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ORGAN DONATION: A CRITICAL ANALYSIS OF THE STATE'S DUTY TO DELIVER ON THE RIGHT TO ACCESS HEALTH CARE

By

Anette Kekisha Mhlongo

Student Number: 220004582

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SUPERVISOR: Dr Janine Hicks

CO-SUPERVISOR: Dr Clydenia Stevens

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DEDICATIONS

I dedicate this dissertation to my parents and sister, who have supported and encouraged me throughout my academic career. I am so grateful that they are in my life, and I owe them everything.

ABSTRACT

Organ shortage has been an increasing issue globally, and South Africa is no exception. Organ transplantation is one of the most effective methods in treating cases where an organ has failed or is damaged by disease. The lack of adequate available organs for transplantation has posed a significant obstacle to the full enjoyment of the right to access health care for patients in need of an organ for transplantation.

This research has attributed the organ shortage to legislation. The state's failure to enact the appropriate legislation to facilitate an increase in the adequate supply of organs has contributed to the shortage thereof. This study delves into the existing legislation to assess its efficiency in addressing the organ shortage and evaluate the state's Constitutional duty to take legislative measures to achieve the progressive realisation of the right to health care in relation to organ transplantation. By analysing existing laws and their impact on the availability and accessibility of organs for transplantation, this research highlights the gaps in legislation and policy that hinder the fulfilment of this fundamental right. This critical analysis of the state's duty to deliver on the right to health care contributed to the broader conversation on the state's ability to fulfil its duties as stipulated in the Constitution to realise socio-economic rights in South Africa.

LIST OF ABBREVIATIONS

CFSD	Charity Foundation for Special Diseases
DOH	Department of Health
ICESCR	International Covenant on Economic, Social and Cultural Rights
NHA	National Health Act
NHI	National Health Insurance
NHIF	National Health Insurance Fund
HOTA	Human Organ Transplant Act
HIV	Human Immunodeficiency Virus
ONT	Organización Nacional de Trasplantes (National Transplant Organisation)
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHCHR	United Nations High Commissioner for Human Rights
SADC	Southern African Development Community
SAHRC	South Africa Human Rights Commission
SDG	Sustainable Development Goals
WHA	World Health Assembly
WHO	World Health Organization

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CHAPTER 1: INTRODUCTION

1.1 INTRODUCTION

The Constitution[1] is the highest law of the Republic of South Africa.[2] It was founded on the values of human dignity, equality, and freedom.[3] Although these founding values form the basis of South Africa's Constitution, the Constitution enshrines other essential rights that are closely linked to these founding values, such as the right to access health care services.[4] S27(1)(a) of the Constitution provides that 'everyone has the right to have access to health care services, including reproductive health care.'[5] Additionally, s27(2) of the Constitution provides that 'the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.'[6]

The right to access health care services is one of the many socio-economic rights contained and protected by the Constitution in the Bill of Rights, among rights such as the right to adequate housing[7] and the right to water.[8] Socio-economic rights are protected in several international human rights instruments as essential human rights,[9] and the South African Constitution is one of the first Constitutions to enshrine these rights as justiciable rights.[10] The duty to realise socio-economic rights is on the state. S7(2) of the Constitution places a duty on the state to 'respect, protect, promote, and fulfil the rights in the Bill of Rights.'[11] The duty to respect requires that the government refrain from interfering with socio-economic rights.[12] The duty to protect requires the government to protect these rights by ensuring that these rights are enjoyed and to improve their enjoyment.[13] The duty to promote and fulfil requires the state to adopt appropriate,

[1] Constitution of the Republic of South Africa, 1996.
[2] Constitution of the Republic of South Africa, s2.
[3] Constitution of the Republic of South Africa, s1a.
[4] Constitution of the Republic of South Africa, s27(1)(a).
[5] Constitution of the Republic of South Africa, s27(1)(a).
[6] Constitution of the Republic of South Africa, s27(2).
[7] Constitution of the Republic of South Africa, s26.
[8] Constitution of the Republic of South Africa, s27(1)(b).
[9] International Covenant on Economic, Social and Cultural Rights, 1966; Universal Declaration on Human Rights, 1948; African Charter on Human and Peoples' Rights, 1981; Protocol to the African Charter on Women's Rights, 2003.
[10] P De Vos and W Freedman, et al *South African Constitutional law in Context* 2nd ed (2021) Pg 782.
[11] Constitution of the Republic of South Africa, s7(2).
[12] MP Olivier 'Socio-economic rights' in L Crouse, et al *Introduction to Human Rights Law* 2nd ed (2016) Pg 172.
[13] P De Vos (note 10 above; 796).

> 'Legislative, administrative, budgetary, judicial, promotional, and other measures so that those that do not currently enjoy access to the rights can gain access, and so existing enjoyment of rights is enhanced.'[14]

There are several ways by which the state can fulfil its obligations to protect the rights in the Bill of Rights; however, in relation to socio-economic rights,[15] the Constitution not only grants the right to access health care,[16] but it also gives the state the duty 'to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation' of this right.[17] The right to access health care is a right afforded to all people in our country.[18] One of the ways the state can realise the right to access health care is by taking reasonable legislative measures to set out a plan for how the state plans to realise this right. However, the realisation of such a right is difficult to secure due to the right's dependence on the availability of resources.[19] This position was confirmed in the case of *Soobramoney v Minister of Health,*[20] where the court acknowledged the state's obligation in terms of the Constitution to provide everyone with access to health care; however, the court further stated that this obligation was dependent on the availability of resources.[21] The issue of the availability of resources presents an obstacle to the realisation of socio-economic rights, but the Constitution allows for the progressive realisation of these rights.

In the case of organ[22] transplantation, the lack of adequate available organs for transplantation has posed a significant obstacle to the full enjoyment of the right to access health care. The researcher is of the view that the state has failed to fulfil its obligation to enact the appropriate legislation to facilitate an increase in the adequate available supply of organs, which has contributed to the shortage thereof. In South Africa, there is currently a critical shortage of organ donors and, therefore, a critical shortage of organs.[23] The Organ Donor Foundation

[14] MP Olivier (note 12 above; 173).
[15] *Glenister v President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) (17 March 2011).
[16] Constitution of the Republic of South Africa, s27(1)(a).
[17] Constitution of the Republic of South Africa, s27(2).
[18] Constitution of the Republic of South Africa, sS7(1).
[19] C Maimela 'Does the right to have access to health care services in terms of section 27 of the Constitution of South Africa, 1996 cater for Cancer patients?' (2018) 39(1) *Obiter,* Pg 9.
[20] *Soobramoney v Minister of Health* 1998 (1) SA 765 (CC).
[21] *Soobramoney,* para 22.
[22] "Organs" in this dissertation refers to solid organs such as: Kidney, Heart, Pancreas, Liver and Lungs.
[23] H Etheredge 'The complex reasons for South Africa's organ donor shortage' (9 January 2019 available at https://www.wits.ac.za/news/latest-news/opinion/2019/2019-01/the-complex-reasons-for-south-africans-organ-donor shortage.html#:~:text=At%20any%20given%20time%2C%20there,t%20unique%20to%20South%20Africa. Accessed 3 April 2025).

explains that the number of solid organ transplants has decreased annually from 468 organ and corneal transplants in 2019 to 282 in 2021.[24] There are currently nearly 5,000 patients in South Africa waiting for an organ transplant.[25] In instances where an organ has failed or has been damaged by disease or injury, transplantation remains among the most effective methods to treat such cases. In addition, it is also cost-effective, and it improves the quality of life for the recipient.[26]

Due to the unfortunate reality of organ shortage, many patients in need of an organ transplant may never get the opportunity to undergo a lifesaving organ transplant simply because there are not enough organs, such as the heart, kidneys, lungs, liver, and pancreas, for patients in need of an organ transplant.[27] The shortage of organs, therefore, has a devastating impact on those in need of organ transplantation, as patients often die while waiting for an organ for transplantation.[28]

The shortage of organs not only has a significant impact on patients who need organs for transplantation, but the great demand for transplantable organs, of which there is an insufficient supply, could also easily induce a black market.[29] Organ trafficking is defined in the Declaration of Istanbul as:

> 'the recruitment, transport, transfer, harbouring or receipt of living or deceased persons or their organs by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability, or of the giving to, or the receiving by, a third party of payments or benefits to achieve the transfer of control over the potential donor, for the purpose of exploitation by the removal of organs for transplantation.'[30]

It can be deduced from this definition that organ trafficking can come in various forms. The root cause of organ trafficking is the significant gap between supply and demand, leading

[24] Organ Donor Foundation 'Statistics' (2022, Available at https://odf.org.za/statistics/#:~:text=In%20South%20Africa%20in%202021%3A&text=229%20transplants%20broken%20down%20into,Livers%3A%2059 Accessed 14 March 2024).
[25] Kevin Brandt 'Critical Shortage of Organ Donors in SA' (19 August 2023 available at https://www.enca.com/news/critical-shortage-organ-donors-sa Accessed 23 February 2024).
[26] SS Nadvi and M Osman-Hyder 'A comparative study of Islamic and South African law on living and cadaveric organ donations: consensus and divergence' (2021) 42(3), *Obiter*, Pg 609.
[27] Organ Donor Foundation 'FAQ' (2022, Available at https://odf.org.za/faqs/) (Accessed 29 March 2024).
[28] J Descourouez, KR Richards, T Sam & B Crowther 'Expanding the role of pharmacists and pharmacy students in the promotion of organ donation awareness.' (2014) 24(2), *Progress in Transplantation*, Pg. 189 Available at: https://doi.org/10.7182/pit2014293.
[29] M Slabbert 'Combat organ trafficking - Reward the donor or regulate sales?' 2008 (73)1 *KOERS*, pp 75-99. Pg 75.
[30] The Declaration of Istanbul on organ trafficking and Transplant, Definitions.

desperate patients and vulnerable donors to resort to illegal and unethical practices.[31] There is currently no indication of the extent of organ trafficking in South Africa; however, an example of the unlawful sale of organs in South Africa is the *State v. Netcare Kwa-Zulu Limited* case,[32] where the private hospital 'Netcare' pleaded guilty to charges of trafficking in human organs.[33] Even though the sale of organs in South Africa is illegal, these illegal practices will not end but will continue to thrive until it is replaced with a viable alternative.[34]

Organs can be procured in one of two ways in South Africa: the first is from brain-dead donors, and the second is from living donors.[35] Brain death is defined as the death of the brain stem,[36] and a brain-dead person is someone whose brain stem is dead, and they are on life support.[37] So, a brain-dead donor is someone who is on life support and donates their organ. A brain-dead person gives their consent to donate their organ when they die while they are still alive. A living donor is a living person who donates an organ for transplantation.[38] Organ Donation in South Africa is currently regulated by the National Health Act (NHA)[39] and the Regulations Regarding the General Control of Human Bodies, Tissue, Blood, Blood Products and Gametes, which were published in terms of the National Health Act.[40] The sale of the human body or body parts is prohibited in South Africa in terms of s60(4)(b) of the NHA.[41] The organ procurement system currently used in South Africa is purely altruistic, which is referred to as the opt-in system. With a long list of people currently waiting to get access to an organ transplant, it is the researcher's view that altruistic organ procurement contributes to the slow procurement of organs. The researcher acknowledges that the altruistic organ procurement system is also hindered by other factors that include culture, religion, lack of awareness, ignorance, fallacies and myths[42] that have contributed to a decline in organ donation in the

[31] M Slabbert 'The payment for an organ and the admission of guilt by a South African hospital: The State v Netcare Kwa-Zulu Natal (Pty) Ltd – Agreement in terms of section 105A (1) of the Criminal Procedure Act 51 of 1977, Netcare Kwa-Zulu (Pty) Ltd and the State, Commercial Crime Court, Regional Court of Kwa-Zulu Natal, Durban – Case No. 41/1804/2010' (2011) *Obiter*, Pg 746.
[32] The State v Netcare Kwa-Zulu Natal (Pty) Ltd, Unreported Case No. 41/1804/2010 of 8 November 2010.
[33] The State v Netcare Kwa-Zulu Natal (Pty) Ltd, Unreported Case No. 41/1804/2010 of 8 November 2010.
[34] M Slabbert and H Oosthuizen, 'Establishing a market for human organs in South Africa Part 1: A Proposal' (2007) 28(1), *Obiter*, Pg 66.
[35] M Slabbert, FD Mnyongani and N Goolam 'Law, religion, and organ transplants' (2011) 76(2) *Koers,* Pg 262.
[36] M Slabbert (note 34 above; 46).
[37] Ibid 46.
[38] United Network for Organ Sharing 'Understanding Living Donation' (Available at: https//unos.org/transplant/living-donation/#:~:text=With%20living%20donation%2C%20other%20organs. Accessed 3 April 2024).
[39] National Health Act 61 of 2003.
[40] Regulations Regarding the General Control of Human Bodies, Tissue, Blood, Blood Products and Gametes.
[41] National Health Act 61 of 2003, s60(4)(b).
[42] SS Nadvi (note 26 above; 610).

country over the years. The focus of this study will be on the legislation that provides for organ donation. However, this study will also address the other factors that contribute to organ shortage.

Because legislation provides for the opt-in system of organ procurement, the researcher is of the view that legislation plays a vital role in the slow procurement of organs due to the organ procurement system. This is evident in the statistics provided by the Organ Donor Foundation, which shows that the system is just not working.[43] The opt-in system of organ procurement is provided for in s55 of the NHA[44] for living donors and s62(1) for deceased organ donors.[45] Living donors, in terms of the Act, are required to do so on a voluntary basis by giving written consent for living persons.[46] Deceased donors may indicate their wish to donate through a clause in a will or orally before two competent witnesses.[47]

The decrease in organ donations over the years has not only affected the right to access health care but has also affected the realisation and protection of other Constitutional rights. The right to life[48] is affected, as many patients are dying while waiting for a transplant.[49] The right to dignity is affected because not having access to health care undermines an individual's worth and value as a human being, which infringes on an individual's right to human dignity.[50] The right to equality is also impacted as the patients in need of an organ transplant do not enjoy the same life-saving health care that other terminal conditions have, for example, patients with human immunodeficiency virus (HIV). Considering the impact the shortage of organs has on the right to health as well as other rights, including the values on which the Constitution is based, it is important to study and analyse the existing measures taken by the state to ensure the realisation and protection of the right to health care in relation to organ transplantation.

[43] Organ Donor Foundation 'Statistics' (2022, Available at https://odf.org.za/statistics/#:~:text=In%20South%20Africa%20in%202021%3A&text=229%20transplants%20broken%20down%20into,Livers%3A%2059 Accessed 16 May 2024).
[44] National Health Act, s55.
[45] National Health Act, s62(1).
[46] National Health Act, s55.
[47] National Health Act, s62(1).
[48] Constitution of the Republic of South Africa, s11.
[49] M Slabbert (note 35 above; 261).
[50] Constitution of the Republic of South Africa, s10.

1.2 LITERATURE REVIEW

Various academics have addressed the issues around organ transplantation and the shortage of organs in South Africa.[51] This issue has raised many concerns as the demand for organs is rising, but the supply is decreasing.[52] It is therefore important to assess what the literature reveals in relation to the instance, impact and possible reasons behind this shortcoming. This will assist in providing a greater understanding of the state's obligation to fulfil its Constitutional duty to enact legislation that is effective enough to meet the transplantation needs of the society, as well as the impact such a failure has on the right to health care.[53]

1.2.1 THE KEY ISSUE RELATING TO ORGAN TRANSPLANTATION

Sarmah et al. define organ donation as:

> 'Medical procedure whereby a person allows their vital body organs to be removed, legally and by consent, while they are still alive or after death with the consent of the family or the next-of-kin.'[54]

An organ transplant is considered one of the best ways to care for a patient with end-stage organ disease, and they have become routine operations in South African hospitals.[55] Crymble[56] supports the point and contends that South Africa has the facilities and the expertise to carry out organ transplantation.[57] However, according to Fabian,[58] even though South Africa

[51] Scholars have covered and elaborated on the shortage of organs that many patients in need of an organ transplantation are facing currently in South Africa. See, for example, M Slabbert, 'Combat organ trafficking – reward the donor or regulate sales' (2008) 73 *Koers: Bulletin for Christian Scholarship*; J Fabian and K Crymble 'End-of-life care and organ donation in South Africa – it's time for national policy to lead the way' (2017) Vol. 107, No. 7 *SAMJ*; SS Nadvi, M Osman-Hyder 'A comparative study if Islamic and South African law on living and cadaveric organ donations: consensus and divergence' (2021). 42(3), *Obiter*.
[52] M Slabbert (note 34 above; 44).
[53] J Fabian and K Crymble 'End-of-life care and organ donation in South Africa –it's time for national policy to lead the way' (2017) Vol. 107, No. 7 *SAMJ,* Pg 545.
[54] R. P. Tamuli, S Sarmah, & B Saikia, 'Organ donation - "attitude and awareness among undergraduates and postgraduates of North-East India"' (2017) 8(1), *Journal of Medicine and Primary Care*, Pg. 130.
[55] M Slabbert (note 29 above; 75).
[56] Wits Donald Gordon Medical Centre, Johannesburg, South Africa.
[57] J Fabian (note 53 above; 545).
[58] Wits Donald Gordon Medical Centre, Johannesburg, South Africa; and Division of Nephrology, Department of Internal Medicine, Faculty of Health Sciences, University of the Witwatersrand, Johannesburg, South Africa june.fabian@mweb.co.za.

has the skills and the facilities to carry out an organ transplant, an organ for transplantation cannot be guaranteed to patients in need of an organ transplant.[59]

One of the most significant areas of concern relating to organ transplantation amongst academics is the shortage of organs for transplantation. Organ shortage is not an issue unique to South Africa; there is a need for transplantable organs worldwide.[60] The demand for organs for transplantation simply outweighs the supply, and this is particularly true in South Africa, as according to Slabbert, the shortage can be attributed to inadequate legislation and the current system of organ procurement.[61] As stated in the introduction, the current organ procurement system in South Africa is purely altruistic, meaning that donation is purely voluntary and that the sale of organs in South Africa is prohibited.[62] The system of voluntary donations has seen a decrease in the number of organs being donated over the years due to low public participation, thus failing to meet the demand. Because of the high demand and the low supply, Slabbert calls for a change in legislation governing organ donation, as too many patients die unnecessarily waiting for an organ.[63]

Literature indicates that current legislation largely contributes to the demand for transplantable organs exceeding the supply. Firstly, Slabbert attributes the present shortage of transplantable organs to the current system of organ procurement (the opt-in method), which is provided for in the NHA. This is due to the method's failure to meet the demand for transplantable organs.[64] Additionally, Slabbert argues that this system,

> 'May not be an acceptable system of organ procurement in South Africa as the diversity of the South African population renders such a system educationally, communicatively and culturally virtually impossible.'[65]

This is largely evident in the steady decline in donations. Nadvi attributes this to a lack of awareness, ignorance, fallacies, and myths, which ties in with the point made by Slabbert.[66] Secondly, Slabbert argues that legislation is not helpful in honouring the wishes of donors who

[59] J Fabian (note 53 above; 545).
[60] M Slabbert and B Venter 'Routine referrals: A possible solution for transplantation shortages' (2017) Vol. 10, No. 1, *SAJBL*, Pg 15.
[61] M Slabbert and H Oosthuizen, Establishing a market for human organs in South Africa Part 2: shortcomings in legislation and the current system of organ procurement. (2007) 28(2), *Obiter*, Pg 304.
[62] National Health Act 60(4)(b).
[63] M Slabbert (note 34 above; 44).
[64] M Slabbert (note 61 above; 304).
[65] M Slabbert (note 34 above; 46).
[66] SS Nadvi (note 26 above; 610).

want to donate after death.[67] Legislation, in addition to a will or a signed document by the person wishing to donate, requires that upon the death of the individual who wishes to donate, the family must consent.[68]

Although academics agree that there is a need for a change in legislation, there are differences in opinion regarding the most effective organ procurement system for South Africa.[69] Fabian calls for the government of South Africa to assume responsibility for the organ donation and transplantation needs of society. The author believes that the best way the government can do so is by 'accessing its own population resources within an ethical framework that protects human rights.'[70] Venter[71] supports this view as he believes that deceased-donor organ retrieval could be a possible solution in South Africa.[72]

Oosthuizen,[73] on the other hand, argues that a solution that will attract living donors and motivate people to make decisions regarding donating their organs after their death must be sought. This solution would entail rewarding the donor financially.[74] This position is also supported by Slabbert, who argues that all current organ procurement methods have failed to meet demands for organs worldwide, and the only solution that has become imperative is monetary compensation to organ donors.[75]

1.2.2 SOCIAL BARRIERS TO ORGAN DONATION IN SOUTH AFRICA

This research acknowledges the role of culture, religion, lack of knowledge, myths and fallacies in the low number of organs being donated. The researcher is still of the view that a change of legislation is necessary. However, it is important that such factors be discussed in detail because these factors will affect the outcome of any organ procurement programme if not addressed appropriately.

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[67] M Slabbert 'The Law as an Obstacle in Solid Organ Donations and Transplantations.' (2018) vol. 81, *Journal for Contemporary Roman-Dutch Law*, Pg 71.
[68] National Health Act s62(2).
[69] J Fabian and K Crymble 'End-of-life care and organ donation in South Africa – it's time for national policy to lead the way' (2017) Vol. 107, No. 7 *SAMJ*; M Slabbert and H Oosthuizen 'Establishing a market for human organs in South Africa Part 2: shortcomings in legislation and the current system of organ procurement.' (2007) 28(2), *Obiter*.
[70] J Fabian (note 53 above; 545).
[71] Faculty of Law, Pearson Institute of Higher Education, Midrand, South Africa.
[72] M Slabbert (note 60 above; 15).
[73] Hennie Oosthuizen, BIuris LLB LLM LLD, Professor and Head of Department Criminal and Medical Law, University of the Free State.
[74] M Slabbert (note 61 above; 310).
[75] M Slabbert (note 29 above; 77).

The law is shaped by society in that it protects the interests, goals and purpose of society.[76] Knowing the values, interaction patterns, and ideologies of a society is key to understanding the legal system and could contribute to the improvement of law and the legal system in society.[77] Understanding the low donation rates from this perspective could be key to understanding why the current system is lacking and suggesting possible solutions to this. Slabbert makes it a point that at the time of the formulation of the opt-in policy, transplants were still in an experimental phase, and the demand was low.[78] The continuously decreasing number of organs being donated shows the poor performance of the system and illustrates that times have changed, and the system must also change to accommodate the needs of society.

As mentioned above, the insufficient supply of organs in South Africa can be attributed to factors such as culture and religion.[79] It must be considered that South Africa is a diverse country that also has diverse cultures and different religions. According to Morgan, culture and religion play a vital role in people's health practices.[80] For example, black people are the majority population in South Africa and among black South Africans, organ donation is novel and uncommon.[81] Traditionally, black Africans may regard organ donation as a taboo practice that violates bodily integrity[82] and risks people's afterlife, as they may be rejected by their kinship ancestors for missing a body part.[83] This is also the case among Muslims, as they believe that bequeathing organs is forbidden in Islamic law.[84] There is also a perception that religions such as Judaism are opposed to organ donation.[85] This is the reason why religion and culture are factors which need to be considered when devising a new procurement system for donation.

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[76] S Vago and SE Barkan *Law and Society* 12th ed (2021) Pg. 5.
[77] Ibid.
[78] M Slabbert (note 61 above; 312).
[79] SS Nadvi (note 26 above; 610).
[80] M Moropa, J Mokwena, M Makgahlela and T Sodi 'Older black rural South African adults' perceptions on organ donation: An exploratory study' (2022) *Journal of Psychology in Africa*, DOI: 10.1080/14330237.2021.2017597. Pg 1.
[81] PM Dimo 'Participating in organ donation: Issues amongst Black South Africans' (2019) 11(1), *Global Journal of Health Science*, https://doi .org/10 .5539/gjhs.v11n1. Pg 71.
[82] H Etheredge 'There are many complex reasons for South Africa's organ donor shortage.' (2019) The Conversation. Available at: https://theconversation.com/there-are-many-complex-reasons-for-south-africas-organ-donor-shortage-107919 (accessed 12 November 2024).
[83] M Makgahlela, T Sodi, S Nkoana, & J Mokwena 'Bereavement rituals and their related psychosocial functions in a Northern Sotho community of South Africa.' (2021) 45, *Death Studies*, Pg. 92.
[84] Tumin, Noh, Satar and Chong 'Organ Donation in Muslim Countries: The Case of Malaysia' (2013) 18, *Annals of Transplantation,* Pg. 673.
[85] D Thomson, 'Organ donation in South Africa – a call to action' (2017) Vol. 33, No. 2, *Southern African Journal of Critical Care*, Pg 36.

Slabbert is of the view that most religions support the promotion and saving of lives and, as such, would be inclined to accept the altruistic donation of organs.[86] For this reason, Muwanga argues that the concept of 'ubuntu' should be considered when dealing with organ donation.[87] The term ubuntu is a term defined by scholars as 'umuntu ngumuntu ngabantu', which translates as 'a person is a person through other people.'[88] Ubuntu is a concept that has been used in case law and has assisted judges in making their decisions, which illustrates the importance of the concept not only to African communities but to all South African communities at large.[89]

A person exists as a 'real' person only through his or her relationship with others.[90] This principle denotes an ideal; it is the community which makes the person, and a person can not exist alone.[91] It can therefore be argued that Ubuntu is aligned with the ethical principle of beneficence, which is to act for the benefit of others.[92] The concept of 'ubuntu' embodies all that organ donation represents and what organ donation aims to achieve, which is to help people and save lives.[93] Donating an organ for the benefit of someone else is a selfless act that is a prime example of the community making a person, and a person can not exist alone. This perspective can be powerful in encouraging participation in organ donation because the community plays an essential role in organ donation. It is important that organ donation be viewed as more than just a medical procedure where one loses an organ, but an expression of compassion and solidarity because by donating organs, individuals contribute to the well-being of others.

In addition to culture and religion, the contention is that organ donation and transplantation cannot be successful without comprehensive awareness of organ donation as well as the process that is involved.[94] Lack of knowledge can hinder the results of any organ procurement programme. Not being organ donation literate and having limited insights on the process leaves room for misinformation and myths.[95] It is that state has the duty and the responsibility to

[86] M Slabbert, F Mnyongani and N Goolam, 'Law, Religion and Organ Transplants' (2011) 76 *Koers,* Pg 263.
[87] TSN Muwanga, A Nienaber and PA Carstens 'Debunking Religious and Cultural Misconceptions of Organ Donation and Transplantation' (2019) Vol 34 No 2, *UP Journals*, Pg 12.
[88] F Mnyongani 'De-linking Ubuntu: Towards a Unique South African Jurisprudence' (2010) 31 *Obiter* Pg 135.
[89] TSN Muwanga (note 87 above; 12).
[90] Ibid.
[91] Ibid.
[92] Ibid.
[93] D Thomson (note 85 above; 36).
[94] VK Bharambe, VU Arole, V Puranam, P Manvikar, & HK Rathod 'Organ donation: from point of view of students doing medical internship in India' (2016) 14 (2) *Bantao journal*, Pg 67.
[95] PM Dimo and DM Mulqueeny 'Low rates of organ donation and transplantation: Causes and Solutions' (2021) Vol 18 No 9, *Journal of Social Science and Humanities*, Pg 152.

educate the public and constantly engage with South African communities to allow organ donation to become the norm. This study submits that knowledge paves the way for action and awareness and is crucial for the success of organ transplantation programmes. [96]

1.2.3 SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA

The South African Bill of Rights was born from a period of struggle and represents an effort to ensure that the injustices of the past are not repeated in the future. This is evident in the Constitution with its emphasis on equality, dignity, and freedom. It is argued that one of the most transformative features of the South African Constitution is the inclusion of socio-economic rights.[97] Such inclusion provides a transformative mechanism that is aimed at addressing the wrongs committed by the previous regime.[98] The inclusion of socio-economic rights is aimed at protecting and advancing social and economic rights and is important in eradicating the vast socio-economic discrepancies emanating from the legacy of Apartheid.[99]

Olivier[100] refers to socio-economic rights as entitlements 'concerned with the material dimensions of social welfare.'[101] As stated above, the right to access health care services is one of the various socio-economic rights contained and protected by the Constitution in the Bill of Rights.[102] The inference that can be drawn from the protection of these rights by the Constitution is that they are essential for the survival of human beings and their ability to live a fully dignified life.[103] This position was confirmed in the case of *Government RSA v Grootboom*,[104] where the court, in discussing the importance of socio-economic rights, held that it is essential that socio-economic rights be realised to achieve a society wherein individuals can equally reach their full potential.[105] It is also important to note the impact socio-

[96] Ibid 150.
[97] P De Vos (note 10 above; 782).
[98] D Bilchitz 'The performance of socio-economic rights in the South African Constitution' in R Dixon and T Roux (eds) *Constitutional Triumphs, Constitutional Disappointments: A Critical Assessment of the 1996 South African Constitution's Local and International Influence* (2018) Pg 45.
[99] P De Vos (note 10 above; 783).
[100] Marius Olivier, Adjunct-Professor: University of Western Australia, Perth, Australia; Extraordinary Professor, Faculty of Law, Northwest University, Potchefstroom, South Africa; Director: International Institute for Social Law and Policy (IISLP).
[101] MP Olivier (note 12 above; 171).
[102] Constitution of the Republic of South Africa, s27.
[103] P De Vos (note 10 above; 784).
[104] *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC).
[105] *Grootboom* para 23.

economic rights have on other human rights in the Constitution; failure to realise socio-economic rights impacts other rights. This was confirmed in the case of *Khosa v Minister of Social Development,*[106] where the court held that the socio-economic rights in the Constitution are implicated with the right to life, human dignity, and equality.[107]

The purpose of the inclusion of socio-economic rights is to achieve equality after the devastating effects of Apartheid, in that socio-economic rights are essential for an individual to live a fully dignified life and for the achievement of equality.[108] There are various aspects that are essential for an individual to live a fully dignified life, including the right to access health care, adequate housing and the right to water. To achieve substantive and material equality, a society must be created where everyone can access health care, housing, water, and other socio-economic rights equally.

The Constitution takes many strides to ensure that South Africa has a strong democracy post-Apartheid. These include the justiciability of socio-economic rights and the creation of state institutions such as the South African Human Rights Commission.[109] The Constitution creates mechanisms to hold the state accountable for the violation of socio-economic rights, including state institutions such as the South African Human Rights Commission (SAHRC).[110] The Constitution gives the SAHRC the important role of monitoring and assessing socio-economic rights in South Africa. This includes the task in terms of s184(3) to monitor the measures that the state has taken towards the realisation of the rights in the Bill of Rights concerning housing, healthcare, food, water, social security, education, and the environment.[111]

Furthermore, socio-economic rights are justiciable, which, according to Keightley,[112] means that they are suited for judicial determination by the courts.[113] Bilchitz argues that judicial oversight by the court is the most important mechanism for determining socio-economic rights.[114] The justiciability of socio-economic rights ensures that legislation, policies, and other

[106] *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC).
[107] *Khoza* para 44.
[108] RG Gaura *Why the caged bird is still caged? The enforcement of socio-economic rights in South Africa* (LLM Dissertation, University of Johannesburg, 2022).
[109] D Holness 'Non-judicial enforcement of human rights' in L Crouse, et al Introduction to Human Rights Law 2nd ed (2016), Pg 271.
[110] Constitution of the Republic of South Africa, s184.
[111] Constitution of the Republic of South Africa, s184(3).
[112] Raylene Keightley, South African judge of the High Court of South Africa.
[113] R Keightley 'The challenges of litigating socio-economic rights in South Africa,' (2011) (2): *New Zealand Law Review*, Pg 267.
[114] 'Taking Socio-Economics Rights Seriously: The Substantive and Procedural Implications' in Van Bueren (ed), *Freedom from Poverty as a Human Rights* UNESCO Publishing, (2010) vol 4, Pg 22.

measures are of an acceptable standard where the realisation of these rights is made possible. Liebenberg[115] recognises the importance of the court's interpretation of socio-economic rights by identifying ways in which the adjudication of socio-economic rights can enrich South Africa's democracy.[116] Liebenberg argues that adjudication by the courts provides a

> 'forum where the impact of legislation and policies on the lives of the disadvantaged receives serious and reasoned consideration in light of the values and the commitments of the Constitution.'[117]

Interpretation by the courts is imperative in instances where the rights of individuals are infringed. This is particularly important in instances where the infringer is the state through the impact of legislation or policies. As such, the court will have an obligation to review the legislation and the policies, and through the court's interpretation of the infringed right, an order will be made to that effect. This was evident in the Constitutional Court decision of *Grootboom*, where the court, after reviewing the government's housing programme, found that it was inconsistent with s26 of the Constitution because it 'failed to recognise that the state must provide for relief for those in desperate need.'[118] The court then made a declaratory order to the state to include reasonable measures in its housing programme.[119] With due deference to the separation of powers doctrine, judicial determination by the court with regard to legislation or the lack thereof is essential to ensure the effective realisation of socio-economic rights. The reasonableness standard of judicial review was first developed in the *Grootboom* case, which applies to measures taken by the state to give effect to socio-economic rights.[120] A core aspect of the reasonableness enquiry is whether a law or policy takes cognisance of the most vulnerable members of society and those in most desperate need.[121]

Accountability for the implementation of socio-economic rights is provided not only in the Constitution but also through the monitoring and reporting mechanisms of international conventions to which South Africa is a signatory. General Comments of the UN Committee on Economic, Social and Cultural Rights[122] state that, generally, socio-economic rights must be

[115] Sandra Liebenberg, HF Oppenheimer Professor in Human Rights Law, University of Stellenbosch Law Faculty.
[116] S Liebenberg 'A Transformative Jurisprudence on Socio-economic Rights' in *Socio-economic rights: adjudication under a transformative Constitution* Juta and Company Ltd. (2010) Pg 37.
[117] Ibid.
[118] *Grootboom* para 66.
[119] *Grootboom* para 99.
[120] *Grootboom* para 39.
[121] *Grootboom* para 44.
[122] The Committee monitors the implementation of the Covenant and of the Optional Protocol by State parties so that all those who are entitled to the rights in the Covenant can enjoy them in full. It seeks to develop a constructive

realised progressively.[123] However, if a significant number of individuals within a state are deprived of, for instance, essential basic foodstuffs or essential primary healthcare, then that state would prima facie be in violation of the rights to access healthcare.[124] Notably, socio-economic realisation cannot be attained on demand, which is why the Constitution allows for progressive realisation, which obliges the state to put measures in place to ensure the realisation of socio-economic rights over time.[125] However, failure to take measures to ensure progressive realisation of socio-economic rights constitutes a violation of those rights, which is worrisome given that it has been over 30 years since the Constitution commenced and the obligations were imposed on the state.

1.2.4 THE CONNECTION BETWEEN THE RIGHT TO ACCESS HEALTH CARE AND OTHER FUNDAMENTAL RIGHTS

Health is a fundamental part of the Bill of Rights and indispensable for the exercise of other human rights; therefore, it cannot be considered in isolation.[126] According to the Office of the United Nations High Commissioner for Human Rights (OHCHR),[127] the realisation of the right to health relies on and contributes to the realisation of other basic human rights. In other words, the obligation of the state to realise the right to health affects not only how individuals exercise other human rights but also how the right to health care is contingent on the realisation of other human rights.

In *S v Makwanyane*[128] the Constitutional Court held that,

> 'The right to life is, in one sense, antecedent to all other rights in the Constitution. Without life in the sense of existence, it would not be possible to exercise rights or to be their bearer.'[129]

dialogue with State parties determine whether the Covenant's norms are being applied in State parties and assess how the implementation and enforcement of the Covenant could be improved.

[123] General Comment No 3: The Nature of State's Parties' Obligations (1990) UN Committee on Economic, Social and Cultural Rights, para 10.

[124] General Comment No 3: The Nature of State's Parties' Obligations (1990) UN Committee on Economic, Social and Cultural Rights, para 10.

[125] P De Vos (note 10 above; 813).

[126] AJ Sundler, L Darcy, A Råberus, and IK Holmström, 'Unmet health-care needs and human rights—A qualitative analysis of patients' complaints in light of the right to health and health care.' (2021) *Health Expectations*, 23(3), Pg. 614.

[127] Office of the United Nations High Commissioner for Human Rights Fact Sheet No 31 (Available at; http://www.ochr.org/Documents/Publications/ Factsheet31.pdf Accessed 23 March 2024).

[128] 1995 (3) SA 391 (CC).

[129] *Makwanyane,* para 326.

Nyane explains that the right to life is the supreme right that all human beings should have, and without it, the protection of other rights would be meaningless.[130] The same can be said about the right to access health care and the protection of other rights. The right to access health care is fundamental to the right to dignity, freedom, and equality. The Constitutional Court in *Grootboom* contended that the fundamental values of human dignity, freedom and equality are denied to those without food, clothing, health care, or shelter.[131] To enjoy the rights afforded by the Constitution, the right to access health care must be realised.

In *Grootboom*, the Constitutional Court further observed that socio-economic rights must be read together in the analysis of Constitutional rights.[132] This is because their interconnectedness has a significant impact on those struggling to enjoy these rights, and this must be taken into consideration when assessing whether the state has met its obligations in relation to these.[133] The right to access health care, as demonstrated above, is intrinsically interconnected with other rights in the Bill of Rights, and this intersectionality would accordingly be critical in determining whether the state has adopted sufficient measures to discharge its obligations.

1.2.5 THE DUTY OF THE STATE TO REALISE THE RIGHT TO HEALTHCARE

Effective access to health care improves levels of health.[134] This is particularly true for patients who need an organ transplant, as an organ transplant for many patients in need would be a lifesaving opportunity. As noted in the introduction, the most significant contributing factor to the slow procurement of organs for transplantation in South Africa is the lack of an organ procurement policy framework and programme that is effective enough to meet the demands of patients in need of an organ transplant. In this sense, the state has an obligation to take measures "within its available resources" to guarantee that those who do not now have access to the right gain access and to improve the enjoyment of those who already have.[135]

The state has the duty to realise the right to access health care. However, it is important to acknowledge the limited resources the state must work with to realise these rights. Nonetheless,

[130] H Nyane 'The interface between the right to life and the right to health in Lesotho: Can the right to health be enforced through the right to life?' (2022) 22 *African Human Rights Law Journal*, Pg 271.
[131] *Grootboom*, para 23.
[132] *Grootboom*, para 24.
[133] *Grootboom*, para 23.
[134] S Plaks and MBJ Butler 'Access to public healthcare in South Africa' (2012) 12(1), *South African Actuarial Journals*, Pg 130.
[135] Constitution of the Republic of South Africa, s27(2).

the researcher argues that the issue of limited availability of resources in relation to organ donation is not relevant in this case. The reason why resources can not be used as an argument is that, firstly, the state can not physically supply organs because it does not have ownership of human bodies,[136] secondly, organ donation is not a financial burden on the state as it is not prioritised as a major health need.[137] Lastly, because there aren't many organs being donated, the study does not reveal any resource constraints on the health care system that affect organ donation. The resources that are of interest in this study and that are applicable to organ donation are organs for transplantation. The researcher in this regard is of the view that legislation is one of the most effective ways that the state can protect and realise the right to access health care in relation to organ donation to ensure that the number of organs being donated increases.

The state is obliged "to take reasonable legislative and other measures, to achieve the progressive realisation" of each of these rights.[138] This duty conferred on the state in terms of the Constitution is essential as it requires that "the state adopt the appropriate legislative and other measures" to fulfil the realisation of this right, which would arguably include, at a minimum, an organ procurement policy framework and programme. The focus of this study is to ascertain whether the state has fulfilled its duties to implement such reasonable steps to guarantee the enjoyment of the right to health care. An argument pertaining to resource constraints in this context has no merit. The duty of the state also entails undertaking necessary promotional measures[139] to increase awareness and to educate donors to encourage them to contribute organs to be made available, thereby increasing the number of donors.

Accordingly, the researcher contends that the state's inability to fulfil the right to health care, particularly with regard to organ procurement, cannot be justified by a lack of funding. The key issue raised by the literature is that the current organ procurement system has seen a significant decline in organ donation over the years; a review of the literature also indicated that the altruistic system of organ procurement is just not working, which is why there is a need for a robust organ procurement mechanism at the national level.

S27(2) of the Constitution obliges the state "to take reasonable legislative and other steps to progressively realise" this right.[140] The International Covenant on Economic, Social and

[136] J Fabian (note 53 above; 545).
[137] D Thomson (note 85 above; 36).
[138] Constitution of the Republic of South Africa, s27(2).
[139] Constitution of the Republic of South Africa, s7(2).
[140] Constitution of the Republic of South Africa, s27(2).

Cultural Rights acknowledges that the realisation of socio-economic rights will not happen in a short period of time, while emphasising the importance of progressive realisation of socio-economic rights.[141] Progressive realisation allows access to rights protected in the Constitution to be improved gradually over time.[142] This also applies to the right to access health care in relation to organ donation; the government has the duty to ensure that there are policies and legislation in place that are effective in facilitating an increase in organ donation. However, we must acknowledge that not everyone in need of an organ for transplantation will receive one immediately. The government is obliged to improve legislation and policies over time to ensure progressive realisation of the right to access health care.[143]

1.2.6 LITERATURE REVIEW CONCLUSION

Organ donation is a topic that is covered mainly in the literature. However, there is currently no literature that looks at the right to access health care in relation to organ donation as a socio-economic right that, in the researcher's view, must be evaluated as such. It is the researcher's view that a major reason for the decline in organ donors is the legislative constraints at a national level. In line with the state's constitutional obligation, the researcher argues that the state must take reasonable legislative and other measures[144] to foster conditions which will enable patients in need of an organ for transplantation to have access to organs for transplantation. The researcher is also of the view that the shortage of organs for donation is due to a lack of appropriate legislation that fails to facilitate an increase in the supply of organs in order to meet the demand. This must be dealt with in the same manner as other socio-economic rights have been dealt with in our courts, for example, the right to adequate housing in the Grootboom case,[145] where the court applied the reasonableness enquiry to determine whether the housing policy was reasonable. In the case of organ procurement, the question, therefore, is whether the current altruistic organ procurement system is reasonable considering the organ shortage.

1.3 RESEARCH QUESTIONS

[141] CESCR General Comments, para 9.
[142] *Grootboom* para 45.
[143] Constitution of the Republic of South Africa, s1(a).
[144] Constitution of the Republic of South Africa, s27(2).
[145] 2000 11 BCLR 1169 (CC).

This section contains questions that the researcher aims to answer in this dissertation. These questions aim to provide clarity as to what the researcher aims to discover.

I. What are the state's obligations in terms of international law to adopt adequate mechanisms to actualise the right to access health care in South Africa to ensure that patients seeking an organ transplant have access?
II. To what extent has the current legislation in relation to organ donation given effect to the right to access health care?
III. What is the current position in Spain, the Islamic Republic of Iran and the United Republic of Tanzania, and how can South Africa use these positions to strengthen its organ procurement mechanism?

1.4 RESEARCH PROBLEM AND OBJECTIVES

The premise of this study lies in the exploration of the duty of the state to 'take reasonable legislative and other measures' to achieve the progressive realisation of the right to access health care in relation to organ procurement for transplant purposes.[146] The researcher, in this regard, seeks to critically discuss whether the current organ procurement system is reasonable considering the organ shortage and assess whether the state is taking reasonable legislative measures to ensure the realisation and protection of the right to health care, particularly in relation to the provision of necessary organ transplantation. Due to the critical shortage of organs in the country, it is the researcher's premise that not enough has been done by the state to fulfil its constitutional obligation, as evidenced by the increasing decline in organ donations.

The objectives of this study are as follows:

- To study the current international law framework to ascertain the extent of South Africa's obligation to realise the right to access health care in relation to organ donation.
- To critically analyse the extent to which legislative measures enacted and implemented by the state have affected these obligations and impacted the access to health care and other constitutional rights by patients seeking organ donation.

[146] Constitution of the Republic of South Africa, s27(2).

- To assess other jurisdictions' policies and legislative measures, such as Spain, the Islamic Republic of Iran, and Tanzania, to evaluate how each jurisdiction has dealt with establishing an enabling environment to ensure the adequate supply of donated organs for transplant purposes.

1.5 RESEARCH METHODOLOGY

Due to the nature of this study, the doctrinal research methodology will be followed. The doctrinal research methodology uses primary sources such as the Constitution, legislation, and case law and secondary sources such as books, journal articles and internet sources. Furthermore, to effectively address the research questions, it is necessary to conduct a comparative law study from different jurisdictions. The researcher will engage with the laws and policies of various jurisdictions regarding their organ procurement policies and the effect these policies have in curbing the shortage of organs in those jurisdictions.

1.6 CHAPTER OUTLINE

- **CHAPTER 1: INTRODUCTION**

This chapter serves as the introductory chapter, which contains a background to the study and explains in detail what the study will entail. This chapter contains the purpose of the study, setting out the study's objectives and aims, a synthesis of relevant literature on the topic, and the research methodology.

- **CHAPTER 2: ASSESSING SOUTH AFRICA'S OBLIGATIONS TO REALISE THE RIGHT TO ACCESS HEALTH CARE WITHIN THE INTERNATIONAL LEGAL CONTEXT**

This chapter assesses the international and regional conventions relating to the right to access health care to establish what obligations arise because South Africa is a signatory to the international and regional instruments. This research starts with the international perspective in order to give a broad overview of the state's duties to realise the right to health care at an international level. This will be followed by an analysis of the state's obligations in terms of South African law.

- **CHAPTER 3: HEALTH CARE AS A CONSTITUTIONAL RIGHT: A CRITICAL ANALYSIS OF THE STATE'S CONSTITUTIONAL OBLIGATION TO REALISE THE RIGHT TO ACCESS HEALTH CARE IN THE CONTEXT OF ORGAN DONATION**

This chapter analyses the state's duty to realise the right to access health care in terms of the South African Constitution. This analysis is necessary to determine whether the state has realised the right to access health care for patients needing an organ for transplantation. This chapter addresses the contribution the current legislative measures have made to the decreasing number of organs for transplantation. To achieve this, this chapter critically analysed the current legislative measures to determine if they meet the standard of reasonableness as described by the Constitutional Court in the *Grootboom* case.

- **CHAPTER 4: A COMPARATIVE STUDY BETWEEN SPAIN, THE ISLAMIC REPUBLIC OF IRAN AND THE REPUBLIC OF TANZANIA: ORGAN PROCUREMENT POLICIES**

In this Chapter, the researcher compares the laws and policies of various other jurisdictions, such as Spain, the Islamic Republic of Iran, and the Republic of Tanzania, in relation to organ procurement to assess the effectiveness of a robust organ procurement policy. The reason for choosing these countries is that they implement unique systems outside the internationally recognised “opt-in” and “opt-out.” These systems have proven to be successful in drastically increasing the number of organs being donated in the respective jurisdictions. Spain has a systematic and organisational approach to deceased organ donations and, as a result, has the highest deceased organ donation rate in Europe. Iran permits the purchasing of kidneys, which has resulted in the eradication of the kidney transplant waiting list. Lastly, the chapter will also consider the Republic of Tanzania as a comparative African country providing organs as a mechanism for treatment. This chapter also evaluates the options available to South Africa to curb the organ shortage; this will be done by assessing the advantages and the disadvantages of each, and concluding by suggesting an organ procurement system, which is believed to be the best possible solution considering the organ shortage.

- **CHAPTER 5: CONCLUSION AND RECOMMENDATIONS**

The issue relating to the lack of organs for transplantation in relation to organ donation will be extensively covered throughout the chapters. This dissertation will make recommendations as

to which solution the researcher believes will be the most effective in curbing the shortage of organs in South Africa, therefore enhancing the enjoyment of the right to access health care for patients in need of an organ transplant.

1.7 CONCLUSION

This chapter serves as a general introduction to the topic relating to organ procurement. In this study, a solution to the ongoing organ shortage will be sought. Considering that the most significant factor contributing to the shortage is the lack of legislation or policy, the solution will be sought by assessing the state's obligation in terms of the Constitution to enact the appropriate legislation to effectively facilitate an increase in the supply of organs that has contributed to the shortage.

CHAPTER 2: ASSESSING SOUTH AFRICA'S OBLIGATIONS TO REALISE THE RIGHT TO ACCESS HEALTH CARE WITHIN THE INTERNATIONAL LEGAL CONTEXT

2.1 INTRODUCTION

Although socio-economic rights are protected in the South African Constitution, the realisation of these rights has been affected by issues ranging from inadequate legislation or the lack

thereof, lack of resources and even failure by the state to take steps necessary to ensure the progressive realisation of socio-economic rights.[147] The realisation of the right to health in every state is essential to ensure the well-being of every individual. To understand the right to health care and what is required to achieve the full realisation of the right, it is imperative to consider international law as it will assist in providing a greater understanding thereof. This will also assist in providing clarity regarding the obligations related to access to health care imposed on states by international law.

A31(1) of the Vienna Convention on the Law of Treaties, in relation to the interpretation of conventions, provides that:

> 'a treaty shall be interpreted in good faith by the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'[148]

The Constitution ensures that South African laws are interpreted to comply with international standards, particularly international human rights law.[149] S39(1) of the Constitution[150] provides for the consideration of international law when interpreting the Bill of Rights.[151] This provision indicates that the Constitution is open to and responsive to international norms and values.[152] In *S v Makwanyane*, the court enforced this as it held that international conventions and customary international law provide a framework for the interpretation of the Bill of Rights.[153] Accordingly, a case can be made that international law can and should be drawn on in interpreting the state's obligation to realise the right to access health care as provided for in s27(2) of the Constitution.[154] This chapter will examine this premise in determining whether international law imposes any obligations on the state to ensure that patients seeking an organ transplant have access to these.

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[147] IR Masanque 'Progressive Realization without the ICESCR: The Viability of South Africa's Socio-economic Rights Framework, and Its Success in the Right to Access Health Care,' (2013) 43 No 2 *California Western International Law Journal* pg. 472.
[148] Vienna Convention on the Law of Treaties. Available at: https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (Accessed 14 August 2024).
[149] *Mazibuko and others v the City of Johannesburg and others* (2009) ZACC 28. Para 97.
[150] Constitution of the Republic of South Africa, s39(1).
[151] Constitution of the Republic of South Africa, s39(1)(a).
[152] S Liebenberg *Socio-economic rights: Adjudication under a transformative constitution*. (2010) Juta and Company Ltd. Pg. 101.
[153] *Makwanyane,* para 35.
[154] Constitution of the Republic of South Africa, s27(2).

In addition, state obligations in international law, in relation to the right to health care, must be evaluated in light of s231[155] of the Constitution, which governs international conventions. S231(2)[156] of the Constitution provides that:

> 'An international agreement binds the republic only after it has been approved by both the National Assembly and the National Council of Provinces.'

In the case of *Glenister v President of the Republic of South Africa,*[157] the court held that approval of a convention under this section indicates an undertaking by South Africa to put measures in place to ensure compliance with the substance of the conventions.[158] This will ensure that the measures put in place by the state to realise human rights in South Africa align with international standards as provided for in international conventions.

Human rights are universal, and all human beings deserve equal respect for their inherent dignity and worth.[159] International human rights law plays a vital role in internationalising the minimum human rights that all persons should enjoy. It serves as guidance for states demonstrating the direction their domestic law, policies and practices should follow.[160] According to the United Nations High Commissioner for Human Rights (UNHCHR), human rights:

> 'Range from the most fundamental—the right to life—to those that make life worth living, such as the rights to food, education, work, health, and liberty'[161]

Health is an essential human right essential for exercising other human rights[162] and is protected in several international and regional human rights documents.[163] These instruments contain obligations of member states to protect and promote the health of individuals.[164] This chapter will assess state obligations relating to the realisation of the right to health care in the different international and regional conventions to which South Africa is a signatory. This will inform a

[155] Constitution of the Republic of South Africa, s231.
[156] Constitution of the Republic of South Africa, s231(2).
[157] *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC).
[158] *Glenister*, para 91.
[159] H Strydom, et al *International law*, OUP Southern Africa, (2015) pg. 320.
[160] Ibid 317.
[161] "What are human rights?" United Nations Human Rights Office of The High Commissioner, (Available at: https://www.ohchr.org/en/what-are-human-rights Accessed 24 May 2024).
[162] D Uberoi and L Forman 'What role can the right to health play in advancing equity in kidney care?' (2021) 41(3) *Semin Nephrol*, Pg 220.
[163] Universal Declaration of Human Rights; International Covenant on Economic, Social, and Cultural rights; African Charter; African Charter on Human and People's Rights.
[164] SMT Karim and GF Tomossy 'Progressive Realisation of the Right to Health: An Opportunity for Global Development' (2019) vol 27 *Waikato Law Review*, pg. 38.

subsequent critical analysis of whether the state has done enough to actualise the right to health care in relation to organ donation in accordance with its international obligations.

2.2 THE RIGHT TO HEALTH CARE AND ORGAN DONATION

This research finds it imperative to first discuss whether the right to access health care includes access to organ transplants. According to the World Health Organization (WHO), the right to health care includes essential, interrelated elements such as availability, accessibility, acceptability and quality.[165] Of interest in this study are the elements of availability and accessibility. Availability refers to the need for a sufficient quantity of functioning health facilities, goods and services for all.[166] A sufficient quantity of services can be said to include access to organ transplants.

It can be deduced from the WHO that the right to health care emphasises the availability of sufficient and functioning health services and the accessibility of these services to all individuals without discrimination. Organ transplantation, a life-saving medical procedure, directly depends on the availability and accessibility of the service of organ transplantation and the availability of donor organs. This would require a well-functioning health system to facilitate their procurement, storage, and transplantation. For this to occur, organ donation systems must be robust, ethically managed, and accessible.

Without an effective framework to support organ donation, including public awareness, equitable distribution, and regulated practices, the right to health care would remain incomplete for patients requiring transplants. Therefore, ensuring the accessibility and availability of organ transplantation services is integral to fulfilling the broader promise of the right to health care.

2.3 RELEVANT INTERNATIONAL HUMAN RIGHTS TREATIES

There are two main sources of international law: international conventions (treaties) and international customs; the focus of this chapter will be on international conventions.[167]

[165] World Health Organisation 'Health' (Available at: https://www.who.int/news-room/fact-sheets/detail/human-rights-and-health#:~:text=The%20right%20to%20health%20includes,goods%20and%20services%20for%20all. Accessed 9 December 2024).
[166] World Health Organisation 'Health' (Available at: https://www.who.int/news-room/fact-sheets/detail/human-rights-and-health#:~:text=The%20right%20to%20health%20includes,goods%20and%20services%20for%20all. Accessed 9 December 2024).
[167] Statute of the International Court of Justice, art 38(1).

Numerous international conventions have been adopted that protect the right to health care. According to Strydom, when states become party to these treaties through ratification or accession, they are bound to have a domestic effect on the rights in these treaties.[168] Once states have signed or consented to be bound to a convention, they are obliged to refrain from acts which would defeat the object and purpose of a treaty in terms of A18 of the Vienna Convention.[169] The focus of this section will be on particular international conventions. Notably, there are several conventions that South Africa has ratified in accordance with the processes outlined in terms of s231 of the Constitution and, as such, is bound to these conventions.

2.3.1 THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

The Universal Declaration of Human Rights (UDHR) was adopted by the General Assembly of the United Nations (UN) in 1948.[170] The UDHR protects first-generation (civil and political rights) and second-generation rights (economic, social and cultural).[171] The UDHR was not adopted as a binding treaty in that it does not have a force of law on its own.[172] It is argued that the UDHR is not a treaty but a recommendatory resolution of the General Assembly and is, therefore, not binding on states.[173] However, scholars have argued that the declaration forms part of customary international law, which is binding on all states.[174]

The purpose of the UDHR, as outlined in its preamble, is to provide a 'common understanding of these rights and freedoms' and further serve as 'a common standard of achievement for all peoples and all nations.'[175] The UDHR provides a standard for other international and regional instruments,[176] such as the International Covenant on Civil and Political Rights and the

[168] H Strydom (note 159 above; 318).
[169] Vienna Convention on the Law of Treaties, (Available at: https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf Accessed 24 August 2024).
[170] Universal Declaration of Human Rights (10 December 1948) UNGA Res 217A (III), UN Doc A/810.
[171] F Pocar, 'Some Thoughts on the Universal Declaration of Human Rights Some Thoughts on the Universal Declaration of Human Rights and the Generations of Human Rights' (2015) Volume 10 *Intercultural Human Rights Law*, Pg 43.
[172] P Vrancken 'Historical background, international context and constitutional environment' in L Crouse, et al *Introduction to Human Rights Law* 2nd ed Durban: Lexis Nexis (2016) pg. 8.
[173] MB Sener 'A review of the meaning and importance of the Universal Declaration of Human Rights' (2021) vol 7(3), *International Journal of Political Studies*, Pg. 17.
[174] M Davis 'To bind or not to bind: The United Nations Declaration on the rights of indigenous people five years on' (2013) vol 19, *Australian International Law Journal*, pg. 17.
[175] Universal Declaration of Human Rights, preamble.
[176] P Vrancken (note 172 above; 9).

International Covenant on Economic, Social and Cultural Rights,[177] Which are legally binding on countries that are signatories to the conventions. This includes South Africa, which has ratified both conventions.[178]

South Africa abstained from ratifying the UDHR because of the declaration's potential to disrupt its practice of racial discrimination and segregation that took place during Apartheid.[179] However, during South Africa's transition into democracy, the former President of South Africa, Mr Nelson Mandela, signed into law South Africa's Constitution on the 10th of December 1997, the same day the UDHR was signed, albeit 49 years earlier.[180] This can be attributed to the fact that the UDHR has significantly influenced the South African Constitution in that the spirit, principles, and standards of the UDHR and the South African Constitution are similar in that they represent humankind's determination to uphold, advance and defend the rights of all people to equality and freedom from discrimination.[181]

The first explicit mention of health within an international human rights instrument is to be found in A25(1) of the UDHR, which provides that:

> 'Everyone has a right to a standard of living adequate for the health of himself and his family, including food, clothing, housing, and medical care and necessary social services and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.'[182]

The enjoyment of this right to a certain standard of living requires, at minimum, that everyone shall enjoy the necessary subsistence rights, including the right to access health care.[183] The

[177] The International Covenant on Economic, Social and Cultural Rights (ICESCR) was adopted by the United Nations General Assembly on 16 December 1966 and entered into force on 3 January 1976.
[178] South African Government 'Minister Joe Phaahla: South African Primary Health Care Conference' (Available at: https://www.gov.za/news/speeches/minister-joe-phaahla-south-african-primary-health-care-conference-15-nov-2023 Accessed 23 June 2024); South Africa Ratifies the International Covenant on Economic, Social and Cultural Rights, on 12 January 2015.
[179] South African Human Rights Commission 'South Africa celebrates the 70th Anniversary of the Universal Declaration of Human Rights (UDHR)' https://www.sahrc.org.za/index.php/sahrc-media/news/item/1686-south-africa-celebrates-the-70th-anniversary-of-the-universal-declaration-of-human-rights-udhr (Accessed 24 August 2024).
[180] South African Human Rights Commission 'South Africa celebrates the 70th Anniversary of the Universal Declaration of Human Rights (UDHR)' https://www.sahrc.org.za/index.php/sahrc-media/news/item/1686-south-africa-celebrates-the-70th-anniversary-of-the-universal-declaration-of-human-rights-udhr (Accessed 24 August 2024).
[181] South African Human Rights Commission, 'South Africa celebrates the 70th Anniversary of the Universal Declaration of Human Rights (UDHR)' (Available at: https://www.sahrc.org.za/index.php/sahrc-media/news/item/1686-south-africa-celebrates-the-70th-anniversary-of-the-universal-declaration-of-human-rights-udhr Accessed 24 August 2024).
[182] Universal Declaration of Human Rights, Article 25(1).
[183] A Eide 'Freedom from need: The universal right to an adequate standard of living–origins, obstacles and prospects' (2010) *Human Rights. Limitations and Proliferation*, Pg 164.

right to health refers to the right to the enjoyment of a variety of goods, facilities, services and conditions necessary for its realisation.[184] Access to health care, according to the UDHR, is the minimum standard of living that everyone has the right to.

The declaration's wording does not take into account how to achieve this right to a minimum standard of living. However, the UDHR emphasises the need for the protection of human rights in the rule of law at a national level to prevent violations of these rights.[185] Due to the fact that the UDHR is not legally binding, it does not impose any obligations on the state to take positive measures that will enable the realisation of the rights that are protected by the UDHR.[186] South Africa is not legally bound to the UDHR and does not have any legal obligations in terms of the UDHR; however, the UDHR serves as the primary source of global human rights standards.[187] The UDHR has been invoked in South Africa's courts as a source, particularly when interpreting rights in the Bill of Rights that have not been interpreted in our courts; one such example is the landmark judgment of *S v Makwanyne*.[188] In this case, the court made reference to the UDHR in its interpretation of the right to life.[189]

The concept of 'the right to a standard of living' is the global standard that is set by the UDHR, and it is the standard that states that those who view the UDHR as the primary global standard should strive to obtain for everyone.[190] South Africa has illustrated a common understanding of the standard of rights the UDHR sets to achieve. However, this would also entail ensuring that everyone acquires a certain standard of living that provides them with access to basic human rights such as health care. South Africa has made great progress in ensuring that everyone has access to health care, with recent developments such as the National Health Insurance,[191] but there are still shortcomings. There are patients who wait for an organ until they die. Not having access to a lifesaving treatment is not the standard of living envisaged in the UDHR.

[184] Office of the United Nations High Commissioner for Human Rights Fact Sheet No 31 http:// www.ochr.org/Documents/Publications/ Factsheet31.pdf (Accessed 23 March 2024) 6.
[185] Universal Declaration of Human Rights, preamble.
[186] MB Sener (note 173 above; 17).
[187] M Freeman *Human rights* John Wiley & Sons, (2022) pg. 1936.
[188] 1995 (3) SA 391 (CC).
[189] *Makwanyne*, para 234.
[190] M Freeman (note 187 above; 1936).
[191] National Health Insurance Act 20 of 2023.

2.3.2 INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS (ICESCR)

The ICESCR enshrines socio-economic rights such as the rights to adequate food, adequate housing, education, health, social security, water and sanitation, and work (second-generation rights).[192] The protection of socio-economic rights at an international level has ensured that a significant portion of the world's population enjoys these rights. However, the responsibility to realise these rights lies with the state.[193] South Africa became a state party to the Covenant in 2015.[194] As a result of South Africa being a signatory to the ICESCR, states are expected to adhere to obligations as set out in A2. A2(1) states the following:

> 'Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.'[195]

An analysis of the obligations of states in terms of this article would include assessing the concepts and phrases used in A2(1) to describe the state's obligations. These include the concept of 'progressive realisation' and 'by all appropriate means, including particularly the adoption of legislative measures.'

a) Progressive Realisation

The ICESCR, in addressing the concept of progressive realisation, elaborated that:

> 'The fact that realisation over time, or in other words progressively, is foreseen under the Covenant should not be interpreted as depriving the obligation of all meaningful content. It is, on the one hand, a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realisation of economic, social, and cultural rights. On the other hand, the phrase must be read in light of the overall objective, indeed the raison d'etre, of the Covenant, which is to establish clear obligations for state parties with

[192] 'Committee on Economic, Social and Cultural Rights,' United Nations Human Rights Office of the High commissioner, (Available at: https://www.ohchr.org/en/treaty-bodies/cescr Accessed 27 May 2024).
[193] 'United Nations High Commissioner for Refugees' The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (Available at: https://www.refworld.org/policy/legalguidance/icjurists/1997/en/63964 Accessed 24 July 2024).
[194] ESCR-Net 'The Government of South Africa ratifies the ICESCR' https://www.escr-net.org/news/2015/government-south-africa-ratifies-icescr (Accessed 24 June 2024).
[195] International Covenant on Economic, Social and Cultural Rights, Article 2(1).

> respect to the full realisation of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal.[196]

The realisation of the right is difficult if the legislation does not provide for the progressive realisation of the right to everyone or if the law does not create an enabling environment for the right to be realised. This is particularly true with regard to the current legislation governing organ transplantation.

b) 'By all appropriate means, including particularly the adoption of legislative measures.'[197]

It is clear from the wording used in the article that the adoption of legislative measures is not the only way that states can realise the rights protected in the convention. Instead, the convention permits some flexibility by providing that the progressive realisation of the rights can be achieved 'by all appropriate means.'[198] States can, therefore, take appropriate measures to realise the rights protected by the convention. However, the use of legislation is emphasised in the convention as it is the most important instrument that plays a vital role in the protection of everyone's human rights.

The right to health care is protected in A12 of the ICESR, according to A12(1) of the Covenant,

> 'States Parties to the recent covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.'[199]

A12(2) of the Covenant provides several 'steps to be taken by the state parties to achieve the full realisation of this right.'[200] One of the steps includes creating conditions that ensure all medical services and medical attention are provided in the event of sickness.[201] In addition to the steps the Covenant provides for in A12, part 1, paragraph 5 of the Covenant, the importance of the adoption of legislative measures by state parties is recognised to give effect to the obligations imposed on the state by the Covenant.[202]

[196] General Comment No 3: The Nature of State's Parties' Obligations (1990) UN Committee on Economic, Social and Cultural Rights, para 9.
[197] International Covenant on Economic, Social and Cultural Rights, Article 2(1).
[198] International Covenant on Economic, Social and Cultural Rights, article 2(1).
[199] International Covenant on Economic, Social and Cultural Rights, Article 12(1).
[200] International Covenant on Economic, Social and Cultural Rights, Article 12(2).
[201] International Covenant on Economic, Social and Cultural Rights, Article 12(2)(d).
[202] International Covenant on Economic, Social and Cultural Rights Part 1, Paragraph 5.

Member states have a clear obligation in terms of this Covenant, the central obligation being the obligation for states to give effect to the right protected in the Covenant as long as the means that are used are reasonable.[203] In response to a report submitted by South Africa to the Committee on Economic, Social and Cultural Rights on the measures adopted by South Africa relating to the rights protected in the Covenant, the Committee recommends that the State party ensure that the rights enshrined in the Covenant are fully recognised.[204] The committee further recommended that South Africa do this through domestic legislation.[205] This implies that there are some shortcomings in South Africa's legislation in relation to the full recognition of rights in legislation. This is the case in organ procurement. Current legislative measures that regulate organ transplantation do not provide for the progressive realisation of the right to health care in relation to organ donation, and they fail to meet the demand for organs in South Africa. A court would similarly find that a change in the current legislative measures is necessary, as the failure to enact legislation that assists in facilitating an increase in the supply of organs for transplantation deprives patients of their right to health care under the convention.

The UN Committee on Economic, Social and Cultural Rights provided that:

> 'A State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, basic shelter and housing, or of the most basic forms of education are, prima facie, failing to discharge its obligations under the Covenant.'[206]

Additionally, General Comment 14 provides that the realisation of the rights to health care facilities for public health and health care, as well as programs, goods, and services, must be sufficiently accessible.[207] Nearly 5000 patients in South Africa are waiting for an organ for transplantation,[208] this is a significant number of people that can not get access to the lifesaving treatment. In relation to access to health care, the committee recommended that South Africa ensure that all people in need of a lifesaving treatment have access to such affordable

[203] General Comment No 9: The domestic application of the Covenant (1998) UN Committee on Economic, Social and Cultural Rights (CESCR).
[204] Department of Justice and Constitutional Development 'International Legal Obligations' (Available at: https://www.justice.gov.za/ilr/documents.html Accessed 22 August 2024).
[205] Department of Justice and Constitutional Development 'International Legal Obligations' (Available at: https://www.justice.gov.za/ilr/documents.html Accessed 22 August 2024).
[206] General Comment No 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant) (2000) UN Committee on Economic, Social and Cultural Rights (CESCR).
[207] General Comment No 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant) (2000) UN Committee on Economic, Social and Cultural Rights (CESCR), para 12a.
[208] Kevin Brandt 'Critical Shortage of Organ Donors in SA' (19 August 2023 available at: https://www.enca.com/news/critical-shortage-organ-donors-sa Accessed 23 February 2024).

medicines.[209] Considering that the measures that are currently in place fail to progressively meet the demand and there is a population of people who are being deprived of such access, it means that the measures are unreasonable. This constitutes a failure to discharge its obligations under international law.

2.3.3 DECLARATION OF ALMA-ATA

International Conference on Primary Health Care, Alma-Ata 'the Declaration of Alma-Ata' of 1978 was convened by WHO and UNICEF. The primary focus of the Declaration is on eradicating inequality in primary health care.[210] Importantly, it is considered one of the greatest milestones and a turning point for global public health care.[211] The Declaration envisions the 'attainment of a level of health that adequately allows people to lead a socially and economically productive life.'[212] The Declaration emphasises the right to health care as a fundamental human right and describes health as a 'state of complete physical, mental and social wellbeing, and not merely the absence of disease or infirmity.'[213]

The Declaration emphasises the idea that governments have the responsibility for the health of their people, which can be fulfilled only by the provision of adequate health and social measures.'[214] also providing that:

> 'All governments should formulate national policies, strategies and plans of action to launch and sustain primary health care as part of a comprehensive national health system and in coordination with other sectors.'[215]

[209] Department of Justice and Constitutional Development 'International Legal Obligations' (Available at: https://www.justice.gov.za/ilr/documents.html Accessed 22 August 2024).
[210] 'Declaration of Alma-Ata,' World Health Organisation, https://www.who.int/publications/i/item/WHO-EURO-1978-3938-43697-61471 (Accessed 8 June 2024).
[211] M Weber, 'From Alma Ata to the SDGs: The Politics of Global Health Governance and the Elusive "Health for All"' (2020) vol 26, no. 1, *The Global Governance*, pg. 176.
[212] RC Sethi 'Alma-Ata Declaration: Ambitious Vision and Achieved Reality,' (2014), 4, no. 1, *GNLU Journal of Law Development and Politics* Pg. 42.
[213] WHO, Declaration of Alma-Ata, (International Conference on Primary Health Care, Alma-Ata, USSR 6-12 September 1978), para-I.
[214] WHO, Declaration of Alma-Ata, (International Conference on Primary Health Care, Alma-Ata, USSR 6-12 September 1978) para I and V.
[215] WHO, Declaration of Alma-Ata, (International Conference on Primary Health Care, Alma-Ata, USSR 6-12 September 1978), para VIII.

In line with the Declaration, South Africa has pledged to facilitate a socially and economically productive life for all South Africans.[216] South Africa is not bound to the declaration but has been greatly influenced by the Declaration of Alma-Ata through its commitment to primary health care and implementation of universal health coverage envisioned in the declaration.[217] Notably, South Africa has taken great strides in ensuring equal primary health care, which includes the implementation of the National Health Insurance.[218] However, there is still inequality in the availability of resources. As mentioned in the previous chapter, patients in need of an organ transplant do not enjoy the same life-saving health care that patients with other terminal conditions have, for example, patients with HIV. Such inequalities illustrate that there is a lot of work that the state still must do to ensure equality regarding access to resources and that everyone has equal access to health care.

2.3.4 DECLARATION OF ISTANBUL

The Declaration of Istanbul is not a legal document, and those involved in its creation did not sign it. Rather than compelling compliance with its principles, the Declaration serves as a model that contains principles that will guide and inspire better transplantation practices from states that seek to develop ethical transplantation programmes and practices and prevent organ trafficking.[219] The Declaration urges governments to enact legislation to govern the recovery of organs from deceased and living donors and the practice of transplantation, consistent with international standards.[220]

Although the Declaration is not a binding instrument, various organisations relating to transplantation have endorsed the Declaration in South Africa. This illustrates that there is major progress in ensuring that transplantation practices with ethical standards align with international norms. The endorsement of the Declaration of Istanbul by South African organisations reflects a commitment to combating organ trafficking and promoting transparency and fairness in organ donation and transplantation. This progress highlights the

[216] South African Government 'Minister Joe Phaahla: South African Primary Health Care Conference' (Available at: https://www.gov.za/news/speeches/minister-joe-phaahla-south-african-primary-health-care-conference-15-nov-2023 Accessed 23 June 2024).
[217] South African Government 'Minister Joe Phaahla: South African Primary Health Care Conference' (Available at: https://www.gov.za/news/speeches/minister-joe-phaahla-south-african-primary-health-care-conference-15-nov-2023 Accessed 23 June 2024).
[218] National Health Insurance Act 20 of 2023.
[219] The Declaration of Istanbul on organ trafficking and Transplant 'Endorsements' (Available at: https://www.declarationofistanbul.org/endorsements Accessed 25 November 2024).
[220] The Declaration of Istanbul on organ trafficking and Transplant.

growing recognition of the need for robust ethical guidelines and legislative frameworks to ensure that transplantation practices respect human dignity and protect vulnerable populations from exploitation.

2.3.5 SUSTAINABLE DEVELOPMENT GOALS

The SDGs are a universal set of goals, targets, and indicators that, over the next 15 years, UN member states are expected to employ to formulate their political objectives.[221] These are goals that were adopted by the UN in 2015 to prioritise progress for those who are furthest behind.[222] Goal 3[223] in the SDGs provides for good health and well-being, with the goal of promoting healthy lifestyles, preventive measures, and modern, efficient health care for everyone.[224] Goal 3(8)[225] aims to achieve universal health coverage, including financial risk protection, access to quality essential health care services, and safe, effective, quality, and affordable essential medicines and vaccines for all.[226] The term 'universal health coverage' stems from the WHO's Constitution, which declares health a fundamental right that everyone has the right to enjoy.[227]

South Africa has made steady progress towards SDG 3, which aims to ensure healthy lives and promote well-being for all ages by 2030.[228] The progress includes the tackling of various epidemics such as HIV/AIDS, Malaria, TB and Hepatitis B, which have seen improvements towards achieving the 2030 targets.[229] In addition to this, the South African government has made fundamental changes, such as the adoption of the National Health Insurance, in order to

[221] United Nations, 'Sustainable Development Goals' (Available at: https://www.unodc.org/roseap/en/sustainable-development-goals.html Accessed 24 July 2024).
[222] United Nations, 'What are the Sustainable Development Goals?' (Available at: https://www.undp.org/sustainable-development-goals Accessed 23 June 2024).
[223] United Nations: Department of Economic and Social Affairs Sustainable Development 'Goal 3: Ensure healthy lives and promote well-being for all at all ages' (Available at: https://sdgs.un.org/goals/goal3 Accessed 1 August 2023).
[224] Global Goals 'Good Health and Wellbeing' (Available at: https://www.globalgoals.org/goals/3-good-health-and-well-being/ Accessed 23 June 2024).
[225] United Nations: Department of Economic and Social Affairs Sustainable Development 'Goal 3: Ensure healthy lives and promote well-being for all at all ages' (Available at https://sdgs.un.org/goals/goal3#targets_and_indicators Accessed 1 August 2024).
[226] Global Goals 'Good Health and Wellbeing' (Available at: https://www.globalgoals.org/goals/3-good-health-and-well-being/ (accessed 23 June 2024).
[227] Y Takahashi 'Primary Health Care and Universal Health Coverage in Certain International Instruments and the Implementation - The Case of Japan,' (2016) 11 No 2, *Asian Journal of WTO and International Health Law and Policy*, pg. 481.
[228] Statistics South Africa 'SDG Country Report 2023' (December 2023 available at: https://www.statssa.gov.za/MDG/SDG_Country_report.pdf Accessed 26 August 2024).
[229] Statistics South Africa 'SDG Country Report 2023' (December 2023 available at: https://www.statssa.gov.za/MDG/SDG_Country_report.pdf Accessed 26 August 2024).

strengthen the health care system whilst achieving universal health coverage.[230] There are still health challenges that persist in South Africa, such as inequality in the health care system, which the NHI seeks to address.

South Africa has an obligation, by virtue of being a member of the UN, to formulate national strategies that affect the SDGs, including providing universal health coverage. In the case of patients in need of an organ for transplantation, 'access to health care' would mean access to not only medical treatment but also access to an organ. As a member of the UN, South Africa has undertaken to ensure that everyone has access to health care, which arguably includes ensuring that there are sufficient organs for patients in need of an organ transplant or creating conditions which allow for organs to be available.

2.3.6 CONSTITUTION OF THE WORLD HEALTH ORGANIZATION

The World Health Organisation Constitution defines health as follows:

> 'Health is a state of complete physical, mental, and social well-being and not merely the absence of disease or infirmity. The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.'[231]

For a state to become a member of the WHO, it must accept or sign its Constitution, and South Africa, as a member of the WHO, signed the Constitution, therefore binding itself to the contents of the Constitution.[232] To give effect to health care for everyone, the WHO Constitution gives states 'the responsibility for the health of their peoples which can be fulfilled only by the provision of adequate health and social measures'.[233] and it is this responsibility that obliges states to protect and promote the right to health care for all individuals. This position was reiterated in the case *LCB v United Kingdom*, where the court held that states have a positive duty to protect the lives of individuals within their jurisdiction.[234] South Africa, in

[230] Department of Health 'National Health Insurance' (Available at: https://www.health.gov.za/nhi/ Accessed 24 August 2024).
[231] Constitution of the World Health Organization, preamble, opened for signature July 22, 1946, 14 U.N.T.S. 185, (Available at: http://www.who.intgovernance/eb/who constitution en.pdf. Accessed 23 June 2024).
[232] South African Government 'International Relations' (Available at: https://www.gov.za/about-sa/international-relations#:~:text=South%20Africa%20is%20one%20of,states%20that%20constitute%20the%20WHO%20. Accessed 24 June 2024).
[233] Constitution of the World Health Organization, preamble, opened for signature July 22, 1946, 14 U.N.T.S. 185, (Available at: http://www.who.intgovernance/eb/who constitution en.pdf. Accessed 23 June 2024).
[234] *LCB v United Kingdom* (1998) 4 BHRC 447.

line with its WHO constitutional responsibility to take responsibility for the health of its people, has the responsibility to ensure that everyone enjoys the highest attainable level of health.

The WHO is an organisation that leads global efforts to expand universal health coverage.[235] The World Health Assembly (WHA), which is a body of the WHO, determines the policies of the organisation and focuses on a specific health issue.[236] The WHA has adopted several resolutions pertaining to organ transplantation, namely resolutions such as WHA40.13 (1987) on the development of guiding principles for human organ transplants,[237] WHA42.5 (1989) on preventing the purchase and sale of human organs,[238] WHA44.25 (1991) on human organ transplantation,[239] and WHA57.18 (2004) on human organ and tissue transplantation.[240]

In a resolution that aims at increasing availability, ethical access and oversight of transplantation of human cells, tissues and organs, adopted by the Executive Board, which is also a body of the WHO, states are urged to implement or strengthen existing preventive strategies targeted at reducing the burden of noncommunicable and other diseases treatable with transplantation.[241]

The responsibility placed on South Africa as a member of the WHO is not clear. States are required to ensure that individuals achieve the highest attainable level of health. However, the steps member states must take to achieve such are not made clear. However, the Executive Board of the WHO has urged states to implement or strengthen existing preventive strategies targeted at reducing the burden of noncommunicable and other diseases treatable with transplantation.[242] In addition to this, WHA has specifically dealt with the issue of organ shortages around the world and has suggested various organ procurement systems that can be

[235] World Health Organisation 'Our Work' (Available at: https://www.who.int/our-work Accessed 1 August 2024).
[236] World Health Organisation 'World Health Assembly' (Available at: https://www.who.int/about/governance/world-health-assembly Accessed 1 August 2024).
[237] WHA40.13 (1987) on development of guiding principles for human organ transplants, (Available at: https://www.afro.who.int/sites/default/files/2017-06/WHA40-13.pdf Accessed 1 August 2024).
[238] WHA42.5 (1989) on preventing the purchase and sale of human organs, (Available at: https://iris.who.int/bitstream/handle/10665/37097/9241693045.pdf?sequence=1 Accessed 1 August 2024).
[239] WHA44.25 (1991) on human organ transplantation, (Available at: https://www.transplant-observatory.org/download/resolution-wha44-25-endorsing-the-1991-guiding-principles/ Accessed 1 August 2024).
[240] WHA57.18 (2004) on human organ and tissue transplantation, (Available at https://apps.who.int/gb/ebwha/pdf_files/WHA57/A57_R18-en.pdf Accessed 1 August 2024).
[241] EB154(7) (2024) on Increasing availability, ethical access and oversight of transplantation of human cells, tissues and organs, (Available at: https://apps.who.int/gb/ebwha/pdf_files/EB154/B154(7)-en.pdf Accessed 1 August 2024).
[242] EB154(7) (2024) on Increasing availability, ethical access and oversight of transplantation of human cells, tissues and organs, (Available at: https://apps.who.int/gb/ebwha/pdf_files/EB154/B154(7)-en.pdf Accessed 1 August 2024).

implemented by states in their legislation. Although South Africa has included an organ procurement system that is among the suggestions of the WHO, the researcher argues that it is necessary to include a system that facilitates an increase in the organs being donated to give effect to the right to health care for patients in need of an organ for transplantation.

2.4 REGIONAL HUMAN RIGHTS TREATIES

Various regional human rights treaties have been adopted to protect civil and political rights as well as economic, social, and cultural rights.[243] This section of this chapter will analyse the existing African human rights conventions that protect the right to health care.

2.4.1 AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

The African Charter on Human and Peoples' Rights was adopted in 1981.[244] It is a regional document that promotes and protects human rights on the continent.[245] The Charter is considered Africa's primary instrument for human rights[246] and covers not only civil and political rights but also economic, social, and cultural rights.[247]

At the onset, the Charter's state parties are required to

> 'Recognise the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.'[248]

The right to health care is provided in the Charter in A16(1) as it provides that 'every individual shall have the right to enjoy the best attainable state of physical and mental health.'[249] The Charter gives further duties to state parties about the right to health care in A16(2), which states that 'state parties to the present Charter shall take the necessary measures to protect their people and to ensure that they receive medical attention when they are sick.'[250] In the case of *Purohit*

[243] African Charter on Human and Peoples' Rights; European Convention on Human Rights; American Convention on Human Rights.
[244] African Union 'African Charter on Human and Peoples Rights' https://au.int/en.treaties.african-charter-human-and-peoples-rights (accessed 16 May 2025).
[245] Amnesty International 'A Guide to the African Charter on Human and People's Rights' (Available at: https://www.amnesty.org/es/wp-content/uploads/2021/08/ior630052006en.pdf. Accessed 17 May 2025).
[246] The African Charter on Human and Peoples' Rights, 1981.
[247] Amnesty International 'A Guide to the African Charter on Human and People's Rights' (Available at: https://www.amnesty.org/es/wp-content/uploads/2021/08/ior630052006en.pdf Accessed 17 May 2025).
[248] The African Charter on Human and Peoples' Rights, 1981.
[249] The African Charter on Human and Peoples' Rights, 1981, Article 16(1).
[250] The African Charter on Human and Peoples' Rights, 1981, Article 16(2).

and Moore v. The Gambia,[251] the African Commission found that states that are party to the African Charter should take immediate steps, mindful of their obligations, to bring their legislation in line with the African Charter.

Patients who require an organ for transplantation can not be said to be 'enjoying the best attainable physical health.' If, in the researcher's view, the legislation contributes mainly to the reasons why there is a shortage, South Africa has a duty in terms of the Charter to ensure that South African legislation is in line with the right every individual has to the highest attainable standard of physical health. In considering the organ shortage and the fact that the rights to the highest attainable health of thousands of individuals are being infringed, it is highly likely that the African Commission on Human and Peoples' Rights would find that South Africa failed in fulfilling its obligation in terms of the Charter.

Notably, organ shortage has become an issue of growing concern in Africa, with Africa performing the lowest number of organ transplants in the world, with 643 in 2016.[252] The WHO has attributed this to issues such as a lack of legal and regulatory frameworks, insufficient national capacity to carry out organ and tissue transplantation, limited organ and tissue donation and transplantation data, etc.[253] In addition to this, what is of more concern is that the true scale of the unmet organ transplantation needs is unknown on the African continent.[254]

2.5 SUB-REGIONAL

South Africa is a member state of the Southern Africa Development Community (SADC), which is a sub-regional community that alleviates poverty, promotes economic development, peace, security, and growth, and raises the standard of living for the people of Southern

[251] Purohit and Moore v. The Gambia, Communication No. 241/2001, Sixteenth Activity report 2002-2003, Annex VII para 42.
[252] Available at https://www.afro.who.int/sites/default/files/2021-02/AFR-RC70-12%20Status%20of%20human%20organ%20and%20tissue%20donation%20and%20transplantation.pdf (Accessed 24 June 2024).
[253] Available at https://www.afro.who.int/sites/default/files/2021-02/AFR-RC70-12%20Status%20of%20human%20organ%20and%20tissue%20donation%20and%20transplantation.pdf (Accessed 24 June 2024).
[254] World Health Organisation 'Status of human organ and tissue donation and transplantation in the who African region' Available at https://www.afro.who.int/sites/default/files/2021-02/AFR-RC70-12%20Status%20of%20human%20organ%20and%20tissue%20donation%20and%20transplantation.pdf (Accessed 16 September 24).

Africa.[255] To achieve such objectives, the Southern Africa Development Community has various treaties, which include the SADC Protocol on Health.[256]

2.5.1 SADC PROTOCOL ON HEALTH (1999)

The SADC Protocol on Health was adopted by state members in 1999.[257] The Protocol speaks to health care in the Southern African region. It addresses many issues related to health care that affect all the member states in the SADC region, such as HIV, Malaria, tuberculosis, etc.[258] It urges member states to address the health care problems and challenges they face.[259] The Protocol is committed to the primary health care approach,[260] and it defines primary health care as:

> 'Essential health care based on the appropriate, acceptable methods and technology, made universally acceptable through community participation.'[261]

The Protocol does not address organ donation, which may be attributed to the fact that diseases such as HIV, Malaria and tuberculosis have significantly impacted African countries, particularly at the time this protocol was adopted.[262]

Although the Protocol does not deal with organ procurement directly, A19[263] speaks to the issue that affects all aspects of health care, including organ donation, in the SADC region, which is a lack of resources. A19 requires states to develop effective strategies for the procurement, allocation, and monitoring of adequate resources for health care.[264] The resources required in organ transplantation are sufficient organs to meet the needs for transplants. Furthermore, one

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[255] Southern African Development Community 'SADC Objectives' (Available at: https://www.sadc.int/pages/sadc-objectives Accessed 24 July 2024).
[256] SADC Protocol on Health, Southern Africa Development Community (SADC), (Available at: www.sadc.int/files/4213/5435/8109/SADCHIVandAIDSStrategyFramework2010-2015.pdf Accessed 14 August 2024).
[257] Southern African Development Community 'Protocol on Health 1999' (Available at: https://www.sadc.int/document/protocol-health-1999 Accessed 24 June 2024).
[258] Southern African Development Community 'Communicable Diseases' (Available at: https://www.sadc.int/pillars/communicable-diseases Accessed 24 July 2024).
[259] SADC Protocol on Health, 1999, Article 3.
[260] SADC Protocol on Health, 1999, Article 2.
[261] SADC Protocol on Health, 1999, Article 1.
[262] Southern African Development Community 'Communicable Diseases' (Available at: https://www.sadc.int/pillars/communicable-diseases Accessed 24 July 2024).
[263] SADC Protocol on Health, Southern Africa Development Community (SADC), (Available at: www.sadc.int/files/4213/5435/8109/SADCHIVandAIDSStrategyFramework2010-2015.pdf Accessed 22 June 2024).
[264] SADC Protocol on Health, 1999, Article 19.

of the methods suggested by A19 to ensure that access to health care is made universally available is through community participation. As discussed in Chapter 1, organ donation relies on the participation of the public because the source of the organs needed is the public. Educating the public about organ donation is key to having the community participate. As a signatory to this protocol, South Africa has an obligation to ensure that the public is educated and that there are effective strategies in place for the procurement of organs to ensure access to health care for patients.

2.6 CONCLUSION

In conclusion, this chapter finds that the right to access health care includes organ transplantation. Although the instruments do not directly deal with organ donation, the right to health care is protected in all the instruments above, which is relevant to addressing issues faced by patients in need of an organ transplant. Of relevance to organ donation are the duties of states in terms of international law to realise the right to access health care. South Africa is a signatory to various international and regional human rights treaties, which force South Africa to comply with the duties set out in the treaties. One duty prevalent in the above-mentioned instruments is the duty to adopt adequate legislative measures to actualise the right to health care. This is of great importance to the study as the researcher sought to evaluate the state's duties in terms of international law to enact legislation in order to realise the right in relation to patients in need of an organ transplant. The researcher has illustrated that South Africa does have a duty in terms of international law to enact legislation that assists in increasing the supply of organs in the country.

CHAPTER 3: HEALTH CARE AS A CONSTITUTIONAL RIGHT: A CRITICAL ANALYSIS OF THE STATE'S CONSTITUTIONAL OBLIGATION TO REALISE THE RIGHT TO ACCESS HEALTH CARE IN THE CONTEXT OF ORGAN DONATION

3.1 INTRODUCTION

'The Apartheid legacy left behind a divided and unequal country.'[265] With the disenfranchisement of the black population and the maintenance of white domination and privilege, the black population was discriminated against in all aspects of economic and social life.[266] The Constitution, as described in *Makwanyane*:

[265] P De Vos (note 10 above; 783).
[266] P De Vos (note 10 above; 517).

> 'provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief, or sex.'[267]

The South African Constitution is deemed one of the most progressive Constitutions in the world.[268] This is because it protects various types of human rights that are typically covered under the majority of international human rights agreements, which include first-generation rights (civil and political rights) and second and third-generation rights (which include socio-economic, cultural rights and environmental rights) as per the discussion in Chapter Two.[269] One of the key purposes behind adopting this Constitution as the supreme law of South Africa is to improve the quality of life for all its citizens and free each person's potential.[270] The Constitution aims to achieve this by acknowledging the effects of apartheid and by recognising and protecting human rights.[271]

The purpose of including socio-economic rights in South Africa's Constitution is to protect and advance the socio-economic interests of those who are disadvantaged.[272] Including socio-economic rights as justiciable rights is most significant because the rights will be subject to judicial enforcement.[273] Courts can protect socio-economic rights in two ways. Firstly, through their legislative authority to interpret laws and create common law norms, and secondly, by deciding cases involving constitutional law and other objectives imposed on the state to further rights.[274] The focus of this chapter is on the latter.

Considering the above facts regarding the purpose of the inclusion of socio-economic rights in South Africa's Constitution and what it aims to achieve, it can be concluded that a life led, either waiting for an organ for transplantation or waiting to die, is a life that is not worth living.

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[267] *Makhwanyane* para 7.
[268] P De Vos (note 10 above; 782).
[269] JC Mubangizi 'The Constitutional Protection of Socio-Economic Rights in selected African countries: a comparative evaluation' (2006) 2(1), *African Journal of Legal Studies*, Pg. 3.
[270] Preamble of the Constitution of the Republic of South Africa, Act 108 of 1996.
[271] C Ngang 'Human Rights and Socio-economic Transformation in South Africa' (2021) *Human Rights Review* https://doi.org/10.1007/s12142-021-00617-1, Pg 6.
[272] P De Vos (note 10 above; 784).
[273] NI Samart *The role of the judiciary towards enforcement of socio-economic rights in Africa (Lessons from South Africa)* (LLM Dissertation, University of Pretoria, 2015) Pg 31.
[274] EAO Ebi *Enforcing the right to access Health care services in South Africa* (LLM unpublished. University of South Africa, 2016) Pg 34.

This is a life lived by almost 5,000 patients in South Africa.[275] As such, s27(1)(a) of the Constitution provides that everyone has the right to access health care services.[276] The state, therefore, has the duty to make health care available to everyone so that it can be accessible when the need for such arises.[277] It can be argued that the rights of patients in need of an organ for transplantation have been violated through the state's failure to ensure that such patients have access to organs. This chapter seeks to critically analyse the extent to which the current legislative measures enacted regulating organ donation and implemented by the state have given effect to the right to access health care for patients in need of an organ for transplantation. First, the researcher will examine South Africa's socio-economic status to give more perspective on the socio-economic challenges that affect the South African population.

3.2 SOUTH AFRICA'S SOCIO-ECONOMIC STATUS

South Africa is a country of extreme differences. Although South Africa has made significant progress in raising the standard of living for its citizens despite the slow economic growth, the economic and social inequality inherent in the Apartheid regime has continued or even increased since a majority rule was instituted in 1994.[278] South Africa is a developing country that still faces many socio-economic challenges, such as high unemployment rates, poverty, social inequality, inadequate public service delivery, etc. The unemployment rate currently stands at an elevated 33.5% in 2024, with women and youth persistently more impacted.[279] Inequality remains among the highest in the world, which is why South Africa is referred to as the most unequal country in the world.[280] According to the World Bank, poverty in South Africa was estimated at 62.6% in 2023, based on the poverty line of an upper-middle-income country, which was only slightly below its pandemic peak.[281]

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[275] Organ Donor Foundation "Statistics" (2022, Available at https://odf.org.za/statistics/#:~:text=In%20South%20Africa%20in%202021%3A&text=229%20transplants%20broken%20down%20into,Livers%3A%2059 (Accessed 14 March 2024).

[276] Constitution of South Africa, s27(1)(a).

[277] EAO Ebi (note 274 above; 22).

[278] African Development Bank Group 'South Africa Economic Outlook' (Available at: https://www.afdb.org/en/countries/southern-africa/south-africa/south-africa-economicoutlook#:~:text=Recent%20macroeconomic%20and%20financial%20developments,gold%20and%20platinum20group%20metals. Accessed 17 October 2024.

[279] World Bank Group 'The World Bank in South Africa' (Available at: https://www.worldbank.org/en/country/southafrica/overview Accessed 17 October 2024).

[280] World Bank Group 'The World Bank in South Africa' (Available at: https://www.worldbank.org/en/country/southafrica/overview Accessed 17 October 2024).

[281] World Bank Group 'The World Bank in South Africa' (Available at: https://www.worldbank.org/en/country/southafrica/overview Accessed 17 October 2024).

The inadequate access to public services includes South Africa's health care system. South Africa has a two-tiered and highly unequal health care system. 71% of the population is served by the state-funded public sector.[282] About 27% of the population is served by the private sector, which is mostly financed by private contributions to health insurance or medical assistance programmes.[283] The majority of South Africans cannot afford the high expense of private care, and the public sector is underfunded. The National Health Insurance Act is an act that is set to ensure equal access to quality health care.[284] The National Health Insurance Fund purchases services from medical professionals in order to offer universal health care. Both public and private hospitals would then provide these services. The effects of National Health Insurance on organ donation will be discussed in further detail at a later stage.[285]

3.3 LEGISLATION AS AN OBSTACLE TO ORGAN DONATION

As mentioned in the first Chapter, the organ procurement system followed in South Africa is the opt-in system of organ procurement. South Africa's organ procurement system was influenced by the Guiding Principles on Human Cell, Tissue, and Organ Transplantation, which were formed by the WHA, which is a body of the WHO.[286] These principles were created to provide an ethical and acceptable framework for the procurement and transplantation of human cells, tissues, and organs for therapeutic purposes.[287] The guidelines allow states to implement these guidelines in their jurisdictions as they deem appropriate.

There are two organ procurement methods that the guiding principles speak to. The first is the opt-in system, which requires that individuals who want to donate do so voluntarily. The guiding principles recognise this form of organ procurement by acknowledging the importance of consent by individuals who wish to do so. Alternatively, the guiding principles allow that

[282] University of the Witwatersrand, 'Healthcare in South Africa: how inequity is contributing to inefficiency' (Available at: https://www.wits.ac.za/news/latest-news/opinion/2021/2021-07/healthcare-in-south-africa-how-inequity-is-contributing-to-inefficiency.html 15 October 2024).
[283] University of the Witwatersrand, 'Healthcare in South Africa: how inequity is contributing to inefficiency' (Available at: https://www.wits.ac.za/news/latest-news/opinion/2021/2021-07/healthcare-in-south-africa-how-inequity-is-contributing-to-inefficiency.html 15 October 2024).
[284] National Health Insurance Act 20 of 2023.
[285] National Health Insurance Act 20 of 2023.
[286] Sixty-Third World Health Assembly, May 2010, Resolution WHA63.22. (Available at: http://apps.who.int/gb/ebwha/pdf_files/WHA63/A63_R22-en.pdf Accessed 2 June 2024).
[287] 'WHO Guiding Principles on Human Cell, Tissue and Organ Transplantation' National Institutes of Health (NIH) (Available at: https://pubmed.ncbi.nlm.nih.gov/21235034/ Accessed 12 June 2024).

organs be procured from deceased individuals, which is known as the opt-out system, as deceased organ donors donate without their consent, as it is believed that there is no reason to think that deceased individuals would have objected to the donation. Lastly, the guiding principles prohibit the sale of organs for transplantation.

Less than two out of every million South Africans were organ donors in 2017.[288] South Africa has one of the lowest rates of organ donation in the world.[289] The opt-in system of organ procurement is provided for in the NHA and is based on altruism. Altruism can be explained as acting or giving freely without any material consideration but out of concern for the well-being of others.[290] It is understood that individual acts of altruism aggregate into a societal norm that strengthens the bonds of society and, in a positive feedback loop, encourages further acts of altruism.[291] In the case of organ donation, altruism means the decision to donate organs is made by the donor or his or her family, and the donor is not compensated financially.[292] If the method is effective for South Africa, it must be examined.

The opt-in system of organ procurement in South Africa is provided for in Chapter 8 of the National Health Act.[293] An analysis of the legislation that regulates organ transplantation is essential as it allows us to understand the shortfalls within the legislation itself. S55 of the National Health Act[294] provides for living donors and s62(1) for deceased organ donors.[295] Living donors, in terms of the Act, are required to do so on a voluntary basis by giving written consent.[296] The issue this presents for patients in need of an organ for transplantation is that hospitals in South Africa typically only accept live donations from those who are blood relatives of the patient who requires the donation.[297] The use of donations from blood relatives can be understood and encouraged as the blood groups and tissue types are more compatible,

[288] Bhekisisa Centre for Health Journalism 'The waiting game: Could SA's Poor policies be behind our organ donation policies?' (20 October 2023 available at: https://bhekisisa.org/health-news-south-africa/2023-10-20-the-waiting-game-could-sas-poor-policies-be-behind-our-organ-donation-crisis/#:~:text=donation%20crisis%3F%20%2D%20Bhekisisa,The%20waiting%20game%3A%20Could%20SA's%20poor%20policies,behind%20our%20organ%20donation%20crisis%3F&text=In%202021%2C%20about%204%20700,country%2C%20demand%20far%20outstrips%20supply. Accessed 31 August 2024.)
[289] Ibid.
[290] K Dopelt, L Siton, T Harrison, and N Davidovitch. 'Revisiting the relationship between altruism and organ donation: Insights from Israel.' (2022) 19(12), *International Journal of Environmental Research and Public Health*, Pg. 1.
[291] Ibid 2.
[292] M Slabbert (note 86 above; 262).
[293] The National Health Act 61 of 2003.
[294] The National Health Act, s55.
[295] The National Health Act, s62(1).
[296] The National Health Act, s55.
[297] M Slabbert (note 61 above; 307).

and this ensures a higher success rate.[298] However, with improvements in medicine, such as the immunosuppressant drug that is used to reduce the risk of a patient rejecting an organ after transplant, it can, therefore, be argued that there is no reason for hospitals to maintain an approach of only accepting live donations from those who are blood relatives.[299] Additionally, if the donor is a friend or a charitable acquaintance, a request for permission to perform the operation must be made to the Department of Health (DoH).[300] The Department will examine the situation and confirm that the contribution is not being made for financial benefit.[301] As such, only then will authorisation to proceed be given.[302] Such requirements present obstacles for individuals who wish to donate, firstly because hospitals do not accept donations from people who are not blood relatives. Secondly, for charitable acquaintances, the process of requesting permission from the Department of Health is time-consuming. Such requirements can discourage donors from donating.

Furthermore, according to the NHA, deceased donors may indicate their wish to donate through a clause in a will or orally before two competent witnesses.[303] Legislation in relation to deceased organ donation is not helpful in honouring the wish of the deceased to donate.[304] Although the deceased gives consent through a will, consent is still required from the family.[305] Moreover, leaving a will or final testament if a person wishes to donate their organs must be approved by the Master of the High Court after the donor's death.[306] This, according to Slabbert, is an issue when it comes to organ transplantation, as time is crucial.[307] Research indicates that when an organ is removed from a brain-dead person, the organs must be removed as soon as possible after brain death to ensure successful transplantation.[308] The researcher is of the opinion that the legislation is an obstacle to deceased donor donations and argues that

[298] Organ Donor Foundation 'FAQ's' (Available at https://odf.org.za/faqs/#:~:text=Yes%2C%20in%20some%20cases.,ensures%20a%20higher%20success%20rate Accessed 31 August 2024.)
[299] Temple Health 'How to Protect Your New Organ Transplant From Rejection' (5 March 2024 available at https://www.templehealth.org/about/blog/how-to-protect-your-new-organ-transplant-from-rejection#:~:text=Patients%20are%20given%20immunosuppressant%20drugs,it%20from%20attacking%20the%20organ Accessed 31 August 2024).
[300] M Slabbert (note 61 above; 307).
[301] Ibid.
[302] Ibid.
[303] National Health Act, s62(1).
[304] M Slabbert (note 67 above; 71).
[305] M Slabbert and B Venter 'Autonomy in organ donations v family consent: a South African legislative context' (2019) 52(1), *De Jure Law Journal*, Pg 461.
[306] Ibid 460.
[307] Ibid 460.
[308] Western Cape Government 'Organ Donation in South Africa' (Available at: https://www.westerncape.gov.za/general-publication/organ-donation-south-africa Accessed 18 October 2024).

more should be done to increase deceased organ donations. For example, putting in place requirements that require medical practitioners to approach family members of deceased individuals to discuss the option of donation, regardless of whether there was consent by the deceased. Aside from issues such as culture and religion, no evidence illustrates that people are not willing to donate. Having a medical practitioner have that conversation with the family and provide them with all the necessary information and support they need goes a long way in identifying potential organ donors and increasing the number of organs being donated.

S60 addresses the payment for organ donations. The Act makes it clear that it is an offence to receive any financial or other reward for a donation, and it is an offence to sell or trade organs.[309] However, the Act does permit reimbursement for the reasonable costs associated with the donation that may have been incurred by the donor.[310] There is no evidence that South Africa implements reimbursement of donors for reasonable costs incurred. In fact, what constitutes "reasonable costs" is not described in the NHA, and there is no clarity regarding who will be responsible for those reasonable costs.[311]

The research suggests that the altruistic system of organ procurement, as it stands, is not a solution to the organ shortage in South Africa. Some experts believe that only under certain and limited circumstances does the human being show willingness for uncompensated transfers and generosity toward others without considering self-interest.[312] While this may be the case, the researcher is of the opinion that the state has not done enough to assist in meeting the demand for organs in the country without having to compensate donors for their organs. One of the reasons why the system is not working is because of the state's failure to come up with a programme to increase the number of organs being donated to solve the issue of organ shortage.

3.4 THE EFFECT OF THE ORGAN SHORTAGE ON CONSTITUTIONAL RIGHTS

[309] The National Health Act, s60(4).
[310] The National Health Act, s60(2).
[311] M Slabbert, 'The Law as an Obstacle in Solid Organ Donations and Transplantations,' (2018) vol 81, no. 1 *Journal for Contemporary Roman-Dutch Law*, Pg 75.
[312] AJ Ghods and S Savaj 'Iranian Model of Paid and Regulated Living-Unrelated Kidney Donation' (2006) Vol 1 *Clinical Journal of the American Society of Nephrology*, Pg. 1136.

As the supreme law in the Republic of South Africa, the Constitution contains a comprehensive Bill of Rights that protects the rights of people.[313] The purpose of this section is to establish the effect the shortage of organs has on patients' Constitutional rights. This section will analyse the right to life, human dignity and equality.

3.4.1 The right to life

The right to life is regarded as the most basic right, as it forms the basis of all other human rights.[314] This is the most significant right because an individual can not enjoy or bear other rights if he is not living.[315] O'Regan J in *Makwanyane* observed that:

> 'the right to life is, in one sense, antecedent to all the other rights in the Constitution. Without life in the sense of existence, it would not be possible to exercise rights or to be their bearer.'[316]

The critical question is, 'What is the use of a right to life as a physical being if it is not a life worth living? ' Sachs J, in the *Makwanyane* case, enhances the idea of a life worth living by adding that the right to life could possibly impose a duty on the state to create conditions which will enable all persons to enjoy a life worth living.[317] An organ transplant for patients with organ failure is one of the most remarkable treatments that has several benefits and increases one's quality of life.

It could be argued that a patient with organ failure does not live a life worth living. Firstly, the physical side effects of organ damage or organ failure contribute to the decay in a patient's quality of life. An organ transplant is the only way to ensure that such patients live a normal life. However, because of the organ shortage, the only options available to patients are waiting for an organ for transplantation or waiting to die. Since it is not easy to gain access to an organ for transplantation due to the lack of supply, many patients are left with the unfortunate reality of waiting to die, which can not be said to be a life worth living. Not only does this constitute a violation of the right to life, but this right is also violated when patients die without receiving an organ transplant. The implications of such a violation could have consequences for the state, such as if the right to life is legally enforced, the health care systems or governments could be

[313] B Venter 'A Selection of Constitutional Perspectives on Human Kidney Sales' (2013) (16)1 *PER / PELJ*, pg. 353.
[314] H Nyane (note 130 above; 270).
[315] B Venter (note 313 above; 3580.
[316] *S v Makwanyane* 1995 3 SA 391 (CC) para 326.
[317] *Makwanyane* para 353.

held accountable for failing to provide organs for transplantation, for the right to be adequately realised laws around organ donation may need to be reassessed to increase organ availability.

The state, in this regard, has the duty to ensure that patients in need of an organ have access thereto. The state could do this through the adoption and implementation of an organ procurement system that is effective enough to facilitate an increase in the number of organs being procured. Only then will such patients be able to enjoy their human existence instead of having a right to a life that entails constant pain and suffering.

3.4.2 The right to human dignity

In s10, the Constitution of South Africa guarantees the right to human dignity.[318] The right to human dignity entails the acknowledgement of the intrinsic worth of human beings.

> The right to life, thus understood, incorporates the right to dignity. So, the rights to human dignity and life are entwined. The right to life is more than existence; it is a right to be treated as a human being with dignity: without dignity, human life is substantially diminished. Without life, there cannot be dignity.[319]

In order to respect the right to inherent dignity, everyone must be able to enjoy their civil and political liberties and have access to the social and economic means essential to their development.[320] It can thus be concluded that a person's dignity is denigrated if he lives in degrading living conditions and is deprived of his basic needs. Health is essential for both life and human dignity.[321]

According to Venter, the right to human dignity entails that everyone has the right to be treated in a dignified and humane manner; the question can now be asked if a patient with organ failure who spends the rest of their life waiting for an organ for transplantation leads a dignified and humane life?[322] It is argued that if a patient has organ failure and needs an organ transplant to save and improve their quality of life, if there is no organ for transplantation and there is no system or programme to assist in ensuring access to organs, such a patient essentially waits to die. Because the right to life and the right to human dignity are two rights that are closely

[318] The Constitution of the Republic of South Africa, s10.
[319] *Makwanyane*, para 327.
[320] B Venter (note 313 above; 353).
[321] Ibid.
[322] Ibid 368.

related, it can be concluded that the shortage of organs in South Africa affects patients' ability to enjoy the right to life; in that respect, the patient's human dignity is also infringed.

3.4.3 The right to equality

S9(1) of the Constitution provides that 'everyone is equal before the law and has the right to equal protection and benefit of the law.'[323] Any legislation enacted must allow for the equal protection and benefit of the law.[324] According to Carstens, even if legislation makes provision for organ donation that does not discriminate against any particular group, it may nonetheless violate s9(1) since it does not guarantee equal protection and benefit under the law.[325]

It is argued that patients in need of an organ for transplantation do not receive protection or gain any benefit from the law in South Africa. The current organ procurement system was only able to produce 282 organ and corneal transplants in 2021; this is concerning, considering there are almost 5000 patients waiting for an organ for transplantation.[326] There are no concerns regarding discrimination in the distribution of the organs when they are donated. However, these statistics show inequality because it is difficult to obtain enough organs to meet the required demand; therefore, there is a failure to ensure that patients in need of an organ transplant equally benefit and are protected by the law.

3.5 THE IMPLICATION OF S7(2) OF THE CONSTITUTION ON THE STATE

S7(2) provides the following: 'The state must respect, protect, promote and fulfil the rights in the Bill of Rights.'[327] In the case of *Glenister v President of the Republic of South Africa,*[328] the court, in interpreting the content of the obligation created by s7(2), held that it was not necessary to prescribe exactly which steps the state must take to meet its obligation in terms of

[323] The Constitution of the Republic of South Africa, s9(1).
[324] The Constitution of the Republic of South Africa, s7(2).
[325] D Labuschagne and PA Carstens 'The Constitutional influence on organ transplants with specific reference to organ procurement' (2014) (17)1. *PER / PELJ,* Pg. 220.
[326] Organ Donor Foundation "Statistics" (2022, Available at https://odf.org.za/statistics/#:~:text=In%20South%20Africa%20in%202021%3A&text=229%20transplants%20broken%20down%20into,Livers%3A%2059 (Accessed 18 October 2024).
[327] Constitution of the Republic of South Africa, s7(2).
[328] *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC).

the section.[329] However, the chosen steps must be reasonable and effective and must be steps that would be taken by a reasonable decision-maker in the circumstances.[330]

Each of these obligations must be analysed individually in the context of organ donation to understand the state's obligations as it relates to organ donation. The duty to respect requires the state to refrain from interfering with the enjoyment of the right.[331] The state's failure to create a legal framework that effectively facilitates an increase in the number of organs being procured can be argued to be unreasonably preventing patients in need of an organ from accessing organs for transplantation and, therefore, creating barriers against such patients, preventing them from accessing health care. The duty to protect requires that the state protects particularly vulnerable individuals by, for instance, enacting legislation to protect their rights.[332] Patients in need of an organ for donation can be deemed a vulnerable group of people because many patients wait for an organ for transplantation until they die.[333]

The duty to promote entails adopting informative and educational programmes aimed at enhancing awareness and understanding of basic human rights.[334] This duty is vital in organ procurement. Awareness amongst the public is of utmost importance as the public is where organs are procured. The duty to fulfil implies that in order for people to obtain health care, the government must provide favourable support, benefits, and real health care services.[335] This duty requires that the state must enact measures, such as creating an appropriate legislative framework, to create conditions which give people access to organs.

In addition, this section of the Constitution imposes both positive and negative duties on the state. According to Ngcobo CJ,

> 'This obligation goes beyond a mere negative obligation not to act in a manner that would infringe or restrict a right. Rather, it entails positive duties on the state to take deliberate, reasonable measures to give effect to all the fundamental rights contained in the Bill of Rights.'[336]

[329] *Glenister* para 194.
[330] *Glenister* para 194.
[331] MP Olivier (note 12 above; 186).
[332] MP Olivier (note 12 above; 186).
[333] J Descourouez (note 28 above; 189).
[334] I Currie, and J De Waal, *The bill of rights handbook. Juta and Company Ltd*. (2013) Pg. 574.
[335] Ibid.
[336] *Glenister,* para 105.

The positive obligation requires the state to 'move expeditiously and effectively as possible' to the realisation of the rights in the Bill of Rights.[337] The negative obligation requires that the state cease to prevent the realisation or access to the rights protected in the Bill of Rights.[338] It can be argued that the failure of the state to realise the right to access health care for patients in need of an organ transplant through its failure to put in place appropriate measures for the increase of the supply of organs to that effect is a violation of both its positive and negative duty.

3.6 THE IMPLICATION OF S27 OF THE SOUTH AFRICAN CONSTITUTION ON THE STATE

As discussed in the previous chapter, the right to access health care is a right that is protected by various international and regional human rights instruments which South Africa has signed.[339] The right to health is an important right and is a fundamental human right indispensable for the exercise of other human rights. By virtue of being a signatory to the international and regional instruments discussed in Chapter 2, states have an obligation to take steps toward the realisation of the right to health as it is mandatory. Although the international and regional conventions are very comprehensive in defining the duties of the state, it must be noted that every state has some discretion in determining the most appropriate ways to fulfil the right to health care.[340] This section looks at the realisation of the right to access health care in relation to organ donation in South Africa.

As mentioned in previous Chapters, s27 of the Constitution protects the rights to health care, food, water and social security. S27 provides as follows:

(1) Everyone has the right to access to:
   a) Health care services, including reproductive health care
   b) Sufficient food and water.
   c) Social security, including if they are unable to support themselves and their dependants, appropriate social assistance.

[337] I Currie (note 334 above; 575).
[338] Ibid 572.
[339] Universal Declaration of Human Rights: International Covenant on Economic, Social, and Cultural Rights: African Charter on Human and Peoples' Rights.
[340] HT Mabetlela and TK Khangala 'A critical analyzation of the socio-economic rights enshrined in section 26 and 27 of the Constitution of the republic of South Africa' in N Delener *2022 GBATA Readings Book Theme resilience and reinvention: Best Practices* (2022), Pg 110

(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.

The protection of these rights in the Constitution is most significant because it ensures that everyone has the right to obtain elements that are typically considered fundamental necessities of life as well as essential elements of an adequate standard of living.[341] The main purpose of this section is to ensure that an increased number of the population can enjoy and have access to rights that are protected.[342] The pressing issue in this research is whether the government of South Africa has done enough to ensure the progressive realisation of the right to health care in relation to organ transplantation by ensuring that patients in need of an organ for donation have access thereto. To ascertain this, the research will critically analyse s27.

3.6.1 Reasonable legislative and other measures

The Constitution in s27 not only gives everyone rights to health care, food, water and social security but also provides the manner in which the state must realise the rights. The Constitution emphasises legislation as the chosen method to protect the rights of individuals. According to the Constitutional Court in the *Mazibuko & Others v City of Johannesburg* case,

> 'The Constitution envisages that legislative and other measures will be the primary instrument for the achievement of social and economic rights. Thus, it places a positive obligation upon the state to respond to the basic social and economic needs of the people by adopting reasonable legislative and other measures. By adopting such measures, the rights set out in the Constitution acquire content, and that content is subject to the Constitutional standard of reasonableness.'[343]

Legislation is one of the most important instruments, particularly in the protection of human rights. According to Currie and de Waal, some of the reasons for this emphasis on the use of legislation as the primary method for the protection of human rights is firstly so that the Court can require an explanation from the state of the measures chosen to fulfil socio-economic

[341] Ibid 104.
[342] MP Olivier (note 12 above; 173).
[343] *Mazibuko*, para 66.

rights.[344] The Court can also require the state to give an account of its progress in implementing those measures.[345]

In addressing the role of legislation in the realisation of human rights, the Constitutional court in *Grootboom* held that:

> 'Legislative measures by themselves are not likely to constitute Constitutional compliance. Mere legislation is not enough. The state is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive. These policies and programmes must be reasonable in both their conception and their implementation. The formulation of a programme is only the first stage in meeting the state's obligations. The programme must also be reasonably implemented. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state's obligations.'[346]

The state has the obligation to put legislation in place to alleviate the organ shortage over time. Slabbert makes it a point that at the time of the formulation of the opt-in policy, transplants were still in an experimental phase, and the demand was low.[347] The continuously decreasing number of organs being donated shows the poor performance of the system and illustrates that times have changed, and the system must also change to accommodate the needs of society. The demand for transplantable organs has increased drastically, which signals that what is currently lacking is a legislative framework that aims at meeting the demand for organs. However, as held in the Constitutional Court, it is not enough for the state to implement legislative measures. The state must ensure that the legislative measures are reasonably implemented to realise the right to health care in relation to patients in need of organ transplantation.

3.6.2 Availability of resources

Furthermore, s27 requires the state to take reasonable legislative or other measures in order to achieve the realisation of the right to access health care, but the obligation does not require the state to do more than its available resources. The obligation placed on the state to realise the rights protected in s27 has significant implications on policies and how resources get

[344] I Currie (note 334 above; 578).
[345] Ibid.
[346] *Grootboom* para 48.
[347] M Slabbert (note 61 above; 312).

distributed, which is an unavoidable consequence of the commitment to achieve the realisation of socio-economic rights.[348] It is acknowledged that the state can not physically provide organs to those in need. In this regard the researcher argues that the state has the duty and the responsibility to put in place an organ procurement system that enables access to organs for transplantations to patients in need. It is the researcher's view that the state has the capacity to do so through a change in legislation.

In addition to this, the number of organ transplants that currently take place in South Africa is low, so organ transplantation is currently not a burden on the resources in the health care system. However, a change in legislation to include an organ procurement system that is able to increase the number of organs being donated is ideal but might have far reaching consequences on the resources in South Africa's health care system. As mentioned above, South Africa's health care system is overburdened as it caters for more than 70% of South Africa's population and already deals with issues relating to lack of resources. An organ transplant and post operation therapies are costly,[349] the financial implications of such operations on a financially strained health care will put further strain on the system and the system may struggle to absorb the costs with more frequent transplants. However, it is important to view these costs in context, while the upfront expenses of an organ transplant are high, in the long term, transplants can be more cost effective than prolonged treatments. For example, kidney transplants are less expensive overtime than ongoing dialysis.

3.6.3 Progressive realisation

It is clear from this section of the Constitution that the Constitution recognises that some human rights must be realised over time.[350] Most socio-economic rights in the Bill of Rights, including the right to access health care, are meant to be realised progressively.[351] As defined by the ICESCR general comment, progressive realisation means that state parties are committed to working as quickly and efficiently as possible to realise the right to health carefully.[352] Progressive realisation is the recognition that the full realisation of socio-economic rights will

[348] S Liebenberg (note 152 above; 191).
[349] A Wireko et al. 'The unmet need of organ transplantation in Africa' (2023) vol 109, *International Journal of Surgery*, Pg 519.
[350] L Chenwi 'Unpacking progressive realisation', its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance.' (2013) 46(3), *De Jure*, Pg. 743.
[351] P De Vos (note 10 above; 813).
[352] General Comment No 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant) (2000) UN Committee on Economic, Social and Cultural Rights (CESCR).

generally not be achieved immediately or even within a short period of time.[353] The term mainly relates to the state's obligation to gradually improve access to goods and services until the goal of full realisation is achieved.[354]

In the case of *Mazibuko and others v the City of Johannesburg and others*,[355] the Court found that in order to guarantee that the right is gradually realised, the government must constantly examine its actions under its obligation of progressive realisation.[356] It can be argued that the current legislation regulating organ donation fails to progressively realise organs for patients whose organs are damaged or who suffer from organ failure. The state, therefore, has an obligation to review the current legislation that regulates organ donation to ensure that the legislation enacted by the state can achieve progressive realisation of the right to access health care.

The Constitutional Court rejected the international standard called the 'minimum core obligation.'[357] One of the reasons the Court provided for the rejection of this standard is because, according to the Court, it is not possible to determine the minimum threshold for the progressive realisation of the right of access to adequate housing without first identifying the needs and opportunities for the enjoyment of such a right.[358] As a result, the Constitutional Court developed the reasonableness approach, which will be discussed later in this chapter.

3.6.4 Minister of Health and Others v Treatment Action Campaign and Others

In the Constitutional Court judgement of *Minister of Health and Others v Treatment Action Campaign and Others* (*TAC*)[359] the Court chose to focus its attention on the state's obligation under s27(2) of the Constitution. The issue before the Court in this case was whether the government had fulfilled its obligation under s27(2). The Constitutional Court, in determining whether the government fulfilled its obligation under s27(2), also considers the reasonableness approach adopted in the *Grootboom* case. Of importance in this section is the Constitutional Court's analysis of s27(2).

[353] R Bwana 'Progressive Realisation of Socio-economic Rights: Nonsense on Stilts?' (2021) Available at *SSRN* 3986266, Pg 9.
[354] S Liebenberg (note 152 above; 187).
[355] *Mazibuko and others v the City of Johannesburg and others* (2009) ZACC 28.
[356] *Mazibuko* para 67.
[357] *Grootboom*, para 14.
[358] *Grootboom*, para 32.
[359] 2002 (5) SA 721 (CC).

This case (*TAC*) focuses on access to HIV treatment (Nevirapine) to pregnant women in order to prevent of mother-to-child transmission.[360] Nevirapine is a medication used to treat and prevent HIV.[361] The Treatment Action Campaign (TAC), together with two other applicants, brought an action to the Pretoria High Court seeking an order to compel the government to provide free Nevirapine to all pregnant women with HIV/Aids to prevent mother-to-child transmission of the disease. The Pretoria High Court found that the government had failed to adequately address the necessity of lowering the potential risk of HIV-positive mothers infecting their newborns.[362] More precisely, it was determined that the government had acted irrationally by (a) not allowing the public health sector to use the antiretroviral medication Nevirapine when the attending physician deemed it medically necessary and (b) failing to establish a timeline for a nationwide program to stop HIV transmission from mother to child.[363] In an attempt to overturn the High Court's rulings, the case was appealed to the Constitutional Court.[364]

In its interpretation of s27 of the Constitution, the Constitutional Court held that the rights conferred by s27(1) are to have access to the services that the state is obliged to provide in terms of s27(2).[365] Additionally, the Constitutional Court held that, together, s27(1) and 27(2) define the extent of each person's positive rights as well as the state's associated duties to "respect, protect, promote, and fulfil" those rights.[366]

The Constitutional Court, in this case, correctly found that the government must develop and carry out, within the limits of its resources, a comprehensive and coordinated program to gradually realise pregnant women's and their unborn children's rights to health services to prevent HIV transmission from mother to child in accordance with s27(1) and (2) of the Constitution.[367]

The organ shortage in South Africa indicates that there is a large area of deprivation that affects a great number of patients in our society. Considering that organ failure is a health issue that continues to grow, the court would find similar in the case of organ donation. The state has an

[360] 2002 (5) SA 721 (CC).
[361] 'Nepirapine' *National Library of Medicine* 5 June 2023, Available at: https://www.ncbi.nlm.nih.gov/books/NBK554477/ Accessed 15 March 2025.
[362] 2002 (5) SA 721 (CC).
[363] *Treatment Action Campaign*, para 39.
[364] *Treatment Action Campaign*, para 39.
[365] *Treatment Action Campaign,* para 39.
[366] *Treatment Action Campaign*, para 39.
[367] *Treatment Action Campaign*, para 39.

obligation to devise and implement a plan that will increase the supply of organs for transplantation, thus realising the rights of patients seeking an organ to have access to health services. The application of the reasonableness approach below will determine whether the NHA is comprehensive and coordinated in its organ procurement programme.

3.7 REASONABLENESS APPROACH

The reasonableness approach was first adopted in the *Grootboom* case. This follows the rejection of the minimum core approach by the Constitutional Court. The reasonableness approach has become the accepted standard of review.[368] According to the Constitutional Court, in evaluating measures taken by the state to ensure access to social security, the court is not concerned with the availability of "more desirable" measures but rather with whether the measures taken were "reasonable."[369] The concept of reasonableness places context at the centre of the enquiry and permits an assessment of context to determine whether a government programme is indeed reasonable.[370] According to this interpretation of the reasonableness approach, people are not entitled to individualised remedies concerning the state's duty to fulfil socio-economic rights.[371] Individuals are only entitled to a reasonable programme, which is a collective benefit to which no person can be entitled any more than any other person in a similar situation.[372]

The Constitutional Court in the *Grootboom* case explained reasonableness as follows:

> 'Reasonableness must also be understood in the context of the Bill of Rights as a whole. The right to access to adequate housing is entrenched because we value human beings and want to ensure that they are afforded their basic human rights. A society must seek to ensure that the necessities of life are provided to all if it is to be a society based on human dignity, freedom, and equality. To be reasonable, measures can not leave out of account the degree and extent of denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights, therefore, is most in peril must not be ignored by the measures aimed at achieving the realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone must be treated

[368] P De Vos (note 10 above; 812).
[369] *Grootboom*, para 41.
[370] *Mazibuko*, para 60.
[371] P De Vos (note 10 above; 809).
[372] P De Vos (note 10 above; 809).

> with care and concern. If the measures, though statistically successful, fail to respond to the needs of the most desperate, they may not pass the test.'[373]

In addition, the Constitutional Court in *Grootboom* outlined features that reasonable measures must have. The main objective of this chapter is to evaluate the current legislation to determine the extent to which the legislation gives effect to the right to access health care in relation to organ donation. Therefore, the following part evaluates the legislative measures taken by the state in relation to organ donation using the features established by the Constitutional Court to determine if the measures are reasonable or not. For government measures to be found reasonable, they must have the following features:

3.7.1 It must be capable of facilitating the realisation of the right[374]

Considering that there are currently almost 5,000 patients waiting for an organ and the number of transplants that occur in South Africa in a year, the latest being 282 in 2021, there is a significant number of people who do not get access to organs for transplantation.[375] Based on the statistics provided by the Organ Donor Foundation, one can reasonably conclude that since the National Health Act was signed into law in 2003, it has failed to ensure sufficient access to organs for transplantation for patients in need of an organ for transplantation. It can therefore be argued that there is a significant portion of the population that is excluded from this programme. According to the Constitutional Court in *Grootboom*, a programme that excludes a significant segment of society can not be said to be reasonable; therefore, the current legislation fails to satisfy this requirement.

3.7.2 It must be comprehensive, coherent, and coordinated[376]

In explaining what comprehensive measures entail, the Constitutional Court in the *Grootboom* case provides that comprehensive measures are a detailed and workable plan to meet its obligations in terms of s26(2) of the Constitution.[377] S26(2) of the Constitution provides that 'the state must take reasonable legislative and other measures, within its available resources,

[373] *Grootboom*, para 44.
[374] *Grootboom*, para 41.
[375] Organ Donor Foundation "Statistics" (2022, Available at https://odf.org.za/statistics/#:~:text=In%20South%20Africa%20in%202021%3A&text=229%20transplants%20broken%20down%20into,Livers%3A%2059) (Accessed 30 September 2024).
[376] *Grootboom*, para 40.
[377] *Grootboom*, para 38.

to achieve the progressive realisation of this right.'[378] The obligations conferred on the state in s26(2)[379] of the Constitution are exactly the same as those in s27(2)[380] of the Constitution. Therefore, the Constitutional Court would find similarly in the case of the right to access health care as it relates to organ donation. A comprehensive and workable plan in the context of organ donation would first entail the recognition of the shortage of organs in South Africa and the dire effects such a shortage has on thousands of patients waiting for an organ for transplantation. What would follow such recognition would be a detailed plan detailing how the state aims to ensure access to organs to meet its obligation in terms of s27(2)[381] of the Constitution and achieve the realisation of the right to access health care.

Considering what is required of 'comprehensive measures,' it can be concluded that the National Health Act is not comprehensive. Firstly, the NHA does not recognise that there is an organ shortage and that there is a great need for organs in South Africa. Recognising that there is an issue and how this issue affects people's lives is the first step to resolving the issue. Secondly, there is no comprehensive plan for the state to ensure access to organs for patients in need. The NHA provides that the only way to get an organ in South Africa is through the written consent of a living donor[382] and in the form of a will, written or oral, or by obtaining consent from family members for a deceased donor.[383] Beyond these requirements, there is no further indication of any steps to be taken by the state to assist in facilitating an increase in the number of organs being donated.

According to the Constitutional Court, reasonable measures, in addition to being comprehensive, must also be coherent and coordinated. On this requirement, the Constitutional Court requires that each sphere of government assume responsibility for parts of the measures adopted by the government.[384] The allocation of responsibilities and functions must be coordinated, coherent, and comprehensively addressed.[385] The only indication of an allocation of responsibility in the National Health Act is in s58, which provides that a person may not remove tissue from a living person for transplantation in another living person or carry out the transplantation of such tissue except in a hospital or on the written authority of a medical

[378] Constitution of the Republic of South Africa, s26(2).
[379] Constitution of the Republic of South Africa, s26(2).
[380] Constitution of the Republic of South Africa, s27(2).
[381] Constitution of the Republic of South Africa, s27(2).
[382] National Health Act, s55.
[383] National Health Act, s62.
[384] *Grootboom*, para 40.
[385] *Grootboom*, para 54.

practitioner.'[386] In addition to s58, s59 provides that only a registered medical practitioner or dentist may remove any tissue from a living person for the purpose of transplanting the tissue to another living person.[387] These sections speak to the responsibility conferred at the hospital/municipal level.

In the NHA, no responsibilities are allocated to the different spheres of government relating to the role each sphere of government would play in increasing the number of donors in South Africa. Because there is no clear comprehensive plan by the government as to how the demand for organs will be met, it is difficult for the different spheres of government to have a role to play if there is no clarity in the legislation on what it aims to achieve regarding organ donation. In addressing the responsibilities of the different spheres of government, the Constitutional Court in the *Grootboom* case found that the national sphere of government must make sure that laws, policies, programs, and strategies are sufficient to fulfil the state's commitments under s27 of the Constitution.[388] It can, therefore, be concluded that the measures adopted by the state in the NHA do not meet this requirement.

3.7.3 Appropriate financial and human resources must be made available for the programme[389]

Although South Africa's health care system faces man issues due to lack of resources and it is overburdened, organ transplantations are carried out in public hospitals. According to Fabian, South Africa's health care system has the expertise and facilities to provide solid organ transplantation.[390] In addition to this the Department of Health is using the month of August as part of Organ and Tissue Donation Awareness Month to intensify awareness and increase knowledge about the significance of donating organs and tissues which illustrates that the state has made available funds for the programme.[391]

[386] National Health Act, s58.
[387] National Health Act, s59.
[388] *Grootboom*, para 40.
[389] *Grootboom*, para 39.
[390] J Fabian (note 53 above; 545).
[391] South Africa Government, 'Health on organ and tissue donation' https://www.gov.za/news/media-statements/health-organ-and-tissue-donation-01-aug-2024 (accessed 15 October 2024).

3.7.4 It must be balanced and flexible[392] and make appropriate provisions for short-, medium, and long-term needs[393]

To determine if the measures adopted are sufficiently flexible in responding to those most desperate in our society, the Constitutional Court in the *Grootboom* case provides that this must be done in the context of the scope of the organ shortage problem that must be addressed.[394] The organ shortage in South Africa has been an issue of growing concern with dire consequences for those in need. The demand continues to grow, and the supply is not growing in line with the needs of patients in need of organs for transplantation.

One must ask themselves whether the legislation regulating organ transplantation is adaptable enough to meet the urgent needs of people in contemporary society and to address short-term and urgent needs suitably.[395] As mentioned above, the NHA does not acknowledge the shortage of transplantable organs in the country, and it fails to consider the needs of any patients in need of organs for transplantation. The legislation largely considers and protects the rights of the donor, and rightly so. However, the researcher is of the view that it is important to balance the rights and interests of both donors and patients. As stated above, the legislation is not comprehensive in how it aims to realise the rights to access health care in relation to organ donation. There is no comprehensive plan regarding how the state aims to facilitate an increase in the organs being donated over time; therefore, the legislation makes no provision for the short-, medium- and long-term needs of patients.

3.7.5 It must be reasonably conceived and implemented[396]

If an otherwise reasonable program is not carried out in a reasonable manner, it will not constitute compliance with the state's obligation.[397] To satisfy this requirement, one can argue that the programme must first be reasonable in order to determine if it is reasonably implemented. Chapter 8 of the NHA that regulates organ donation, so far in this research, does not seem to be reasonable at all, mostly based on the fact that it does not recognise the issue of the shortage of organs and does not come up with a clear plan as to how the issue will be dealt with.

[392] *Grootboom*, para 43.
[393] *Grootboom*, para 43.
[394] *Grootboom*, para 56.
[395] *Grootboom*, para 56.
[396] *Grootboom*, para 42.
[397] *Grootboom*, para 42.

Additionally, according to the Constitutional Court, this requirement requires that all spheres of government must guarantee the programme's reasonable and appropriate implementation.[398] As mentioned above, there are no responsibilities allocated to each sphere of government relating to how the state aims to increase the availability of organs to patients in need. Because the legislation can be said to be unreasonable, it can be concluded that it does not meet this requirement.

3.7.6 It must be transparent, and its contents must be known effectively to the public[399]

A public programme's contents must be known in order for it to satisfy the reasonableness requirement of the Constitution.[400] The Department of Health, in collaboration with various non-governmental organisations, has committed to using the month of August as part of Organ and Tissue Donation Awareness Month to intensify awareness and increase knowledge about the significance of donating organs and tissues.[401] Organ donation relies on the participation of the public and in order for the public to be able to participate they have to have knowledge of organ donation and the laws pertaining to organ donation. The low number of organ transplants reveal that there is miscommunication between the state and the public regarding the topic of organ donation. It is the researcher's view in this regard that the current initiatives to educate the public are not enough. As discussed in Chapter 1, culture, religion, lack of knowledge, myths and fallacies also contribute to the organ shortage in South Africa, these are factors should be addressed through the education of the public. The state must increase efforts to constantly engage with South African communities to allow organ donation to become the norm. Education of the public must not only consist of awareness but to address issues relating to culture and religion and must also ensure that knowledge concerning the laws that govern human organ transplantations and donation are effectively known and understood by the public.

The researcher believes that it is the duty of the Department of Health to ensure that the public is sufficiently educated regarding organ donation. Given that South Africa has a diverse society, this education must be tailored to resonate with various belief systems while reinforcing the shared value of saving lives. Implementing a culturally sensitive, inclusive and community-

[398] *Grootboom*, para 82.
[399] *Treatment Action Campaign*, para 123.
[400] *Treatment Action Campaign*, para 123.
[401] South Africa Government, 'Health on organ and tissue donation' https://www.gov.za/news/media-statements/health-organ-and-tissue-donation-01-aug-2024 (accessed 15 October 2024).

based approach that directly addresses the myths, misconceptions and religious or cultural barriers that hinder participation. The department of health can design a community centred awareness campaigns that involves local clinics, community leaders and faith-based organisations. Considering that culture and religion contribute to the organ shortage, Slabbert argues that most religions and cultures support the promotion and saving of lives and, as such, would be inclined to accept the altruistic donation of organs.[402] As discussed in Chapter 1, the concept of ubuntu, plays a vital role in all South African communities, such a concept could be used to teach people that it is the community which makes the person and a person cannot exist alone.[403] By aligning organ donation with the values of Ubuntu, the department of health can encourage a more culturally resonant and morally compelling message that transcends religious and ethnic boundaries.

Additionally, the Department of Health could work with the Department of Education to introduce organ donation education into school curricula, particularly in life orientation, to normalise these conversations among young people. To reach broader demographics, large scale public education campaigns through media platforms such as radio, TV, social media and community newspapers can play a vital role in humanising organ donation and will help counter fear and stigma. Partnership with organisations such as the Organ Donor foundation can significantly enhance public education and awareness efforts around organ donation. Organisations such as the Organ Donor Foundation bring specialised knowledge and experience that can strengthen government led initiatives. Importantly, government could also create a government programme for organ donation that could be included on the Department of Health website under the department's programmes, as the government has done with HIV/Aids, TB and child health.

The (SAHRC) on the other hand has a constitutional duty to raise awareness of human rights issues, which include organ donation. This commission could also contribute by holding the government to act on its constitutional duty to realise the right to access health care for patients in need of an organ for transplantation. Education of the public should include large-scale public education campaigns about the importance of organ donation, its benefits, the process involved. These campaigns could include social media, schools, community-based outreach.

[402] M Slabbert (note 86 above; 263).
[403] TSN Muwanga (note 87 above; 12).

The initiatives taken by the state to educate the public only focus on raising awareness of the importance of donating among donors, not the process and the requirements that are required by the legislation nor does it address the cultural and religious barriers that prevent people from donating their organs. This is the reason why the researcher argues earlier in the chapter that the requirements in the legislation can be discouraging to potential donors, and initiatives to educate the public must be tailored to resonate with the beliefs of South Africa's population. It is concluded that this requirement is not satisfied.

3.7.7 It must make short-term provisions for those whose needs are urgent and who are living in intolerable conditions[404]

This requirement, according to the Constitutional Court, must be satisfied considering the scope of the organ shortage issue that must be addressed. In South Africa currently, there are approximately 4700 people waiting for a life-saving organ or cornea transplant in South Africa, but only 0.2% of our population are registered organ donors.[405] The shortage of organs has devastating effects on patients as they often die if they do not have an organ transplant. This issue affects not only patients but also state resources in the case of kidney dialysis. Patients who suffer from kidney failure but do not have an organ for transplantation must be put on renal dialysis, which strains the state resources.

The legislation regulating organ donation not only fails to meet the demand for organs, but it also falls short of the duties placed on the national government to the point where it disregards the need for the state to help individuals in dire need.[406] They should not be disregarded in the interest of a program as a whole.[407] As stated above, the current legislative provisions fail to make short-, medium- and long-term provisions to meet the demand for organs. Most importantly, it fails to make short-term provisions for those who live in intolerable conditions; therefore, this requirement is not satisfied.

3.8 SHORTFALLS OF THE *SOOBRAMONEY* CONSTITUTIONAL COURT JUDGMENT

[404] *Grootboom*, para 56.
[405] Western Cape Government 'Organ Donation in South Africa' https://www.westerncape.gov.za/general-publication/organ-donation-south-africa (Accessed 18 October 2024).
[406] *Grootboom*, para 66.
[407] *Grootboom*, para 66.

The *Soobramoney v Minister of Health* judgement is a landmark case in South Africa. It is a significant judgement as it was the first major Constitutional Court case that dealt with the interpretation of socio-economic rights.[408] Focus on this case is important to strengthen the argument in favour of the argument to adopt a legal framework that can meet the demands for organs in South Africa.

In the case of *Soobramoney v Minister of Health*,[409] the appellant, who had diabetes and was suffering from heart disease, vascular disease, and irreversible renal failure, was not admitted to the Addington Hospital dialysis programme because the hospital did not have sufficient resources to provide dialysis to all patients suffering from renal failure. The primary requirement of the hospital for admission of a patient on dialysis was his eligibility for a kidney transplant. Because of his other illnesses, he was not a candidate for a transplant and, therefore, was also not allowed on the dialysis programme. The Constitutional Court held that the availability of resources determined the state's responsibilities under s27 of the Constitution.[410]

The researcher is of the view that, based on the facts of the case, the court arrived at the correct conclusion. However, the researcher also viewed that there were shortcomings. It was decided in the *Soobramoney* case that individuals with Soobramoney's medical condition did not require access to renal dialysis from the state. The researcher disagrees with this point. The main point behind this finding is the issue of a lack of resources due to the demand for renal dialysis. The only reason a patient who has kidney failure would need renal dialysis is because they are waiting for a kidney for transplantation. In the interim, renal dialysis replaces the function of the kidney.[411] If legislation provides a legislative framework that enables access to organs in South Africa, the demand for renal dialysis would significantly decrease, therefore significantly reducing the load on the state's resources. This would leave room for more people like Soobramoney to be able to access life-saving treatments such as renal dialysis.

3.9 NATIONAL HEALTH INSURANCE

Recent developments in South Africa that relate to health care include the National Health Insurance (NHI). Although NHI is not a foreign concept in South Africa, it was officially signed

[408] P De Vos (note 10 above; 803).
[409] 1997 12 BCLR 1696 (CC).
[410] Soobramoney, para 11.
[411] S Vadakedath and V Kandi 'Dialysis: a review of the mechanisms underlying complications in the management of chronic renal failure' (2017) 9(8) *Cureus*, Pg. 1.

into law in 2024. The overall purpose of the NHI is to improve access to quality health care services for the whole population. The NHI aims to improve access to quality health services for all South Africans, irrespective of whether they are employed or not.[412] Considering the issues pertaining to accessing health care that have been faced by patients in need of an organ for transplantation in South Africa, it is important to analyse the ways in which the National Health Insurance will improve access to health care for such patients.

However, the development of the NHI has not been without criticism. Various points have been highlighted detailing why the NHI Act may face shortcomings. The research noted financial and operational challenges that may arise from South Africa's limited physical and financial capacity to sustain the model.[413] Additionally, underfunded hospitals are already grappling with shortages, risk further strain under the NHI, and potentially impact infrastructure, equipment, and staffing. Finally, concerns about organisational and financial integrity have been raised, with the pooling of funds making the system vulnerable to theft and corruption.[414] This issue is compounded by inadequate external audits and risk management procedures, increasing the likelihood of mismanagement and looting within the NHI framework.[415]

According to the National Health Insurance Act, the Minister of Health must establish a Benefits Advisory Committee (BAC). This committee must determine the health care services that will be purchased by the national health insurance at each level of care at primary health care facilities and at district, regional and tertiary hospitals.[416] There is no information provided by the BAC regarding the services that will be purchased by the NHI. Therefore, as it stands, there is no information as to what health care services will be covered by the NHI, which includes whether organ transplantations will be covered by the NHI.

The researcher believes that the NHI covering organ transplantation is important because organ failure or organ damage is a serious health concern in South Africa. As discussed above, the low number of transplants are currently not a financial burden on the state however if organ transplants increase over time, this could strain South Africa's health care system. The NHI could play a vital role in managing the financial aspects of an increasing demand. The NHI will

[412] South African Department of Health 'National Health Insurance' https://www.health.gov.za/nhi/#:~:text=The%20NHI%20is%20a%20centralised,no%20one%20is%20left%20behind. (Accessed 14 March 2025)
[413] KC Makhubele, '35 critical points revealing potential pitfalls of the NHI Bill in its current form' (2024) Vol. 79 No. 2 *SADJ*, Pg 67.
[414] Ibid 68.
[415] KC Makhubele (note 413 above 68).
[416] National Health Insurance, s25(5)(a).

make it possible for all patients in need of an organ for transplantation to access the procedure and the costs will be covered by the NHI. The operation costs of donors should also be covered by the NHI, this could encourage more people to donate as the financial costs for the operation will not be on them, thus increasing the number of donors. The researcher is also of the view that this is the opportunity for the state to address s60(2)[417] of the NHA, which permits reimbursement for the reasonable costs associated with the donation that may have been incurred by the donor. Clarity regarding what will be regarded as reasonable costs and who is responsible for the reimbursement for the reasonable costs must be provided.

3.10 CONCLUSION

The state has a clear obligation in terms of the Constitution to realise the right to access health care through reasonable legislative or other measures. This chapter sought to examine the extent to which the current legislative measures regulating organ donation have given effect to this obligation of the state. This was achieved in this chapter through the application of the reasonableness approach. In order to ascertain whether the legislation is capable of facilitating the full realisation of the right, the question that must be asked is whether the measures taken are reasonable.[418] It is the researcher's opinion, based on the analysis above, that the legislative measures implemented by the state are unreasonable, and therefore, the state is failing to fulfil its obligations in terms of s7(2) and s27(2) of the Constitution. In line with this analysis, it is important to revise legislation to include an organ procurement system that can provide a solution to the current organ shortage. It is evident from the previous chapter and the analysis in this chapter that the current legislative measures regulating organ donation do not meet international or constitutional standards. S27(2) of the Constitution requires legislative and other measures to realise the right to access health care. Legislation plays a vital role in the protection of citizens' rights in South Africa; therefore, the researcher believes a change in legislation to include a legal framework that is effective in facilitating an increase in the number of organs being procured is paramount.

[417] The National Health Act, s60(2).
[418] *Grootboom*, para 41.

CHAPTER 4: A COMPARATIVE STUDY BETWEEN SPAIN, THE ISLAMIC REPUBLIC OF IRAN AND THE REPUBLIC OF TANZANIA: ORGAN PROCUREMENT POLICIES

4.1 INTRODUCTION

When an organ fails or is damaged, replacement through transplantation is one of the only options that allows patients to live everyday lives.[419] As previously mentioned in the first chapter, there is currently a considerable shortage of transplantable organs worldwide, which has resulted in loss of life, a poor quality of life for those waiting for an organ for transplantation and an increase in the illegal black-market trade of organs.[420] Numerous analysts suggest that any solution that can close the gap should be considered immediately.[421] Various ideas have been put forth to increase the number of donated organs to meet the urgent need for organs. The organ procurement system that is followed in a country has a key impact on that country's success rate in acquiring organs for donation.[422] In this regard, the researcher believes it is important to look at different systems which have been successful in drastically increasing the number of organs being donated. These systems include the sale of organs, followed by Iran and the Spanish model, as well as how these countries have implemented these systems to meet the demand for organs. These systems have proven to be successful in drastically increasing the number of organs being donated in the respective jurisdictions, and an analysis of such systems allows the researcher to determine whether the system is adequately appropriate for the South African socio-economic context. The Republic of Tanzania is a SADC country with similar socio-economic issues relating to health care, such as HIV/Aids, that contribute to an increase in organ failure.[423] Currently, the Republic of Tanzania has not adopted any organ procurement system to regulate organ donation. However, this comparison presents an opportunity to give more perspective on how countries like Tanzania have dealt with the issue of organ shortage with such health issues.

As discussed in previous chapters, there are two main organ-procurement systems acknowledged internationally, namely, an "opt-in"[424] system and an "opt-out"[425] system. Jurisdictions worldwide have implemented different organ procurement systems in their

[419] PM Ayama 'Kidney Disease, Donation, and Transplantation in East Africa' (2021) Volume 8 Issue 2, *Journal of Social and Administrative Sciences*. Pg. 75.
[420] R Matesanz et al 'How Spain Reached 40 Deceased Organ Donors per Million Population' (2017) vol 17 *American Journal of Transplantation*, Pg 1447.
[421] A Bagheri 'Compensated kidney donation: an ethical review of the Iranian model.' (2006) 16(3), *Kennedy Institute of Ethics Journal*; SS Nadvi and M Osman-Hyder 'A comparative study if Islamic and South African law on living and cadaveric organ donations: consensus and divergence' (2021) 42(3), *Obiter*; M Slabbert 'Combat organ trafficking - Reward the donor or regulate sales?' (2008) (73)1 *KOERS*.
[422] B Venter and M Slabbert 'Rewarding a Living Kidney Donor: A comparison between South Africa, Singapore and Iran (2013) 34(2), *Obiter*, Pg 188.
[423] A Wireko (note 349 above; 519).
[424] The "opt-in" system of organ procurement requires that people donate their organs for transplantation on a voluntary basis.
[425] The "opt-out" system of organ procurement means every citizen is considered an organ donor on death unless the contrary is proved.

respective jurisdictions. For example, countries that follow the opt-in system include South Africa, the United Kingdom and the United States of America.[426] Countries that follow the opt-out system include Singapore,[427] Spain, Belgium and France.[428] According to Slabbert, none of the organ procurement systems mentioned above can adequately meet the demand for organs.[429] Although it may be true that none of the internationally recognised organ procurement systems can meet the demand for organs worldwide, it must be noted that some countries, such as Spain and the Islamic Republic of Iran, have implemented their organ procurement systems in a unique manner that has resulted in an increase in transplantable organs and, thus, the success of these systems.

As mentioned above, Spain and the Islamic Republic of Iran have successfully increased the number of organs donated to eliminate waiting lists in their respective countries. Spain implemented a systematic and organisational approach to the process of deceased donation, which has been instrumental in the success of Spain's system.[430] Iran, on the other hand, utilises a government-regulated and funded Living Unrelated Organ Donation programme.[431] Examining these systems is essential as it will allow us to observe the success of different organ procurement systems in curbing the organ shortage in each jurisdiction to assess whether South Africa could follow the example of any of these jurisdictions to make significant strides in lessening our organ shortage crisis. As mentioned above, the Republic of Tanzania has not implemented any organ procurement system. The Republic of Tanzania is one of the few African countries that conducts organ transplantation.[432] This chapter will look at how the Republic of Tanzania has dealt with the organ shortage, considering other prevailing issues

[426] B Venter (note 422 above; 188).
[427] Singapore follows the opt-out system for organ procurement. Organ donation in Singapore is governed by the Human Organ Transplant Act (HOTA). HOTA allows for the kidneys, heart, liver, and corneas to be recovered in the event of death from any cause, for the purpose of transplantation. People can opt out of donating their organs when they die; however, people who object to donating will be a lower priority on the organ transplant waiting list should they need a transplant in the future. This method has contributed significantly to the increase in the number of deceased organ donations. Additionally, HOTA also provides for the reimbursement of living donors who donate their kidneys. The donor may be reimbursed for the following costs or expenses (including the costs of travel, accommodation, domestic help or childcare) or loss of earnings as far as are reasonably or directly attributable to the donor supplying his kidney. The donor will also be reimbursed for any short-term or long-term medical care or insurance protection that may be reasonably necessary as a consequence of the donor supplying his kidney.
[428] B Venter (note 422 above; 188).
[429] M Slabbert (note 29 above; 76).
[430] R Matesanz et al 'Spanish experience as a leading country: what kind of measures were taken?' (2011) 1 *European Society for Organ Transplantation* 24. Pg 334.
[431] S Siraj 'How a compensated kidney donation programme facilitates the sale of human organs in a regulated market: the implications of Islam on organ donation and sale' (2022) 17:10, *Philosophy, Ethics, and Humanities in Medicine*, Pg 2.
[432] A Wireko (note 349 above; 519).

such as HIV. As such, an analysis of each country's socio-economic conditions will give more perspective on whether the systems can be implemented in South Africa.

4.2 SPAIN

4.2.1 Spain's socio-economic status

Spain is considered a developed country despite experiencing significant economic challenges, such as unemployment and poverty. Spain's economy is projected to grow at 2.1% in 2024, driven by resilience in the labour market and domestic demand.[433] Unemployment has been a major economic and social problem in Spain, reaching its highest level of 26% in 2013.[434] Unemployment significantly improved in the following years, and despite the impact of the COVID-19 crisis, in 2020, the unemployment rate kept decreasing.[435] The unemployment rate fell to 12.1% last year and is projected to continue to decline further, although remaining at an elevated level, reaching 11.6% in 2024.[436] Despite these improvements, Spain still has the highest unemployment rate in the European Union.[437] Moreover, official data published in June found that 27.8% of the population was "at risk of poverty or social exclusion" in the country in 2021.[438]

Although Spain faces challenges of unemployment and poverty, it has made significant strides to ensure that everyone has access to primary health care.[439] Spain operates a decentralised national health system that is virtually universal and mainly funded by taxes; it provides health care free of charge at the point of delivery using a vast network owned by the public sector, complemented by private providers where needed.[440] An overview of Spain's health care system illustrates its ability to implement a systematic and organisational deceased organ

[433] European Commission 'Economic Forecast for Spain' https://economy-finance.ec.europa.eu/economic-surveillance-eu-economies/spain/economic-forecast-spain_en (29 October 2024).
[434] E Bernal-Delgado, E Angulo-Pueyo, M Ridao-López, RM Urbanos-Garrido, J Oliva-Moreno, D García-Abiétar, C and Hernández-Quevedo 'Spain: health system review 2024.' (2024) 26(3) *Health Systems in Transition* Pg 5.
[435] Ibid.
[436] European Commission 'Economic Forecast for Spain' https://economy-finance.ec.europa.eu/economic-surveillance-eu-economies/spain/economic-forecast-spain_en (29 October 2024).
[437] European Commission 'Economic Forecast for Spain' https://economy-finance.ec.europa.eu/economic-surveillance-eu-economies/spain/economic-forecast-spain_en (29 October 2024).
[438] Human Rights Watch 'Spain' https://www.hrw.org/world-report/2023/country-chapters/spain (Accessed 29 October 2024).
[439] Ley 14/1986, de 25 de abril, general de sanidad [General Health Care Act 14/1986, 25 April].
[440] E Bernal-Delgado (note 434 above; 5).

donation system.[441] Spain has one of the highest deceased organ donation rates in the world; however, they still face an organ shortage, with the number of patients on waiting lists often exceeding available donor organs.[442] Despite still having a shortage, Spain has gained significant recognition for their organ procurement system because it has increased its number of organ donations, which has led Spain to have the highest deceased organ donor rates in the world.[443]

4.2.2 Spain's legislation on organ transplantation

Organ donation is regulated in Spain by the transplantation law 30/1979.[444] Law 30/79 outlines the basic regulatory framework regarding human organ donation, removal, preservation, exchange and transplantation. In relation to living donation, Law 30/79 provides that living donors must give consent, and the consent must be expressed before the civil registry judge. In order for the donation to be valid, the legislation sets conditions for living donation to ensure that the donation is valid.[445] The conditions for consent include the legal age of the donor, and the legislation requires that the donor be 18 years of age and mentally competent.[446] The legislation also requires that the donor be previously informed of the physical, mental and psychological consequences, as well as the possible repercussions that the donation may have on his or her personal, family and professional life.[447] In relation to deceased organ donation, the legislation allows for presumed consent (opt-out).[448] The law also states that no compensation may be paid for donated organs. Since 1979, the opt-out system has been used in Spain, but it did not make much of a difference in the 10 years it was in place.[449] Instead, the demand for organs in Spain increased, which led to the founding of the Organización Nacional de Trasplantes (National Transplant Organisation) in 1989.[450] The ONT was created by the

[441] R Matesanz (note 420 above; 1447).
[442] La Moncloa 'Spain, with over 6,400 transplants, exceeds forecasts for 2024' February 16, 2025 https://www.lamoncloa.gob.es/lang/en/gobierno/news/paginas/2025/20250116-transplant-figures.aspx#:~:text=Although%20the%20high%20level%20of,list%20stood%20at%205%2C096%20patients. Accessed 30 October 2024).
[443] R Matesanz (note 420 above; 1447).
[444] Spanish Transplantation Law 30/79.
[445] Spanish Transplantation Law 30/79, Article 4.
[446] Spanish Transplantation Law 30/79, Article 4.
[447] Spanish Transplantation Law 30/79, Article 4.
[448] Spanish Transplantation Law 30/79, Article 5.
[449] R Matesanz (note 430 above; 334).
[450] Ibid.

Spanish Ministry of Health. [451]Although the organ procurement system adopted in Spain is the opt-out system, it is not enforced in Spain.

The ONT is regulated by the Royal Decree 1825/2009,[452] this decree defines the ONT in its preamble as an 'entity dedicated to coordinating Spain's organ, tissue, and cell donation and transplant activities'.[453] The regulation also includes the objectives and functions of the ONT and the organisational structure, which will be discussed in further detail below.

4.2.3 Practical implementation of the Spanish Model

Nearly 47 persons per million in Spain are actual donors.[454] Spain has one of the highest organ donation rates in the world, and the donation rates in Spain have been the highest worldwide for many years.[455] Spain's organ donation and transplantation programme has long been regarded as the best in the world because the system has succeeded in continuously and consistently increasing the number of organs being donated since its implementation. It is now commonly referred to as the 'Spanish Model.'[456]

Spain adopted the opt-out method of organ procurement.[457] Spain implemented the opt-out system in 1979, and the availability of organs increased progressively during the 1980s, but after a peak in demand in 1986, there was a natural growth in the waiting list.[458] Thereafter, it was presumed that the shortage of organs is the principal limitation to organ transplants and that the problem was probably not the absence of suitable donors but a failure to convert potential into actual donors by identifying possible donors and evaluating medical suitability for donation.[459] This led to the formulation of the Organización Nacional de Trasplantes.[460]

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[451] Ibid.
[452] Royal Decree 1825/2009.
[453] Royal Decree 1825/2009, preamble.
[454] R Matesanz (note 420 above; 1447).
[455] S Streit, C Johnston-Webber, J Mah, A Prionas, G Wharton, D Casanova, E Mossialos, and V Papalois, 'Ten lessons from the Spanish model of organ donation and transplantation.' (2023) Volume 36 Article 11009 *Transplant International* Pg 3.
[456] FG Mixon and KP Upadhyaya 'Donor Compensation and the Elimination of the Organ Shortage in Spain: Evidence from Break Point Analysis' (2017) vol 6 no 2 *Journal of Statistical and Econometric Methods* Pg. 9.
[457] CJ Rudge, 'Organ donation: opting in or opting out?' (2018) 68(667) *British Journal of General Practice* Pg. 62.
[458] R Matesanz (note 430 above; 333).
[459] S Streit (note 455 above; 6).
[460] R Matesanz (note 420 above; 1447).

The Organización Nacional de Trasplantes (ONT) plays a vital role in Spain's organ procurement system as it is responsible for carrying out Spain's organ donation policy.[461] The purpose of the organisation is to coordinate all the actors on whom a donation and a transplant depend to improve and save the lives of people who need an organ.[462] According to Gallagher, although Spain adopted the opt-out method of organ procurement, Spain's success in increasing organ donation in the country is not attributed to the adopted opt-out system.[463] A few key features of Spain's organ donation system contribute to its success; one is that the system operates in all spheres of government. The ONT plays a vital role as it is set up at the municipal, regional, and national levels.[464]

It is at the national level that donation and transplant operations are coordinated.[465] The national level is responsible for analysing national developments in organ donation and transplantation, building a general national strategy in cooperation with relevant stakeholders, and implementing relevant regulations and guidelines.[466] At the national level, the ONT's national coordinator and central office organise national donations and transplantation, develop regulations, inform professionals and the general public, organise and promote continuing education programmes, and examine transplantation data.[467] Similar tasks are carried out on a regional level by ONT's regional coordinators, who are assigned to each of Spain's seventeen Autonomous Communities.[468] Regional transplant coordinators are responsible for ensuring regional compliance with national standards and protocols, including quality and safety requirements.[469] The municipal level is essentially the hospital level, where hospital coordinators work in donor and transplant centres, managing the day-to-day operations of their transplant teams.[470] According to the Spanish Model, hospital coordinators are critical care physicians.[471] The main objective of the hospital coordinator is to detect and facilitate organ

[461] S Streit (note 455 above; 6).
[462] Organización Nacional de Trasplantes 'MISSION, VISION, VALUES AND PURPOSES' available at: https://www.ont.es/la-organizacion-nacional-de-trasplante/mision-vision-valores-y-propositos-1-2/ (accessed 14 September 2024).
[463] S Streit (note 455 above; 6).
[464] Organización Nacional de Trasplantes 'WHO WE ARE' available at: https://www.ont.es/la-organizacion-nacional-de-trasplante/quienes-somos/ (accessed 14 September 2024).
[465] R Matesanz (note 420 above; 1447).
[466] S Streit (note 455 above; 6).
[467] Royal Decree 1825/2009, Article 5.
[468] Organización Nacional de Trasplantes 'WHO WE ARE' available at: https://www.ont.es/la-organizacion-nacional-de-trasplante/quienes-somos/ (accessed 14 September 2024).
[469] Organización Nacional de Trasplantes 'WHO WE ARE' available at: https://www.ont.es/la-organizacion-nacional-de-trasplante/quienes-somos/ (accessed 14 September 2024).
[470] Organización Nacional de Trasplantes 'WHO WE ARE' available at: https://www.ont.es/la-organizacion-nacional-de-trasplante/quienes-somos/ (accessed 14 September 2024).
[471] R Matesanz (note 430 above; 335).

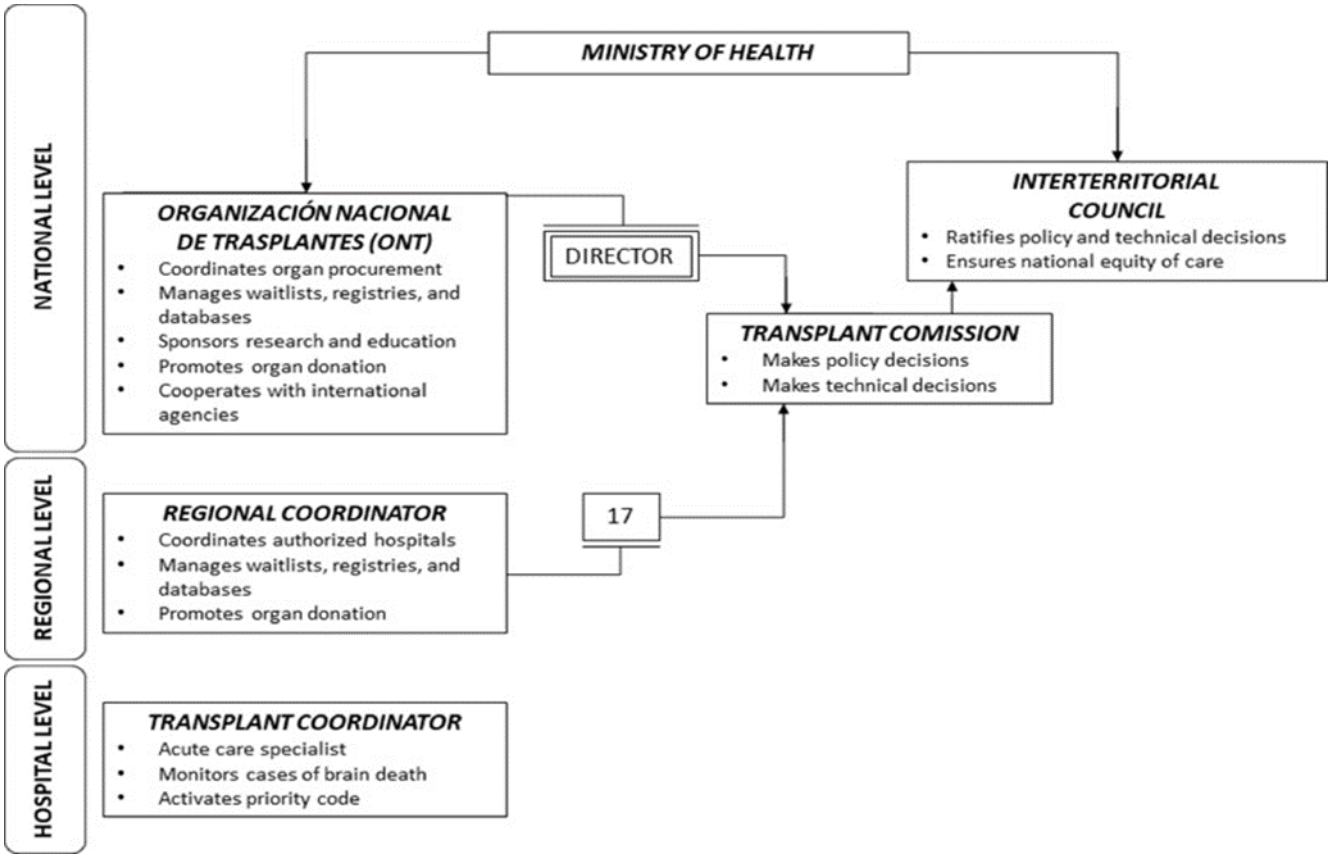
procurement.[472] The ONT holds the view that the role played by the hospital coordinator serves as the impetus for organ detection at the local level.[473]

In addition to all three spheres of government playing a vital role in the organ procurement system, another key feature that has contributed to the success of this system is the fact that in Spain, it is mandatory to approach the family of a potential donor for consultation and approval.[474] Although the organ procurement system adopted in Spain is the opt-out system, it is not enforced in Spain, meaning that although the law provides for presumed consent, that is not what is practised under the ONT.[475]

Spain has built and maintained public support and trust in the Spanish model of organ procurement, which illustrates the importance of public support and trust in building a culture of organ donation.[476] The efficacy of the Spanish model presents a unique perspective for South Africa to consider. Countries such as Italy and Portugal that have adopted the Spanish model have succeeded in doubling the number of organs being donated in the country in one year since the implementation of the Spanish model.[477] As discussed in the previous chapter, South Africa's organ procurement system does not have responsibilities allocated to each sphere of government. South Africa could benefit from the presence of a central coordinating authority, a three-tiered governing structure, transplant coordinators in every ICU, and the creation of a culture of routine donation through media education.[478]

[472] Ibid.
[473] Organización Nacional de Trasplantes 'WHO WE ARE' available at: https://www.ont.es/la-organizacion-nacional-de-trasplante/quienes-somos/ (accessed 14 September 2024).
[474] S Streit (note 455 above; 5).
[475] DP Longo 'Are We Bad Samaritans - A Comparative Analysis of Duty to Rescue Legislation and Cadaveric Organ Donation Systems in Spain and the United States' (2011) 39:1 *Syracuse J Int'l L & Com* Pg. 76.
[476] Editorial, 'Organ donation: lessons from the Spanish model' (2024) Vol 404 Issue 10459 *The Lancet* Pg 1171.
[477] S Streit (note 455 above; 6).
[478] Ibid 1.

The figure below is a diagram that summarises the Spanish model.[479]



4.2.4 Policy Implications for South Africa

The implementation of a comprehensive programme to combat the shortage of organs in South Africa, such as the programme implemented in Spain, is no doubt ideal. A systematic and organisational approach could be useful for a reasonable government programme for organ procurement. As discussed in the previous chapter, in order for a government programme to be considered reasonable, the Constitutional Court requires that each sphere of government assume responsibility for parts of the measures adopted by the government.[480] The Spanish model is, in the researcher's view, an example that South Africa should look at in this regard.

It must be noted that while South Africa is a developing country, and Spain is a developed country, the differences in the quality of the health care systems may impact the implementation of this system. The hospital level of the Spanish model requires that hospitals have coordinators who work in donor and/or transplant centres, managing the day-to-day operations of their

[479] RH Sáenz, 'We're Good at Tennis, Soccer… and Organ Donation': The Spanish organ procurement organisation as a producer of national identity discourses (2017–2020).' (2022) 92, *Poetics*, p.101618.
[480] *Grootboom*, para 40.

transplant teams.[481] The transplant coordinators also carry out the important work of detecting potential donors and facilitating organ procurement.[482] South Africa's health care system is already overburdened and underfunded as it caters to more than 70% of South Africa's population.[483] This already strains the hospital's infrastructure and equipment, and there is a lack of staff.[484] The lack of staff, inadequate infrastructure and lack of equipment can affect the operation of this system at the hospital level.

However, the recent developments in the implementation of the National Health Insurance in South Africa are a step in the right direction in ensuring that everyone has access to primary health care. While this presents an opportunity for the state to consider implementing a system similar to the Spanish Model, the introduction of the National Health Insurance in South Africa did not go without criticism, largely from medical practitioners.[485] According to the South African Dental Association (SADA), the South African health care system is riddled with issues that will only be exacerbated by the NHI.[486]

Aside from the differences between South Africa's health care system and Spain's health care system, it must also be considered that the two countries have different cultures and religions that can affect the outcome of the system in South Africa. Based on the increase in the donation rates in Spain, one can reasonably infer that Spanish people are more willing to donate. South Africa is a diverse country that also has diverse cultures and different religions. As discussed in Chapter 1, culture and religion play a vital role in people's health practices in South Africa.[487] Culture and religion have contributed to the low organ donation rates in South Africa's current system and can hinder the results of this system, should it be implemented. It is, therefore, the researcher's view that the state has the duty and the responsibility to educate the public and constantly engage with South African communities to allow organ donation to become the norm.

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[481] Organización Nacional de Trasplantes 'WHO WE ARE' available at: https://www.ont.es/la-organizacion-nacional-de-trasplante/quienes-somos/ (Accessed 23 September 24).
[482] R Matesanz (note 430 above; 335).
[483] University of the Witwatersrand, 'Healthcare in South Africa: how inequity is contributing to inefficiency' https://www.wits.ac.za/news/latest-news/opinion/2021/2021-07/healthcare-in-south-africa-how-inequity-is-contributing-to-inefficiency.html (15 October 2024).
[484] KC Makhubele (note 413 above; 68).
[485] Ibid 67.
[486] Ibid 68.
[487] M Moropa (note 80 above; 1).

4.3 ISLAMIC REPUBLIC OF IRAN

4.3.1 Islamic Republic of Iran's socio-economic status

The Islamic Republic of Iran is classified as an upper-middle-income country, with GDP growth accelerating to 5 per cent in 2023/24.[488] This growth is primarily fuelled by the hydrocarbon, agricultural, and service sectors, alongside significant state involvement in manufacturing and financial services.[489] Iran is rich in natural resources, ranking second globally in natural gas reserves and fourth in proven crude oil reserves, making it one of the largest producers within the Organisation of the Petroleum Exporting Countries (OPEC).[490] Despite these economic strengths, Iran faces significant socio-economic challenges, including poverty, unemployment, and inequality. These issues persist even though the country boasts a youthful, educated, skilled workforce and abundant natural resources.[491]

In spite of the socio-economic challenges faced by Iranians, the Iranian government aims to provide universal access to health care through a mix of public and private sectors.[492] To achieve this, Iran operates a national health insurance system called the Islamic Republic of Iran Health Insurance Organisation,[493] which helps cover a large portion of the population.[494] This system provides coverage for various health services, such as hospitalisation, outpatient care, and prescription medications. Although the Iranian government has made strides to achieve universal access to health care, many Iranians still face inequality with regard to access to health care.[495]

[488] World Bank Group 'Islamic Republic of Iran' https://www.worldbank.org/en/country/iran/overview (Accessed 29 October 2024).
[489] World Bank Group 'Islamic Republic of Iran' https://www.worldbank.org/en/country/iran/overview (Accessed 29 October 2024).
[490] Iran International Newsroom 'Iran's Economic Woes Run Deeper Than Sanctions, Economist Says' https://www.iranintl.com/en/202403252126 (Accessed 21 October 2024).
[491] Iran International Newsroom 'Iran's Economic Woes Run Deeper Than Sanctions, Economist Says' https://www.iranintl.com/en/202403252126 (Accessed 21 October 2024).
[492] A Aboutorabi, B Darvishi Teli, A Rezapour, SJ Ehsanzadeh, M Martini, and M Behzadifar. 'History of primary health care in Iran.' (2023) 64: *J Prev Med Hyg*, E367.
[493] Public Health Insurance Law of 1994.
[494] A Aboutorabi (note 492 above; E369).
[495] N Soleimanvandiazar, et al 'Decomposition of Healthcare Utilization Inequality in Iran: The Prominent Role of Health Literacy and Neighborhood Characteristics. (2024) 61 *INQUIRY: The Journal of Health Care Organization, Provision, and Financing*, p.00469580241229622. Pg. 2.

4.3.2 Iran's background of organ donation and transplantation

The high and rising incidence of chronic diseases such as hypertension, diabetes, obesity, and kidney disease greatly increased the need for kidney transplants in Iran in the 1900s.[496] Many of these chronic diseases ultimately lead to kidney failure.[497] As a result, the number of patients receiving dialysis increased continuously between 1967 and 1988, while the kidney transplantation programme's growth was significantly slower compared to that of dialysis.[498] The Ministry of Health began permitting dialysis patients to undergo transplants overseas using public funding in 1980 due to the extremely low level of kidney transplant activity in the nation.[499] All travel and transplant-related costs were covered for any dialysis patient who had an acceptance letter from a transplantation facility overseas.[500] As a result, the Ministry of Health faced a lengthy renal transplant waiting list because of the large number of dialysis patients seeking a transplant.[501] In order to fly overseas with government subsidies for transplantation, the patients had established a lengthy waiting list for renal transplants at the Ministry of Health.[502] It seems that the high cost of transporting so many patients overseas for an organ transplant was unaffordable. Health authorities established renal transplant facilities domestically in 1974 because of the high cost of kidney transplantation overseas and the growing number of patients on the waiting list.[503] At the time, Iran used the opt-in system of organ procurement, and almost all the kidneys donated at the time were from living donors related to the patient.[504]Although kidney transplant services were then offered in Iran, many end-stage kidney failure patients in 1988 required kidney transplants but lacked a living relative donor.[505] This presented another obstacle to kidney transplantation in Iran. The lack of organs being donated led to a further strain on dialysis resources. As a result, a government-sponsored, controlled, and paid renal transplantation programme using living unrelated donors was

[496] M Kiani, M Abbasi, M Ahmadi, and B Salehi 'Organ Transplantation in Iran; Current State and Challenges with a View on Ethical Consideration' (2018) 7, 45, *Journal of Clinical Medicine*, Pg. 1.
[497] Ibid.
[498] T Moeindarbari and M Feizi 'Kidneys for Sale: Empirical Evidence from Iran' (2022) 35: 10178, Transplant International, Pg 3.
[499] J Ahad (note 312 above; 1137).
[500] M Mahdavi-Mazdeh 'The Iranian model of living renal transplantation.' (2012) 82(6), *Kidney international*, Pg. 628.
[501] Ibid.
[502] J Ahad (note 312 above; 1137).
[503] M Mahdavi-Mazdeh (note 500 above; 627).
[504] B Venter (note 422 above; 195).
[505] Ibid.

established in 1988.[506] Due to the high demand for kidneys in Iran, the government programme only legalises the sale of kidneys to ensure sufficient access to organs. However, this did not prevent the establishment of a deceased donor organ transplantation programme for other organs.

4.3.3 Iran's Legislation on Organ Transplantation and Donation

Organ donation in Iran is regulated by the Organ Transplantation and Brain Death Act, which came into force in April 2000.[507] This legislation accepted the concept of brain death and allowed for the deceased organ donation of organs such as the heart, pancreas, liver and lungs in Iran.[508] Since the adoption of the legislation, the number of deceased donor organ transplants has slowly but steadily increased in the country.[509] However, the focus for the purposes of this chapter is on Iran's government-funded programme that allows for the selling of kidneys in the country.

4.3.4 Practical implementation of the Iranian Model

The sale of organs has been widely condemned as unethical globally and by organisations such as the WHO. The prohibition of the sale of organs is rooted in a range of ethical principles that aim to protect human dignity, prevent exploitation and ensure fairness and justice in health care systems.[510] One of the most significant ethical concerns is the risk of exploiting vulnerable populations, particularly the poor.[511] It is argued that poorer individuals would feel disproportionately greater pressure to sell their organs than would the wealthy and that only the wealthy will be able to afford kidneys, leaving the poor without them.[512] Additionally, the sale of organs is largely viewed as a violation of human dignity, reducing the body to a set of tradable parts. Ethical frameworks, especially those grounded in human rights, hold that the body should not be treated as property or a commodity to be bought or sold. Lastly, arguments against the sale of organs provide that allowing the sale of organs could erode altruistic

[506] AN Haghighi1, O Ghobadi, K Najafizadeh, F Noohi, B Broumand and I Fazel '20 Years Iranian Experience of Organ Donation: Shifting from Compensated Living Unrelated Kidney Transplantation' (2025) 10, *Kidney International Reports,* Pg 979.
[507] Organ Transplantation and Brain Death Act of 2000.
[508] M Mahdavi-Mazdeh (note 500 above; 628).
[509] Organ Transplantation and Brain Death Act of 2000.
[510] A Oppermann 'An Ethical and Practical Dilemma: Legalizing the Sale of Human Organs' (2024) Vol 1 Issue 2, Journal of Organ Transplantation, Pg 30.
[511] Ibid 29.
[512] Ibid 29.

donation systems because if organs can be bought and sold, individuals may be less inclined to donate freely. Over time, this could reduce the overall sense of social responsibility and solidarity that underpins organ donation programmes. In line with this, many countries, including South Africa, have passed legislation prohibiting monetary compensation for the donation of kidneys and other organs for transplantation.[513] Altruism has been the predominant motive in most nations for prohibiting the sale of organs.[514]

Iran is one of the few countries around the world that legalised the sale of organs, and it has been effective in alleviating the shortage of organs.[515] This was based on the fact that altruism alone is not enough to satisfy the needs of the thousands of patients on renal transplant waiting lists in Iran and that providing some financial incentives or social benefits is necessary to increase the number of deceased or living organ donations.[516] The aim of the legalisation of the sale of organs was to address the increasing demand for kidney transplantation.[517]

In Iran, it is mandatory for the transplant doctor to recommend renal transplantation from a living-related donor and stress the benefits of living-related donor renal transplantation over living-unrelated donor renal transplant under the Iranian model of living-unrelated donor renal transplant programme.[518] The patient is directed to the Charity Foundation for Special Diseases (CFSD) to find a suitable living, unrelated donor if they do not have a living-related donor.[519] The CFSD is an Iranian organisation that regulates organ donation and transplantation, helps match donors with recipients, and arranges compatibility tests.[520] Volunteers who are living but unrelated donors also get in touch with CFSD. After the kidney donor and receiver are matched, the donor and recipient undergo evaluations.[521] Both the donor and the receiver undergo a thorough clinical and psychiatric evaluation in addition to the necessary laboratory testing, which includes standard imaging and laboratory operations.[522] The second stage is to get the informed consent of the contributors and their next of kin after the potential donor has provided the foundation with a national identification card.[523] After that, the recipient and donor are

[513] Centre for Public Impact 'Organ Donations in Iran' https://www.centreforpublicimpact.org/case-study/organ-donations-in-iran. (Accessed 19 September 2024).
[514] Centre for Public Impact 'Organ Donations in Iran' https://www.centreforpublicimpact.org/case-study/organ-donations-in-iran. (Accessed 19 September 2024).
[515] A Oppermann (note 510 above; 31).
[516] AJ Ghods (note 312 above; 1137).
[517] AN Haghighi1 (note 506 above; 979).
[518] AJ Ghods (note 312 above; 1137).
[519] M Mahdavi-Mazdeh (note 500 above; 629).
[520] Ibid.
[521] B Venter (note 422 above; 196).
[522] AJ Ghods (note 312 above; 1139).
[523] M Mahdavi-Mazdeh (note 500 above; 629).

presented to one another. They are directed to a nephrologist for the last assessment, who will thoroughly look for any problems.

Currently, donors receive two different payments: one is an official payment provided by the government, and the other is the unofficial amount and is referred to as the "gift of altruism" provided by the recipient.[524] The CFSD may help recipients who cannot afford the unofficial "gift of altruism." After the transplant, the donor receives a payment from the government, a "gift of altruism" from the recipient or the CFSD and one year of medical insurance from the government through the CFSD.[525] The CFSD controls the organ donation process and ensures that corruption and inequality are prevented by not involving transplant physicians or centres in identifying potential donors.[526] If a donor asks for an unusual amount of money, the CFSD may introduce a different donor to the recipient or remove the donor from the list of potential donors.[527] There is no room for an organ broker or agency to step in under the Iranian approach.[528] A third-party independent association was set up to arrange contact between donors and recipients.[529]

The success of the Iranian model is evident based on the information provided because the renal transplant waiting list in Iran has been eradicated, and it is the only system known to do so.[530]

4.3.5 Policy Implications for South Africa

The implementation of such a system in South Africa would be beneficial in various ways. Firstly, legalising the sale of organs is beneficial to patients who suffer from end-stage kidney failure. Research suggests that a kidney transplant with a kidney from a living donor is of better quality and yields better results than one from a deceased donor.[531] Secondly, the legalisation of the selling of organs could be a solution to cater for the short-term needs of those who live in intolerable conditions.[532] Lastly, the implementation of this system could be useful in combating organ trafficking in South Africa. As discussed in the first chapter, the extent of

[524] AN Haghighi1 (note 506 above; 980).
[525] M Mahdavi-Mazdeh (note 500 above; 629).
[526] Ibid.
[527] Ibid.
[528] B Venter (note 422 above; 196).
[529] Ibid.
[530] A Oppermann (note 510 above; 31).
[531] M Slabbert (note 34 above; 51).
[532] Grootboom, para 56.

organ trafficking in South Africa is unknown. Research shows that where there is a great demand for transplantable organs for which there is an insufficient supply, it could easily induce a black market.[533] An example of the illegal sale of organs in South Africa is the *State v. Netcare Kwa-Zulu Limited* case,[534] where the private hospital 'Netcare' pleaded guilty to charges of trafficking in human organs.[535] According to Oppermann, the option to legalise the sale of human organs by regulating it nationally could be a better alternative to combating organ trafficking.[536]

The implementation of this system will not go without challenges. A government-funded programme could be useful in ensuring equality; however, this will have financial implications on a health system that is already underfunded. The state would be responsible for covering the costs of the transplantation and the donor's reimbursement. The NHI could cover the costs of the transplant. Regarding the reimbursement of donors, an organisation such as the Charity Foundation of Special Diseases should ensure that there is no corruption and that donors are reimbursed equally and fairly. Such an organisation can also assist with ensuring that there is an equal distribution of organs between private and public hospitals.

Additionally, the Iranian model is plagued with ethical issues that cannot be ignored. Many complications that are usually linked with paid kidney donations have been prevented by the Iranian model. One of the arguments made against compensated organ donation is that if the sale of kidneys becomes legal, only the wealthy will be able to afford kidneys, leaving the poor without them. The Iranian model has succeeded in disputing this argument by developing a government-funded programme where the government is responsible for paying donors for their donations, which allows for all transplant facilities to be equally accessible to all Iranians.[537] A major ethical issue that is of concern in South Africa, considering the high poverty and unemployment rate, is that the people who would be willing to sell their organs are poor South Africans.[538] This raises concerns about the exploitation of poor people and ethical concerns around coercion and consent. This is an ethical factor that the Iranian model has not disputed. In fact, more than 80% of living kidney donors also come from a low socio-

[533] A Oppermann (note 510 above; 29).
[534] The State v Netcare Kwa-Zulu Natal (Pty) Ltd Case No. 41/1804/2010.
[535] The State v Netcare Kwa-Zulu Natal (Pty) Ltd Case No. 41/1804/2010.
[536] A Oppermann (note 510 above; 30).
[537] B Venter (note 422 above; 197).
[538] K Greasly 'A legal market in organs: the problem of exploitation' (2012) Vol 40, Issue 1, *Journal of medical ethics,* Pg 52.

economic status.[539] South Africa and Iran face similar issues of high poverty and unemployment; therefore, one can reasonably infer that the result could be the same.

4.4 THE REPUBLIC OF TANZANIA

4.4.1 The Republic of Tanzania's socio-economic status

According to the United Nations, Tanzania ranks among the least-developed African Countries.[540] However, GDP growth is projected at 5.7% in 2024, driven by agriculture, manufacturing, and tourism, and supported by public investments and reforms to improve the business environment.[541] Tanzania has made significant social and economic progress in recent decades, achieving lower-middle-income country status.[542] Despite this positive trend in the economy, poverty rates have not decreased accordingly. The World Bank Report- "2019 Tanzania Mainland Poverty Assessment" notes that poverty decreased by eight percentage points in 10 years, down from 34.4% in 2007 to 26.4% in 2018.[543] Meanwhile, unemployment also declined from 10.5% in 2014 to 9.3% in 2021/22.[544] Tanzania is a resource-strained country with a weak health care system, which is challenged by high maternal mortality, child mortality, HIV/AIDS, pneumonia, and malaria.[545]

The socio-economic challenges faced by Tanzania are similar to those faced by South Africa. Firstly, both Tanzania and South Africa are considered developing countries. Although South Africa has a more advanced economy than Tanzania, both countries struggle with issues of

[539] F Zahedi, I Fazel, B Larijani. 'An Overview of Organ Transplantation in Iran over Three Decades: With Special Focus on Renal Transplantation' (2009) Vol. 38, Suppl. 1, *Iranian J Public Health*, Pg 143.
[540] United Nations Trade and Development 'UN list of least developed countries' (December 2024, available at: https://unctad.org/topic/least-developed-countries/list accessed 28 October 2024).
[541] World Bank Group 'The World Bank in Tanzania' (December 2019, available at: https://www.worldbank.org/en/country/tanzania/overview#:~:text=Tanzania%20has%20made%20significant%20social,from%203.8%20to%206.4%20years. (Accessed 28 October 20204).
[542] World Bank Group 'Tanzania country overview' (4 April 2025 available at: https://www.worldbank.org/en/country/tanzania/overview, accessed 16 May 2025).
[543] World Bank Group 'Tanzania - Mainland Poverty Assessment 2019: Part 1 : Path to Poverty Reduction and Pro-Poor Growth' (December 2019 available at: https://documents.worldbank.org/en/publication/documents-reports/documentdetail/254411585030305188/part-1-path-to-poverty-reduction-and-pro-poor-growth accessed 29 October 2024).
[544] World Bank Group 'Tanzania - Mainland Poverty Assessment 2019: Part 1 : Path to Poverty Reduction and Pro-Poor Growth' (December 2019 available at: https://documents.worldbank.org/en/publication/documents-reports/documentdetail/254411585030305188/part-1-path-to-poverty-reduction-and-pro-poor-growth accessed 29 October 2024).
[545] International Trade Administration 'Tanzania-Health care' (14 December 2022 available at: https://www.trade.gov/country-commercial-guides/tanzania-healthcare accessed 28 August 2024).

poverty and unemployment. Both countries face significant health care challenges, such as limited resources, uneven distribution of health care services, and the burden of diseases.

As part of the African Union and the Southern African Development Community (SADC), both countries have undertaken to combat health care issues that largely affect the African Continent and the SADC region. Communicable diseases such as HIV/AIDS and non-communicable diseases such as diabetes and hypertension have had a great impact on African countries, and research suggests that such health issues contribute to organ failure in the African region.[546] Both countries have a growing demand for organ transplants due to rising incidences of non-communicable diseases such as kidney failure.

4.4.2 Tanzania's Health Care System and Organ Donation Background

Research indicates that both communicable and non-communicable diseases cause most end-stage organ failures, and considering the prevalence of both forms of diseases in Tanzania, research shows that it is likely that rates of end-stage organ failure (particularly kidney failure) exceed those of developed countries because of a high prevalence of diseases such as HIV/AIDS.[547] There is currently no indication of the extent of the organ shortage in Tanzania. However, the increase in end-stage kidney failure in Tanzania is indicative that there is a considerable demand for organs, which is not being met.[548] Countries that include the Ivory Coast, South Africa, Seychelles, Sudan, Nigeria, Namibia, Kenya, Ethiopia, Ghana, Mauritius, and Tanzania are among the few African countries that offer organ transplants.[549] Although Tanzania offers organ transplants, the country still faces issues in managing organ failure and carrying out organ transplantation, which academics attribute to a lack of professional skills, quality equipment and institutions.[550]

The issues faced by Tanzania relating to organ donation largely reflect the issues faced by African countries, including South Africa. Tanzania's struggle with organ donation reflects deeper issues of inadequate infrastructure, health care policy gaps, and socio-economic challenges, which mirror the broader difficulties faced across Africa. Africa faces major

[546] A Wireko (note 349 above; 519).
[547] E Muller, S White, and F Delmonico 'Regional Perspective: Developing Organ Transplantation in Sub-Saharan Africa' (2014) Volume 97, Number 10, *Transplantation,* Pg 975.
[548] Dr NM Mwita and GG Mseke 'An appraisal of the legal regime governing human organ donation, transplant and organ trafficking in Tanzania' (2023) Volume 9 issue 6, *Journal of Legal studies and research,* Pg. 353.
[549] A Wireko (note 349 above; 519).
[550] Dr NM Mwita (note 549 above; 353).

setbacks in organ donation and transplant services, which include poor infrastructure, shortages of trained, skilled health care workers, a lack of equipment, and underdeveloped policies to govern organ donation.[551] Additionally, organ transplants are costly procedures that involve pre-transplant assessments, surgical procedures, post-operative therapies and immunosuppressive medication. With hospitals facing issues of insufficient financial support in many states, this contributes to the challenges associated with organ transplantation in Africa.[552]

This study has established that there is a shortage of organs worldwide. The true scale of the unmet organ transplantation needs is unknown on the African continent.[553] This speaks to the extent of the challenges faced by Africans and African countries in dealing with organ donation and organ transplantation, which is concerning because the lives of many people are at risk. According to WHO, the challenges faced by African countries in relation to organ donation can be attributed to various issues and challenges, such as a lack of legal and regulatory frameworks covering organ donation and transplantation in most countries, insufficient national capacity to carry out organ and tissue transplantation, and weak organisation and management of national organ donation and transplantation programmes.[554]

4.4.3 The Republic of Tanzania's Legislation on Organ Transplantation and Donation

In Tanzania, there is currently no legislation regulating organ transplantation.[555] However, there is a National Health Insurance Fund (NHIF)[556] that covers part of the costs of kidney transplants.[557] Academics in Tanzania largely attribute the shortage of organs in the country to the lack of legislation.[558] Legislation is essential as it guides organ procurement, storage, and allocation and addresses ethical dilemmas such as organ trafficking.[559] The lack of legislation

[551] A Wireko (note 349 above; 519).
[552] Ibid.
[553] World Health Organisation 'Status of human organ and tissue donation and transplantation in the who African region' Available at https://www.afro.who.int/sites/default/files/2021-02/AFR-RC70-12%20Status%20of%20human%20organ%20and%20tissue%20donation%20and%20transplantation.pdf (Accessed 16 September 24).
[554] World Health Organisation 'Status of human organ and tissue donation and transplantation in the who African region' Available at https://www.afro.who.int/sites/default/files/2021-02/AFR-RC70-12%20Status%20of%20human%20organ%20and%20tissue%20donation%20and%20transplantation.pdf (Accessed 16 September 24).
[555] Dr NM Mwita (note 549 above; 353).
[556] National Health Insurance Fund Act No. 8 of 1999.
[557] PM Ayama (note 419 above; 73).
[558] Dr NM Mwita (note 549 above; 353).
[559] Dr NM Mwita (note 549 above; 353).

has raised concerns among Tanzanian academics, as there could be a rise in human organ trafficking in Tanzania,[560] and it limits the ability to carry out more transplants in Tanzania.[561] The Minister of Health, Community Development, Gender, Elderly, and Children, in addressing the issue of the lack of legislation regulating organ transplants in Tanzania, said that the government plans to enact an organ transplants law and warned people not to sell their organs.[562]

4.4.4 Practical implementation

Research indicates that Tanzania has taken steps to ensure access to organ transplant services through the training of health personnel in transplantation and the improvement of infrastructure, including procurement of equipment and the creation of dedicated spaces.[563] People in Tanzania still donate organs regardless of there being no official regulations in place.[564] When a donor expresses willingness to donate, the donor signs consent forms that give licensed medical professionals at a specific medical facility permission to take an organ and provide it to a recipient for transplantation.[565] This is usually the case for living donors who donate organs such as kidneys.[566] In the event that the organ removal and transplant procedure results in death for either the donor or the recipient, the medical professionals are primarily protected by the medical permission form. In essence, this is a contract between the donee, the donor, and the medical facility that performs or oversees the organ's removal and

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[560] Ibid 360.
[561] PM Ayama (note 419 above; 83).
[562] The Citizen 'Govt to enact organ transplant law, says minister' https://www.thecitizen.co.tz/tanzania/news/national/govt-to-enact-organ-transplant-law-says-minister-2614360 (Accessed 29 July 2024).
[563] F Furia et al, 'Establishing kidney transplantation in a low-income country: a case in Tanzania' (2024) 10:29 *Renal Replacement Therapy,* Pg 2.
[564] Kilindu Giattas and partners, 'The Legal framework regulating organ donation and transplantation in mainland Tanzania' https://kgpartners.co.tz/the-legal-framework-regulating-organ-donation-and-transplantation-in-mainland-tanzania3/#:~:text=Tanzania%20has%20not%20enacted%20any,survive%20without%2C%20such%20as%20kidneys. (Accessed 13 November 2024).
[565] Kilindu Giattas and partners, 'The Legal framework regulating organ donation and transplantation in mainland Tanzania' https://kgpartners.co.tz/the-legal-framework-regulating-organ-donation-and-transplantation-in-mainland-tanzania3/#:~:text=Tanzania%20has%20not%20enacted%20any,survive%20without%2C%20such%20as%20kidneys. (Accessed 13 November 2024).
[566] Kilindu Giattas and partners, 'The Legal framework regulating organ donation and transplantation in mainland Tanzania' https://kgpartners.co.tz/the-legal-framework-regulating-organ-donation-and-transplantation-in-mainland-tanzania3/#:~:text=Tanzania%20has%20not%20enacted%20any,survive%20without%2C%20such%20as%20kidneys. (Accessed 13 November 2024).

transplantation.[567] Because of a lack of legislation, there is currently no indication of how deceased organ donation is conducted.

4.4.5 Policy Implications for South Africa

The Republic of Tanzania has made positive strides in expanding transplantation services. Organ procurement in Tanzania is still greatly affected by various issues, mainly the lack of legislation. Tanzania's case sheds light on the consequences of inadequate organ donation and transplantation legislation. However, Tanzania's struggle with organ donation reflects deeper issues of inadequate infrastructure, health care policy gaps, and socio-economic challenges. Although South Africa is more advanced in organ procurement and infrastructure, the issues faced by Tanzania relating to organ donation largely reflect the issues faced by South Africa. South Africa struggles with socio-economic challenges such as unemployment and poverty, which contribute to the reasons why our health care system is overburdened, as it caters for 71% of the population.[568] Even though organ donation and transplantation are regulated in South Africa, they can not be seen to be addressing the issue of organ shortage in South Africa. It is argued in this research that the current legislation regulating organ procurement is inadequate in dealing with the organ shortage.

Evidently, much work still needs to be done in both Tanzania and South Africa to strengthen health care systems and enable them to handle patients with organ failure and organ donation effectively. The researcher believes there is a need to develop and implement policies, strategies, plans and regulatory frameworks for all organ donation and transplantation aspects.[569] In doing so, both countries must ensure that the regulations and policies they implement are equipped to meet the demand for organs. The researcher also notes that the cultural similarities between the two countries are that they have diverse populations with

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[567] Kilindu Giattas and partners, 'The Legal framework regulating organ donation and transplantation in mainland Tanzania' https://kgpartners.co.tz/the-legal-framework-regulating-organ-donation-and-transplantation-in-mainland-tanzania3/#:~:text=Tanzania%20has%20not%20enacted%20any,survive%20without%2C%20such%20as%20kidneys. (Accessed 13 November 2024).

[568] University of the Witwatersrand, 'Healthcare in South Africa: how inequity is contributing to inefficiency' https://www.wits.ac.za/news/latest-news/opinion/2021/2021-07/healthcare-in-south-africa-how-inequity-is-contributing-to-inefficiency.html (15 October 2024).

[569] World Health Organisation 'Status of human organ and tissue donation and transplantation in the who African region' Available at https://www.afro.who.int/sites/default/files/2021-02/AFR-RC70-12%20Status%20of%20human%20organ%20and%20tissue%20donation%20and%20transplantation.pdf (Accessed 16 September 24).

traditional beliefs that may affect attitudes toward organ donation.[570] Addressing these attitudes is crucial for improving organ donation rates.

4.5 CONCLUSION

The Islamic Republic of Iran and Spain have achieved great success in increasing organ donation, which can largely be attributed to their approach to organ procurement. South Africa needs an organ procurement system that can meet the demands for organs; although there are social and economic differences between the countries and ethical concerns, particularly regarding the Iranian model, South Africa could learn from both systems. Strong coordination at all governmental levels is crucial, as evidenced by Spain's systematic and well-structured strategy, which is defined by its comprehensive framework under the ONT. However, the research noted the socio-economic differences between Spain and South Africa. It was found that the implementation of such a system will be affected by South Africa's already overburdened health care system. Iran, on the other hand, implemented a unique approach to organ procurement involving a government-regulated market for living-unrelated kidney donations. The implementation of the Iranian model presents various advantages for South Africa, as noted above. However, the implications on South Africa's health care system and the ethical concerns presented by this model can not be ignored. An overview of organ procurement in the Republic of Tanzania highlights critical issues that reflect broader challenges across Africa, particularly in managing organ failure and establishing effective organ procurement systems. Tanzania's case illustrates the necessity of developing policy frameworks that facilitate an increase in organ donation, which is also the case in South Africa. Without these changes, both South Africa and the Republic of Tanzania risk failing to address the growing demand for organ transplants, which is a risk to the lives of thousands of patients.

[570] Dr NM Mwita (note 549 above; 519).

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1 INTRODUCTION

This chapter provides a detailed discussion of the findings of the thesis, and it provides recommendations on how access to health care in relation to organ donation can be improved in South Africa. This study provided a critical analysis of the South African and international legal frameworks pertaining to the duties of the state to realise the right to access health care in relation to organ donation. The study sought to demonstrate the extent to which the state has a duty to ensure that the measures put in place can realise the right to access health care for patients in need of an organ for transplantation. The researcher is of the view that the legislative measures taken by the state to regulate organ donation contribute to the organ shortage because the legislation fails to facilitate an increase in the number of organs being donated. The low rate of donation is a testament to the fact that the current system is not working. Therefore, the researcher saw it necessary to address this issue as it constitutes a violation of international law obligations and fundamental constitutional rights to health, with potentially fatal consequences for patients in need of an organ for transplantation.

The first chapter provided an overview of how the dissertation will be structured and the key research focus. Having established the background and core focus of the thesis, the second chapter of the dissertation aimed to study the current international law framework to ascertain the extent of South Africa's obligation to realise the right to access health care. This chapter analysed various relevant international and regional conventions that South Africa is a signatory to in order to determine state obligations relating to the realisation of the right to health care. This chapter provided an overview of international treaties that include the Universal Declaration of Human Rights,[571] the United Nations International Covenant on Economic, Social and Cultural Rights,[572] the Declaration of Alma-Ata,[573] the Declaration of Istanbul,[574] the Sustainable Development Goals[575] and the Constitution of the World Health Organisation (WHO).[576] At a regional level, this research provided an overview of the African

[571] Chapter 2, pg. 35.
[572] Chapter 2, pg. 38.
[573] Chapter 2, pg. 41.
[574] Chapter 2, pg. 42.
[575] Chapter 2, pg. 43.
[576] Chapter 2, pg. 44.

Charter on Human and Peoples' Rights,[577] and at a sub-regional level, this research looked at the SADC Protocol on Health.[578] These international and regional instruments were of particular interest in this study because the right to health care is protected in the treaties mentioned above. These instruments consider the right to health care as a fundamental human right that requires protection at a universal level.[579]

Chapter three of the dissertation sought to establish the extent to which the current legislation in relation to organ donation has given effect to the right to access health care.[580] This chapter first analysed the legislation regulating organ donation to determine if the legislation can affect the right to access health care by increasing the number of organs being donated, and to point out shortfalls in the legislation. The chapter also considered the impact the organ shortage has on constitutional rights such as the right to life, human dignity, and equality, to give more perspective on the impact of the organ shortage on patients in need of an organ transplant.

In addition to this, chapter three analysed the duties of the state in terms of s7(2)[581] and s27[582] of the Constitution. S7(2) of the Constitution provides that the state has the duty to respect, protect, promote and fulfil the rights in the Bill of Rights. After having considered the rights affected by the organ shortage and the duties of the state in terms of the Constitution, the reasonableness approach was applied to the NHA to determine if the NHA meets the Constitutional Court standard of reasonableness required for the realisation of rights in the Bill of Rights.

The fourth chapter examines the current position in Spain, the Islamic Republic of Iran and the United Republic of Tanzania. The objective of this chapter was to assess other jurisdictions' policies and legislative measures and evaluate how each jurisdiction has dealt with establishing an enabling environment to ensure the adequate supply of donated organs for transplant purposes. This comparative study was essential to determine how South Africa can use these different approaches to strengthen its organ procurement mechanism.

[577] Chapter 2, pg. 46.
[578] Chapter 2, pg. 48.
[579] Uberoi D, Forman L. What role can the right to health play in advancing equity in kidney care? (2021) 41(3) *Semin Nephrol*: 220–229.
[580] Chapter 3, pg. 51.
[581] Chapter 3, pg. 60.
[582] Chapter 3, pg. 61.

5.2 FINDINGS

This section provides a discussion of the dissertation findings. The first chapter introduced the reader to the importance of an organ procurement system that can increase organ donation in South Africa. This chapter achieved this through a critical analysis of some of the prevalent literature on the topic.[583] This analysis indicated that organ donation is a topic that is largely covered by literature; however, there is currently no literature that looks at the right to access health care in relation to organ donation as a socio-economic right that, in the researcher's view, must be evaluated as such.[584]

In the second chapter, the research found that the relevant international treaties that South Africa is bound to give effect to include the ICESCR, the WHO Constitution and the Sustainable Development Goals. The researcher in this chapter argued that South Africa, by virtue of being a signatory to the abovementioned international treaties, has the duty to adopt adequate mechanisms to actualise the right to access health care. Firstly, this research considered whether access to health care includes access to organ transplants.[585] In this regard, the chapter also found that the right to health care includes the right to have access to a sufficient quantity of goods and services for all. The chapter concluded that this includes access to organ transplants.[586]

By virtue of being a signatory to the ICESCR, a member of the WHO and a member of the UN, South Africa has an obligation to realise the right to access health care. The ICESCR, however, is the only international convention that not only protects the right to health care but also requires states to take steps towards progressively achieving the full realisation of the right.[587] The ICESCR requires that reasonable legislative and other measures be taken as a means for the full realisation of the right to health care.[588]

The research further established that international instruments such as the UDHR serve as the global standard, which has significantly influenced the South African Constitution.[589] This research found that South Africa shows a willingness to improve access to primary health care

[583] Chapter 1, pg. 11.
[584] Chapter 1, pg. 27.
[585] Chapter 2, pg. 34.
[586] Chapter 2, pg. 49.
[587] Chapter 2, pg. 39.
[588] Chapter 2, pg. 39.
[589] Chapter 2, pg. 36.

through its commitment to primary health care and implementation of universal health coverage in line with the UDHR and the Declaration of Alma-Ata.[590]

At the regional level, as a signatory to the African Charter on Human and Peoples' Rights, South Africa not only has the duty to realise the right to the best attainable health through the adoption of legislative and other measures, but has a duty in terms of the Charter to ensure that South African legislation is in line with the African Charter.[591] Furthermore, the research found that at the sub-regional level, the SADC Protocol on Health requires states to develop effective strategies for the procurement, allocation, and monitoring of adequate resources for health care.[592]

The third chapter sought to determine the extent to which the current legislation in relation to organ donation affects the right to access health care. The researcher analysed the legislation. An analysis of chapter 8 of the National Health Act found that the current organ procurement system, as it stands in the NHA, is inadequate to meet the demand for organs in South Africa and, therefore, fails to give effect to the right to access health care. The dissertation further found that because of the shortage of organs in South Africa, patients in need of an organ transplant are not only deprived of their right to access health care but also of other constitutional rights, such as the right to life, equality and human dignity, are violated as well.[593]

An analysis of s7(2) of the Constitution found that the state has an obligation to respect, protect, promote and fulfil the right to health care in relation to organ donation. In respect of the NHA, the research found that the legislation fails to respect, protect, promote and fulfil the right to access health care. S27 of the Constitution requires that 'the state take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation' of the right to access health.[594] The chapter critically analysed this section of the Constitution and found that the state has the duty and the responsibility to put in place an organ procurement system that enables access to organs for transplantations to patients in need to realise the right

[590] Chapter 2, pg. 36.
[591] *Purohit and Moore v. The Gambia, Communication* No. 241/2001, Sixteenth Activity report 2002-2003, Annex VII para 42.
[592] SADC Protocol on Health, 1999, Article 19.
[593] Chapter 3, pg. 57.
[594] The Constitution of South Africa of 1996, Section 27.

to access health care.[595] The research found that although there are currently legislative measures in place, they fail to enable access to organs in order to meet the demand.

Additionally, the third chapter evaluated the legislative measures taken by the state in relation to organ donation using the features established by the Constitutional Court to determine if the measures are reasonable or not.[596] In this regard, the researcher argues that the state has not fulfilled its obligation to gradually realise the right to obtain health care in connection with organ donation through appropriate legislative actions or other means. The research found that the current legislative measures fail to meet the required standard for reasonableness and therefore can be said to be unreasonable.[597]

It is the researcher's view that the state's failure to implement a programme that can increase the number of organs being donated to solve the issue of organ shortage is a violation of the state's Constitutional obligations. The objective of this chapter was to critically analyse the extent to which legislative measures enacted and implemented by the state gave effect to these obligations and impacted access to health care and other constitutional rights by patients seeking organ donation. In answering the question the chapter sought to answer, the research found that not only does chapter 8 of the NHA[598] fail to realise the right to access health care by ensuring that there is an adequate supply of organs, but the chapter also failed to meet the requirements of reasonableness required by the Constitution.[599] This chapter revealed that the legislation contributes to the organ shortage by failing to ensure that there is an adequate supply of organs, which constitutes a violation of international law obligations and fundamental constitutional rights to health, with potentially fatal consequences for patients in need of an organ transplant. This chapter concluded that there is a need for a change in organ transplant legislation, and it is the state's duty to ensure that adequate measures are put in place for the realisation of the right to health care in relation to patients in need of an organ for transplantation.

The fourth chapter sought to examine the current position in Spain, the Islamic Republic of Iran and the United Republic of Tanzania and how South Africa can use these positions to strengthen its organ procurement mechanism. The research found that South Africa could learn from both the Iranian and Spanish systems of organ procurement. The research found that the

[595] Chapter 3, pg. 61.
[596] Chapter 3, pg. 67.
[597] Chapter 3, pg. 75.
[598] The National Health Act 61 of 2003, chapter 8.
[599] Chapter 3, pg. 77.

Spanish model could be an ideal organ procurement system for South Africa that meets the Constitutional Court's requirements for reasonableness; however, the research also considered that the implementation of the system could face challenges in South Africa.[600] This research noted the differences between South Africa and Spain that could affect the success of this system; these differences include the health care systems and the cultural and religious differences.[601]

The research noted the benefits of increasing living-unrelated kidney donation, and compensation, according to the Iranian model, is the only way to increase living-unrelated kidney donation.[602] The Iranian model of compensated living-unrelated kidney donation succeeded in dispelling many ethical arguments regarding the sale of organs.[603] However, the research considered that the people who would be willing to sell their organs are poor South Africans, which is an ethical issue that the Iranian model has not been able to dispel.[604]

5.3 RECOMMENDATIONS

The main objective of this research was to determine the duties of the state to deliver on the right to access health care. As shown above, the dissertation has found that the state has an international and constitutional obligation to realise the right to health care progressively using reasonable legislative and other measures. Having arrived at these findings, this research's recommendations will be put into two categories. The first category of the recommendation will include the recommended measures that this research finds should be used by the state to address the organ shortage. The second category of the recommendation will include recommendations as to what appropriate organ donation system South Africa should implement. The dissertation proposes the following recommendations:

5.3.1 The duty of the State

The thesis acknowledges that there are various factors that contribute to the failure of the current organ procurement system, such as culture, religion, lack of awareness, ignorance,

[600] Chapter 4, pg. 87.
[601] Chapter 4, pg. 87.
[602] Chapter 4, pg. 93 and 94.
[603] Chapter 4, pg. 90.
[604] Chapter 4, pg. 93.

fallacies and myths.[605] The research noted in the third chapter the initiatives taken by the state to educate the public and concluded that these are insufficient.[606] The research found that the current measures fail to penetrate diverse communities and do not adequately address stigma and misperceptions pertaining to organ donation.[607] The measures to educate the public must address culture, religion, lack of knowledge, myths and fallacies as these factors contribute to the organ shortage in South Africa.

Currently, the education of the public focuses on the importance of donating, and the researchers' opinion does not address the issues relating to culture and religion.[608] This research recommends that the Department of Health must do more to educate the public in line with its constitutional duty in terms of s7(2) to promote human rights protected in the Bill of Rights. This could be done by improving policies that are currently in place and including policies that are tailored to resonate with various belief systems. Implementing a culturally sensitive, inclusive and community-based approach that directly addresses the myths, misconceptions and religious or cultural barriers that hinder participation in organ donation is imperative. The Department of Health can design a community-centred awareness campaign that involves local clinics, community leaders and faith-based organisations.[609] This research assessed the role the concept of Ubuntu could play in encouraging a more culturally resonant and morally compelling message that transcends religious and ethnic boundaries.[610]

Additionally, measures taken by the state to educate the public must also ensure that knowledge concerning the laws that govern human organ transplantations and donation is effectively known and understood by the public.[611] In this regard, the Department of Health could work with the Department of Education to introduce organ donation education into school curricula, particularly in life orientation, to normalise these conversations among young people. To reach broader demographics, large-scale public education campaigns through media platforms such as radio, TV, social media and community newspapers can play a vital role in humanising organ donation and will help counter fear and stigma. Partnerships with organisations such as the Organ Donor Foundation can significantly enhance public education and awareness efforts

[605] Nadvi (note 26 above; 610).
[606] Chapter 3, pg. 72.
[607] Chapter 3, pg. 73.
[608] Chapter 3, pg. 73.
[609] Chapter 3, pg. 74.
[610] Chapter 1, pg. 20.
[611] Chapter 3, pg. 74.

regarding organ donation.[612] Organisations such as the Organ Donor Foundation bring specialised knowledge and experience that can strengthen government-led initiatives.[613] Importantly, the government could also create a government programme for organ donation that could be included on the Department of Health website under the department's programmes, as the government has done with HIV/Aids, TB and child health.[614]

This research has established that the current organ shortage is an issue that affects individuals' right to access health care, and the South African Human Rights Commission (SAHRC) has a constitutional duty to raise awareness of human rights issues. The SAHRC could also play a role in the overall education of the public with regards to organ donation in South Africa and call on the government to act on its constitutional duty to realise the right to access health care for patients in need of an organ for transplantation.

This research has established that South Africa has an international and Constitutional duty to realise the right to access health care progressively through reasonable legislative and other measures. The researcher recommends that a change in legislation is necessary to include a legal framework that is effective in facilitating an increase in the number of organs being procured. The researcher is of the view that legislation is the most appropriate measure that can be used to protect the rights of patients in need of an organ transplant. The legislation to be enacted by the state must fulfil the state's s7(2) and s27 constitutional obligations and ensure that the legislation satisfies the requirements for reasonableness.

5.3.2 Suggested organ procurement programme

In analysing different organ procurement systems, the study indicates that models from jurisdictions such as Spain and Iran provide valuable insights into increasing organ donation rates. This research recommends that the Spanish model is suitable for South Africa, because there has not been much of an effort from the state to increase organ donation, and the measures that are put in place are not working, there is a lot of uncertainty regarding the number of potential donors, which suggests that South Africa should do more to identify and track potential organ donors.[615] The Spanish system would be very useful in this regard, as hospital

[612] Chapter 3, pg. 74.
[613] Chapter 3, pg. 74.
[614] Chapter 3, pg. 74.
[615] Chapter 4, pg. 87.

coordinators are responsible for identifying and tracking potential organ donors at the hospital. In addition to this, a systematic and organisational approach could be useful for a reasonable government programme for organ procurement in terms of what the Constitutional Court would deem a reasonable legislative programme.[616] However, the research revealed that there would be challenges in the practical implementation of the programme. In the fourth chapter, the research noted the differences between Spain and South Africa, including the economy, socio-economic status of South Africa, health care system and finally, the differences in cultures and religion.[617] This research acknowledges that these factors may affect the system's ability to yield results. The researcher believes that socio-economic issues and South Africa's health care system are issues that the government must improve over time to allow for the proper implementation of this system.

This research recommends that the sections in the NHA that present obstacles to organ donation, noted in Chapter 3, be removed. S62(1) of the NHA, which requires that deceased organ donors must express their willingness to donate by making a will or signing a document attested by two competent witnesses or by indicating this wish through a clause in a will or orally before two competent witnesses, should be removed.[618] This section of the NHA was found to be an obstacle to organ donation. In a case where there is a will or the donor has expressed their will to donate their organs to two witnesses, further consent is sought from the families, and the families can object to the donation, which means the will of the deceased is not honoured.[619] This research also noted that requiring consent to be included in a will is an obstacle as a will must be approved by the Master of the High Court after the donor's death, and that could take time, which is an issue because time is of the essence where the donor has deceased.[620] For deceased organ donation, consent from the donors' families should be enough.

Legislation should make the process of donating an organ easier and faster for both the donor and the patient. S55 provides that living donors are required to do so on a voluntary basis by giving written consent for living persons. This research found that hospitals in South Africa typically only accept live donations from those who are blood relatives of the patient requesting the donation. This research also found that there should be no reason for hospitals to only accept live donations from those who are blood relatives of the patient requesting the donation,

[616] Chapter 4, pg. 87.
[617] Chapter 4, pg. 86 and 87.
[618] Chapter 3, pg. 56.
[619] Chapter 3, pg. 56.
[620] Chapter 3, pg. 56.

because with improvements in medicine, such as the immunosuppressant drug that is used to reduce the risk of a patient rejecting an organ after transplant.[621]

The changes in the legislation would include the establishment of a national organisation inspired by Spain's ONT, which will be responsible for overseeing and coordinating all organ donation and organ transplantation activities. The organisation could be set up at the municipal, regional, and national levels. Policy could play a role in providing further details on the roles of the organisation in each sphere of government.

Additionally, the legislation must provide for the integration of transplant coordinators in hospitals. Transplant coordinators in hospitals have played a vital role in the success of the Spanish model, as their main objective is to detect and facilitate organ procurement.[622] One of the important functions of the transplant coordinators is approaching the families of deceased individuals for the purpose of asking them for consent for organ donation. Transplant Coordinators are trained and skilled appropriately to be able to approach families. In order for the Spanish Model to be successful in South Africa, the government has to be fully prepared to enforce such laws, which will be difficult, but not impossible.

Although the Spanish model is recommended as the ideal model for South Africa, the researcher also recommends that the Iranian model should not be completely disregarded. This research has illustrated the benefits of legalising the sale of kidneys, particularly for providing for the short-term needs of patients who live in intolerable conditions.[623] This research acknowledges that the ethical issues around the Iranian model will be a barrier that would be an obstacle to its implementation in South Africa, as it could be viewed as an exploitation of low-income individuals. However, the research did note that South Africa's legislation provides for the compensation of donors for reasonable costs associated with the donation. However, there is no explanation as to what 'reasonable costs' entail, and there is no evidence that donors are compensated in South Africa.[624] This research, therefore, recommends that the legislation clearly state what reasonable costs entail, and a good example of how this could be done is Singapore.[625] Furthermore, this research recommends that legislation must be clear as

[621] Chapter 3, pg. 55.
[622] Chapter 4, pg. 85.
[623] Chapter 4, pg. 93.
[624] Chapter 3, pg. 77.
[625] Chapter 4, pg. 80, footnote 427.

to who will be responsible for the reasonable costs associated with the donation, whether it will be the patient receiving the organ or the state through government initiatives such as the NHI.[626]

5.4 CONCLUSION

In conclusion, this dissertation has raised that the organ shortage constitutes a violation of international law obligations and fundamental constitutional rights to health with potentially fatal consequences for patients in need of an organ for transplantation. The current system of organ procurement has failed due to an increase in the number of organs being donated in South Africa, therefore failing to realise the right to access health care. The findings reveal a need for innovative legislative measures that meet the state's constitutional and international obligations for the progressive realisation of the right to access health care. The government is ultimately responsible for ensuring that the laws enacted can effectively address the requirements of the populace, and it plays a crucial role in realising the right to access health care. The researcher is of the view that action must be taken now and consistently to address the issues that have been identified, which range from legislative gaps to structural and cultural obstacles. If the issue of inadequate supply of organs is not dealt with effectively, the right to access health care will continue to be denied to many patients.

[626] Chapter 3, pg. 77.

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UNIVERSITY OF KWAZULU-NATAL
INYUVESI YAKWAZULU-NATALI

Miss Anette Kekisha Mhlongo (220004582)
School Of Law
Howard College

Dear Miss Anette Kekisha Mhlongo,

Original application number: 00026732
Project title: Organ donation: A critical analysis of the State's duty to deliver on the right to access to health care.

Exemption from Ethics Review

In response to your application received on 25 September 2024 , your school has indicated that the protocol has been granted **EXEMPTION FROM ETHICS REVIEW.**

Any alteration/s to the exempted research protocol, e.g., Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through an amendment/modification prior to its implementation. The original exemption number must be cited.

For any changes that could result in potential risk, an ethics application including the proposed amendments must be submitted to the relevant UKZN Research Ethics Committee. The original exemption number must be cited.

In case you have further queries, please quote the above reference number.

PLEASE NOTE:
Research data should be securely stored in the discipline/department for a period of 5 years.

I take this opportunity of wishing you everything of the best with your study.

Yours sincerely,

[redacted]

Mr Matthew Blain Kimble
pp Academic Leader Research
School Of Law