



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

*The extent to which health rights are neglected or promoted is a major factor in the promotion of health equity in Africa. Central to this is the incorporation of the right to health in the national Constitution, as the supreme law of the country. Including the right to health as a constitutional right provides a bench mark for government, private sector and society to respect, protect, fulfil and promote it. In many countries in east and southern Africa (ESA) there is advocacy and debate on inclusion in the constitution of the right to health. This brief presents a review of how the constitutions of 14 countries covered by EQUINET include the right to health. It uses as a framework the six core obligations spelt out in General Comment 14 of the International Covenant on Economic and Social Rights (ICESR).*

### International commitments on the right to health

Two-thirds of Constitutions in the world have a provision addressing the right to health or to health care. While some countries in east and southern Africa have incorporated the right to health in the substantive articles of their national Constitutions, others have not and it is still under debate in others. The International Covenant on Economic and Social Rights (ICESR) is an international human rights instrument that obliges state parties to satisfy minimum essential levels of each of the rights it includes (OHCHR, 1985). All the countries covered in this brief except Botswana and Mozambique have signed and ratified the ICESR, while South Africa has signed the agreement but is yet to ratify it. The other countries covered in the brief are Angola, Kenya, Lesotho, Madagascar, Malawi, Namibia, Swaziland, Tanzania, Uganda, Zimbabwe, Zambia and Congo Brazzaville. Article 12 of the ICESR states that every human being is entitled to enjoy the highest attainable standard of health needed to live with dignity. It notes that health is a fundamental human right that is inextricably linked to the realisation of other human rights, including the right to food, housing, work, education, human dignity, life, non-discrimination, equality, privacy, access to information and freedom of association, assembly and movement, as well as a prohibition against torture.

To help States to implement the ICESR and fulfil their reporting obligations, General Comment 14 of the Covenant highlights the core obligations with regard to the right to health as including:

1. access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable groups;
2. access to the minimum essential food that is nutritionally adequate and safe, to ensure freedom from hunger;
3. access to basic shelter, housing and sanitation, and adequate safe water;
4. provision of essential drugs, as defined according to the World Health Organization's Action Programme on Essential Drugs;
5. equitable distribution of all health facilities, goods and services; and
6. adoption and implementation of a national public health strategy and plan of action that addresses the health concerns of the whole population, devised and periodically reviewed in a participatory and transparent process (United Nations, 2000).

### Constitutional provisions in East and Southern Africa

Despite their shared socio-economic and public health contexts, the right to health is covered to a very different extent in the different constitutions of the ESA region. If the right to health is incorporated in Constitutions as a positive right (vs a





directive principle of policy) it can be enforced in a court of law. Some constitutions explicitly state that the right to health is realised progressively, compared to rights and freedoms like non discrimination which are not subject to progressive realisation. This brief summarises information on what constitutions in ESA countries provide, and further detail can be found in EQUINET discussion paper 81.

In Swaziland under Article 27 the State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right to health.

Five constitutions (Kenya, Malawi, Congo, South Africa, Mozambique) provide for the right to shelter and safe water, and six (Kenya, Malawi, Congo, South Africa, Uganda, Namibia) provide for rights to food, with more detailed provisions in Uganda, Namibia and Malawi.

In the Malawi constitution, in Article 30, the State shall take all necessary measures for the realisation of the right to development, including food. In Article 13, the State shall actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving adequate nutrition for all in order to promote good health and self-sufficiency.

Seven constitutions (Angola, Kenya, Malawi, Congo, Mozambique, South Africa, Uganda) provide for rights to healthcare services and the equitable distribution of health facilities, goods and services. While the constitutions do not specifically refer to 'essential drugs', they do provide for 'treatment', 'medical care' or 'health care' services that would include this. Vulnerable groups are noted in some constitutions: Angola's constitution specifically addresses child, maternity, disability and old-age care, and care in any situation causing incapacity to work, and states that private and co-operative enterprise in health, social welfare and social security shall be exercised in accordance with the law.

Malawi's constitution refers to the state's obligation to ensure equality of opportunity in access to basic health services.

In South Africa, Article 27 provides that everyone has the right to have access to health care services, including reproductive health care and no one may be refused emergency medical treatment.

Angola, Malawi, Swaziland and Zambia provide for obligations to ensure public health policy, strategy and the general duty to public health in a positive manner. It is, however, more common for constitutions to provide for restrictions on rights, such as freedom of movement, to prohibit conduct injurious to health. Some constitutions (also include provisions to protect the health of vulnerable groups, such as children.

In Botswana, Articles 8, 9, 11, 12, 13 and 14 of the Constitution justify eroding other rights, such as the right to ownership of property, to privacy, and to protection of freedoms, like freedom of expression, assembly and movement, in order to protect public health.

Constitutions in the region have in recent years been providing for more comprehensive provisions on the right to health. For example, in the most recent new constitution, enacted in Kenya in 2010, Articles 42 and 43 provide for rights to a clean and healthy environment; to the highest attainable standard of health, which includes the right to health care services, including reproductive health care; to accessible and adequate housing, and to reasonable standards of sanitation; to be free from hunger, and to have adequate food of acceptable quality; and to clean and safe water in adequate quantities. Article 43 also provides that a person shall not be denied emergency medical treatment. The constitution also has provisions to ensure greater certainty as to the application of those rights and fundamental freedoms for vulnerable groups, including children, young or elderly people, people with disabilities, minorities and marginalized groups.



## **Debates on including the right to health in constitutions**

While national values and policies indicate that people's health should be protected, including as an obligation of the state and private actors, and a shared responsibility of society, there are debates on inclusion of the right to health in the constitution. In some countries the right to health is restricted to principles of State policy and objective which cannot be enforced by courts of law, as is the case with Lesotho. Madagascar's constitution makes reference to international human rights instruments that spell out the right to health, allowing for them to be invoked as a reminder to the State of its obligations. The most common debate is on how to make such social and economic rights enforceable, given that their realisation depends on available resources. States are also aware of the greater possibility that those with more resources and power may be more likely sue the state to assert constitutional rights than vulnerable communities.

Constitutions in the region have addressed this concern by including provisions

- i. on the obligation of the state to allocate resources to ensure the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals;
- ii. referring to the principle of progressive realization, obliging the state to take reasonable legislative and other measures within its available resources; and
- iii. for the state to show, if contested by individuals through a court, tribunal or other authority on the implementation of the rights, that the resources are not available.

Article 20 of the Kenya constitution provides in relation to socio-economic rights that if the State claims that it does not have the resources to implement a right, a court or other authority shall be guided by principles that:

- (a) the State has responsibility to show that the resources are not available;
- (b) in allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals; and
- (c) the court, tribunal or other authority may not interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion.

## **What options for including the right to health in constitutions?**

With increasing recognition of the need to provide for and realise the right to health in constitutional reforms, we suggest that countries in the region review how other ESA countries have crafted the provisions on the right to health in their constitutions and familiarise with the relevant international human rights instruments, to inform their constitutional reform processes. Some 'best practice' examples from the constitutions in the region that can inform constitutional review processes include:

1. With regard to the right of **access to health facilities, goods and services on a non-discriminatory basis**, Article 116 of Mozambique's Constitution states that: *Medical and health care for citizens shall be organised through a national health system, which shall benefit all Mozambican people. To achieve the goals of the national health system, the law shall establish the ways in which medical and health care is delivered. The State shall encourage citizens and institutions to participate in raising the standard of health in the community. The State shall promote the expansion of medical and health care and the equal access of all citizens to the enjoyment of this right. The State shall be responsible for promoting, supervising and controlling the production, the sale and the use of chemical, biological and pharmaceutical products and other forms of treatment and diagnosis, and The medical and health care activities run by collective and private entities shall be carried out in accordance with the law and be subject to the supervision of the State.*



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2. On **access to food** that is nutritionally adequate and safe, the Uganda Constitution, Objective XXII provides that: *The State shall: take appropriate steps to encourage people to grow and store adequate food; establish national food reserves; and encourage and promote proper nutrition through mass education and other appropriate means in order to build a healthy State.* As noted earlier, to enforce this it would need to be captured under the substantive articles and not just objectives of the constitution.
3. The South African Constitution on **access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water**, in Section 26 and Section 27 provides that: *Everyone has the right to have access to adequate housing. No one may be evicted from their home, or have their home demolished, without an order of Court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions, and in Sec 27) Everyone has the right to have access to sufficient food and water.*
4. Section 43 of the Kenya Constitution provides for *health care, food, water and social security*, *Every person has the right (a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;(b) to accessible and adequate housing, and to reasonable standards of sanitation;(c) to be free from hunger, and to have adequate food of acceptable quality; (d) to clean and safe water in adequate quantities; (e) to social security; and (f) to education; that a person shall not be denied emergency medical treatment and that the State shall provide appropriate social security to persons who are unable to support themselves and their dependants.*
5. In terms of **equitable distribution of all health facilities, goods and services**, Section 116(4) of the Constitution of Mozambique provides: *The State shall promote the expansion of medical and health care and the equal access of all citizens to the enjoyment of this right.*
6. Regarding the *national public health strategy* Article 13(c) of the Constitution of Malawi provides: *The State shall actively promote the welfare and development of the people of Malawi by*

*progressively adopting and implementing policies and legislation ... to provide adequate health care, commensurate with the health needs of Malawian society and international standards of health care.*

7. Almost all constitutions already have provisions on **prohibition of conduct injurious to health**.
8. Article 20 of the Kenya constitution provides useful clauses shown earlier to make socio-economic rights justiciable in ways that oblige the state but also protect it against unfair suit. Mozambique Article 81 introduces the right of popular action for citizens to advocate the prevention, termination or prosecution of offences against public health.

This brief covers the law as written. It shows, drawing examples from *within* the region that constitutions can and have included the provisions of General Comment 14 of the ICESR. Their inclusion in practice, depends on social awareness, dialogue and action, particularly in those who are most disadvantaged. It would thus be important to follow up on how far constitutional rights, once included, are implemented, including through processes for monitoring, public reporting and review of progress.

## **FURTHER RESOURCES AND REFERENCES**

1. Mulumba M, Kabanda D, Nassuna V (2010): Constitutional provisions for the right to health in east and southern Africa; *EQUINET Discussion Paper 81*. CEHURD, EQUINET: Harare.
2. United Nations (1976) *International Covenant on Economic, Social and Cultural Rights*. United Nations: Switzerland.
3. United Nations (2000) *General Comment No 14: The Right to the Highest Attainable Standard of Health Committee on Economic, Social, and Cultural Rights* United Nations, Geneva
4. Constitutions of the ESA region cited can be found at <http://www.equinet africa.org/bibl/>

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