable distribution of health facilities, goods and services and many recognise rights to healthcare services. In *Table 3* below, we present constitutional provisions protecting public health and the right to live and work in a healthy environment.

Table 3: Constitutional provisions protecting public health and the right to a healthy environment

Country	Provisions related to the protection of public health and the right to a healthy environment
Angola	<ul style="list-style-type: none"> • Under Article 24, all citizens have the right to live in a healthy and unpolluted environment. The Article requires the State to take the requisite measures to protect the environment and to punish any acts that damage or directly or indirectly jeopardise the environment. • Article 22 requires the State to respect and protect the life of persons in Angola and prohibits the death penalty. • Article 23 prohibits acts of torture or any other cruel, inhuman or degrading treatment or punishment on the citizens of Angola.
Botswana	<ul style="list-style-type: none"> • Under Article 4, no person should be deprived of their life intentionally, unless in execution of the sentence of a Court in respect of an offence under the law in force in Botswana of which they have been convicted. • Articles 8, 9, 11, 12, 13 and 14 of the Constitution justify eroding other rights, such as the right to property and to privacy, and freedoms, like freedom of expression, of assembly and of movement, to protect public health.
Congo-Brazzaville	<ul style="list-style-type: none"> • Article 10 provides that people are sacred and have the right to life. It therefore requires that the State should have the absolute obligation to respect and protect the citizens. • Article 46 guarantees the right to a healthy, satisfactory and enduring environment to the citizens of DRC and imposes a duty on them to defend it.
Kenya	<ul style="list-style-type: none"> • Article 71(1) provides that no person can be deprived of their life intentionally, unless in execution of the sentence of a Court in respect of a criminal offence under the law of Kenya of which they have been convicted. • Article 74 prohibits torture or to inhuman or degrading punishment or other treatment. • Under Article 72, a person's property can be compulsorily taken possession of in the interests of public safety or public health.
Lesotho	<ul style="list-style-type: none"> • Article 27 requires Lesotho to adopt policies aimed at ensuring the highest attainable standard of physical and mental health for its citizens, including policies designed to improve environmental and industrial hygiene. • Article 5 gives the right to life as part of the fundamental rights and freedoms. • Article 8 grants freedom from inhuman treatment. • Under Articles 10, 11, 13, 14, 16 and 15, rights and freedoms, such as those governing movement, privacy, expression and peaceful assembly, can be taken away to prohibit conduct injurious to health.
Madagascar	No specific provision

Country	Provisions related to the protection of public health and the right to a healthy environment
Malawi	<ul style="list-style-type: none"> • Under Article 16, every person has the right to life and no person shall be arbitrarily deprived of their life. • Under Article 17, acts of genocide are prohibited and shall be prevented and punished. • Article 19 provides that the dignity of all persons is inviolable. It provides that no person should be subject to torture of any kind or to cruel, inhuman or degrading treatment or punishment. • Under Article 19, no person should be subject to corporal punishment in connection with any judicial proceedings or in any other proceedings before any organ of the State. • Article 19 also prohibits subjecting a person to medical or scientific experimentation without their consent.
Mozambique	<ul style="list-style-type: none"> • Article 81 introduces the right of popular action for all citizens to advocate the prevention, termination or judicial prosecution of offences against the public health. • Article 40 makes provision for the right to life. All citizens have the right to life and to physical and moral integrity, and they should not be subjected to torture or to cruel or inhuman treatment. • Article 40 further provides that there should be no death penalty in the Republic of Mozambique.
Namibia	<ul style="list-style-type: none"> • Article 95 requires the State to actively promote and maintain the welfare of the people by enacting legislation to ensure that children are not abused. • Article 6 requires that the right to life should be respected and protected by all. • Under Article 6, no law may prescribe death as a competent sentence. No Court or Tribunal should have the power to impose the death sentence on any person and executions are prohibited from taking place in Namibia.
South Africa	<ul style="list-style-type: none"> • According to Article 10, everyone has inherent dignity and the right to have their dignity respected and protected. • Under Article 11, everyone has the right to life. • Under Article 24, everyone has the right to an environment that is not harmful to their health or well-being.
Swaziland	<ul style="list-style-type: none"> • Article 15 prohibits depriving someone of life intentionally, unless in execution of a sentence of Court in respect of a criminal offence.
Tanzania	<ul style="list-style-type: none"> • Article 14 provides that every person has the right to live and to the protection of their life by society in accordance with law.
Uganda	<ul style="list-style-type: none"> • Article 21(1) provides that no person should be deprived of life intentionally, except under the law. • Article 22 provides that no person has the right to terminate the life of an unborn child, except as may be authorised by law. • Under Article 39, every Ugandan has a right to a clean and healthy environment.
Zambia	<ul style="list-style-type: none"> • Under Article 12, no person should be deprived of their life intentionally except in execution of the sentence of a Court in respect of a criminal offence under the law in force in Zambia of which they have been convicted. • Under Article 24 no young person should be employed and should in no case be caused or permitted to engage in any occupation or employment which would prejudice their health or education or interfere with their physical, mental or moral development.
Zimbabwe	<ul style="list-style-type: none"> • Article 12 provides that no person should be deprived of their life intentionally, unless in execution of the sentence of a Court in respect of a criminal offence of which they have been convicted.

As shown in *Table 3*, constitutional provisions provide for rights to clean and healthy environments in five countries. More commonly, constitutions provide for restrictions on rights, such as freedom of movement, to protect children and to prohibit conduct injurious to health.

In general, the analysis suggests that, although some Constitutions expressly provide for the right to health, many do not and this right is rather inferred from other rights. For example, it may be inferred from the right to a clean and healthy environment in Uganda's Constitution, and from the right to development, in the case of Malawi. In other cases, the constitution provides for Parliament to enact laws to provide for the right of persons to work under satisfactory, safe and healthy conditions, as is the case in Swaziland. In some constitutions, the right to health is conferred to specific groups such as children, health workers, the elderly and persons with disabilities. In some countries the right to health is restricted to principles of State policy and objective and thus excluded from enforcement by courts of law, as is the case with Lesotho. South Africa is a unique case in the region, as its Constitution combines the right to health with other rights critical for its realisation, such as the right to food, to water and to social security.

Some countries provide for the right to medical services and health care, rather than the right to health, as in the Constitution of Mozambique. In some countries the state is viewed as the guarantor of the right to health, as in Congo-Brazzaville's Constitution. Mozambique goes further by giving details on how the right to medical and health care is supposed to be realised, while Madagascar's constitution makes reference to international human rights instruments that spell out the right to health. This means that even if the Constitution is silent on the right to health, the provisions of these international instruments can be invoked to remind the State of its obligations.

Most of the constitutions in the region capture the right to life as one of the fundamental human rights. Some permit taking life when enforcing the death penalty. Most also permit the limitation of other rights to ensure protection of public health and safety. In fact, for some countries, this limitation of rights in the public interest was the primary mention of health in their Constitutions.

6. Conclusions and recommendations

The right to health has received different approaches in the various constitutions of the ESA countries. While some constitutions expressly make provisions for it, others have no single provisions on the right to health. Even then there are experiences that can be drawn from each individual country on the incorporation of this right under its national constitution.

There is increasing recognition of the need to provide for and realise the right to health. In countries where major constitutional reforms are taking place, recognition of the right to health is an area that is being given attention. For example, the harmonised draft Constitution of Kenya does this. We thus suggest that countries in the region review how other ESA countries have crafted the provisions on the right to health in their constitutions and familiarise with the relevant international human rights instruments, to inform their constitutional reform processes. ESA countries can learn from each other, as some countries have better provisions on the various aspects of the right to health than others.

We suggest some 'best practice' examples below from the constitutions in the region as an input to constitutional review processes:

:

With regard to the right of **access to health facilities, goods and services on a non-discriminatory basis**, Article 116 of Mozambique's Constitution makes detailed provisions. It states:

1. *Medical and health care for citizens shall be organised through a national health system, which shall benefit all Mozambican people.*
2. *To achieve the goals of the national health system, the law shall establish the ways in which medical and health care is delivered.*
3. *The State shall encourage citizens and institutions to participate in raising the standard of health in the community.*
4. *The State shall promote the expansion of medical and health care and the equal access of all citizens to the enjoyment of this right.*
5. *The State shall be responsible for promoting, supervising and controlling the production, the sale and the use of chemical, biological and pharmaceutical products and other forms of treatment and diagnosis.*
6. *The medical and health care activities run by collective and private entities shall be carried out in accordance with the law and be subject to the supervision of the State.*

On **access to food** that is nutritionally adequate and safe, and to ensure freedom from hunger to everyone, Uganda has an extensive provision that could inform other countries. Under its Constitution, Objective XXII provides that:

The State shall:

- a) *take appropriate steps to encourage people to grow and store adequate food;*
- b) *establish national food reserves; and*
- c) *encourage and promote proper nutrition through mass education and other appropriate means in order to build a healthy State.*

The South African Constitution provides good provisions **access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water.**

Section 26 states that, with respect to housing:

- 1) *Everyone has the right to have access to adequate housing.*
- 2) *The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.*
- 3) *No one may be evicted from their home, or have their home demolished, without an order of Court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.*

Further, Section 27 of the South African Constitution provides for **health care, food, water and social security.** It states:

- 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 dependents, 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.*

In terms of **equitable distribution of all health facilities, goods and services**, Section 116(4) of the Constitution of Mozambique still provides the best provision. It states:

The State shall promote the expansion of medical and health care and the equal access of all citizens to the enjoyment of this right.

Regarding the **national public health strategy** addressing the health concerns of the whole population, this aspect that is not directly addressed in all the Constitutions of the countries covered. It can rather be implied from the general provisions on development. Even then, Article 13(c) of the Constitution of Malawi could be a reference point. This Article provides:

The State shall actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation ... to provide adequate health care, commensurate with the health needs of Malawian society and international standards of health care.

Almost all constitutions have general provisions on **prohibition of conduct injurious to health**. There range from restricting other rights to the most extreme form in the death penalty.

This study reviewed the law as written. We thus recommend that further study be done in those countries that have express provisions on the right to health on how they have implemented and enforced this right, including how advocates of health rights have subjected constitutional provisions to court interpretation. We also recommend further review of how rights to health are being dealt with in countries where they are not explicitly provided for in the national constitutions.

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Acronyms

ACHPR	African Commission on Human and Peoples' Rights
CEHURD	Centre for Health, Human Rights and Development
ESA	East and southern Africa
EQUINET	Regional Network for Equity in Health in East and Southern Africa
ICESR	International Covenant on Economic and Social Rights
OHCHR	Office of the High Commissioner for Human Rights
PHC	Primary health care
SERAC	Social and Economic Rights Action Centre
UN	United Nations
WHO	World Health Organization

Equity in health implies addressing differences in health status that are unnecessary, avoidable and unfair. In southern Africa, these typically relate to disparities across racial groups, rural/urban status, socio-economic status, gender, age and geographical region. EQUINET is primarily concerned with equity motivated interventions that seek to allocate resources preferentially to those with the worst health status (vertical equity). EQUINET seeks to understand and influence the redistribution of social and economic resources for equity oriented interventions, EQUINET also seeks to understand and inform the power and ability people (and social groups) have to make choices over health inputs and their capacity to use these choices towards health.

EQUINET implements work in a number of areas identified as central to health equity in the region:

- public health impacts of macroeconomic and trade policies;
- poverty, deprivation and health equity and household resources for health;
- health rights as a driving force for health equity;
- health financing and integration of deprivation into health resource allocation;
- public-private mix and subsidies in health systems;
- distribution and migration of health personnel;
- equity oriented health systems responses to HIV/AIDS and treatment access;
- governance and participation in health systems;
- monitoring health equity and supporting evidence-led policy.

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