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THE RIGHT TO HEALTH AND THE COVID 19 PANDEMIC IN UGANDA: AN APPRAISAL OF THE STATE'S OBLIGATIONS REGARDING THE RIGHT TO HEALTH DURING A PANDEMIC

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ABSTRACT

The unprecedented Covid-19 pandemic has taken a gruesome toll on every country's healthcare system. However, a special malignant threat is faced by developing nations whose healthcare system has always been so fragile, like the case of Uganda. The devastating effects of the pandemic should be a wakeup call for the state to rejuvenate the public health care system as well as regulate private healthcare providers. Unfortunately, there exists a persistent indifference towards the realization of Social and Economic rights, especially the right to health. As such, the call to move state machinery towards the beefing up of the healthcare system is overlooked. Where this state of affairs leaves the state as regards its constitutional and international obligations is in stark violation of its international obligations. The same must therefore be remedied.

1.1 INTRODUCTION

The right to health, as a fundamental human right, forms the foundation of human existence. This right is intertwined with several other human rights, especially the right to life and as such, the absence of proper health care threatens the lives of citizens.

Although the 1995 Constitution of the Republic of Uganda does not expressly guarantee the right to health, Objective XIV and XX of the National Objective and Directive Principles of State Policy directs the state to provide basic medical services to the people. Additionally, Uganda ratified international human rights treaties[1] that impose obligations on states to promote the

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[1] According to The World Vision Stakeholder Report on Uganda on The Right to Health in Uganda, accessible at http://lib.ohchr.org/HRBodies/UPR/Documents/session12/UG/WV-WorldVision-eng.pdf, [accessed 16 August 2021], Uganda is a state party to the Covenant on

enjoyment of the highest attainable standard of physical and mental health. Key to mention is the International Covenant on Economic, Social and Cultural Rights.[2] The right to health has come to be justiciable with the 2005 Constitutional Amendment Act which introduced Article 8A that elevated the National Objectives and Directive Principles of state policy from mere guidelines to justiciable principles directing state policy.[3]

Important to note is that economic, social and cultural rights like the right to health receive minimal attention while state budgets, laws and policies are being made in Uganda. With the unprecedented wave of the deadly Corona virus, the already struggling health care system of Uganda was wreaked havoc. With public hospitals full to maximum capacity, citizens have been rendered no option but to turn to private health facilities.

However, given the rise in poverty levels by a 10% point[4], attributable to the spill over effects of a total lockdown of over four months, most individuals have not been in position to seek refuge at private health facilities because of hefty charges levied there. An overwhelming portion of the citizens has been and continues to be locked out of both the public and private health care facilities in the country, yet the unforgiving pangs of the corona virus continue to strike.

The fate of the citizens hangs in the balance and the state maintains a standoffish position as regards the handling of Covid 19 patients who get

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Economic, Social and Cultural Rights, the Convention on the Elimination of Violence against Women and other international, regional and national agreements enshrining the human right to health.

2 Article 12, UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: https://www.refworld.org/docid/3ae6b36c0.html [accessed 5 July 2021]

3 See Amooti Godfrey Nyakaana v Nema & 6 ors, Constitutional Appeal No 5 of 2011 where Katureebe, CJ while referring to the National Objectives & Directive Principles of State Policy observed that "to my mind, this means that these objectives have gone beyond merely guiding us in interpreting the constitution, but may in themselves be justiciable."

4 Reduce rising level of poverty in Uganda, 'Daily Monitor, 30 January 2021'. Available at https://www.monitor.co.ug/uganda/oped/editorial/reduce-rising-level-of-poverty-uganda-3211864. [accessed 16 August 2021]

admitted in private health facilities as well as the closure of their doors on those who cannot meet the costs as will be elaborated on later in this paper.

This status quo poses questions as to the scope of obligations imposed on states with regard to the right to health, whether the state's nonchalance towards the questionable handling of Covid 19 patients in private health facilities is justifiable and ultimately, the possible solutions to the defectiveness of the health care system during the pandemic. This paper is purposely scripted to answer these questions. The first section of the paper will provide a concrete legal basis of the right to health followed by an examination of its normative content and the nature of obligations it attracts for its proper enjoyment.

The paper will further address in detail the effect of the Covid 19 pandemic on the health care system of the country in real data and examine whether the state has appropriately dispensed its obligations in the handling of the Covid 19 crisis. Lastly, the paper will front possible and feasible solutions for the betterment of the treatment of Covid 19 patients.

1.2.1 DEFINITION AND LEGAL BASIS OF THE RIGHT TO HEALTH

Every individual has a right to health. It relates to both the right of individuals to obtain a certain standard of health or health care and the state's obligation to ensure a certain standard of public health with the community generally.[5]

The Preamble of the 1946 Constitution of the World Health Organization defines Health as a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity. It further postulates that 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.

[5] The Right to Health | ESCR-Net, available at https://www.escr-net.org/escr-net-listservs/right-health. [accessed 16 August 2021]

The World Health Organization definition has been reaffirmed and broadened to the extent that the attainment of the highest possible level of health is an extremely important worldwide social goal whose realization requires the action of many other social and economic sectors in addition to the health sector.[6] In General Recommendation 24, the CEDAW Committee also defines the right to health to include socio-economic factors.[7]

The African Commission on Human and Peoples' Rights shares this view. In *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah v. Zaire*,[8] the Commission found that the failure of a state party to provide basic services necessary for a minimum standard of health such as safe drinking water and electricity as well as the shortage of medicine constituted a violation to the right to enjoy the best attainable state of physical and mental health.

Therefore, the right to health is in fact a short form of the highest attainable standard of physical and mental health.[9]

1.2.2 Constitutional Basis of the Right to Health in Uganda

The Ugandan constitution does not expressly provide for the right to health.

However, the right to health is implicit in other complementary rights that are expressly provided for in the constitution such as the right to life, equality, safe working conditions and freedom from torture.[10]

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6 1978 Declaration of Alma Ata on Primary Health Care

7 The Committee notes that the full realization of women's right to health can be achieved only when States parties fulfil their obligation to respect, protect and promote women's fundamental human right to nutritional well-being throughout their life span by means of a food supply that is safe, nutritious and adapted to local conditions.

8 (Communication Nos. 25/89, 47/90, 56/91, 100/93, Ninth Activity Report 1995-1996, Annex VIII)

9 What is the Right to Health? | Icelandic Human Rights Centre, available at https://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/substantive-human-rights/the-right-to-health. [accessed 16 August 2021]

10 Review of constitutional provisions on the right to health in Uganda: CEHURD 2008, available at

Objective XIV of the National Objectives and Directive Principles of State Policy asserts that the state shall ensure that all Ugandans enjoy rights, opportunities and access to education, health services, clean and safe water, work, decent shelter, adequate clothing, food security, pension and retirement benefits. Additionally, objective XX directs the state to take all practical measures to ensure provision of basic medical services to all citizens. The recognition of the right to health in Uganda is further reinforced by three indicators.

First, Article 8A emphasizes the enforceability of the national objectives and directive principles of state policy[11] thus making the directive principles relating to the right to health enforceable. Secondly, there is a paucity of knowledge on implementing implicit constitutional provisions on the right to health in Uganda.[12] Lastly, public health is one of the recognized permissible grounds for the restriction of other rights.[13]

1.2.3 The Right to Health under International and Regional Instruments.

Uganda is party to several international instruments which recognize the right to health. These include the Universal Declaration of Human Rights (UDHR),[14] International Covenant on Economic, Social and Cultural Rights (ICESCR),[15] The Convention on the elimination of all forms of discrimination against women (CEDAW),[16] The Convention on the Rights of Persons with Disability (CRPD)[17] and Convention on the Rights of the Child (CRC) et al.

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https://www.equinetafrica.org/sites/default/files/uploads/documents/CEHURD%20Constitutional%20Review%20Sep2018.pdf. [accessed 16 August 2021]

11 Ssekikubo & 4 Ors V Attorney General & 4 Ors, Constitutional Appeal No. 1of 2015

12 Review of constitutional provisions on the right to health in Uganda: CEHURD 2008, available at https://www.equinetafrica.org/sites/default/files/uploads/documents/CEHURD%20Constitutional%20Review%20Sep2018.pdf. [accessed 16 August 2021]

13 Article 26(2) (a)

14 Article 25

15 Article 12

16 Article 12 and 14

17 Article 25

At the regional level, Uganda is party to The African Charter on Human and Peoples Rights (ACHPR),[18] Protocol on the Rights of Women in Africa,[19] the Treaty for the Establishment of the East African Community (EAC),[20] the East African Community HIV and AIDS Prevention and Management Act of 2012.

Uganda is also a member state of the World Health Organization,[21] a body specifically set up to globally govern health and disease and to ensure universal health coverage.

In relation to the international policy framework, the Sustainable Development Goals (SDGs) provide a policy regime aimed at transforming the world for sustainable development by 2030, and goal number three caters for good health, well-being and in overcoming inequalities within and between countries globally.[22]

From the foregoing, it is safe to say that the right to health is justiciable and indispensable in Uganda.

2.0 THE NORMATIVE CONTENT OF THE RIGHT TO HEALTH.

The right to health is an inclusive right.[23] Usually, the right to health is solely associated, albeit wrongly, with unconstrained access to health care and the building of hospitals. Whereas this is correct, the right to health also encompasses other factors that are necessary to lead a healthy life which the Committee on Economic, Social and Cultural Rights refers to as *'the underlying determinants of health.'*[24] These include; safe drinking water and adequate sanitation, safe food, adequate nutrition housing healthy working and

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18 Article 16 and 14
19 Article 14
20 118
21 WHO | Members and partners in WHO African Region
22 21252030 Agenda for Sustainable Development web.pdf (un.org)
23 World Health Organisation, The Right to Health Fact Sheet No. 31 https://www.ohchr.org/documents/publications/factsheet31.pdf. [accessed on 16 August 202]
24 General Comment 14 paragraph 4

environmental conditions health-related education and information; gender equality.[25]

The Committee on Economic, Social and Cultural Rights postulated the essential elements of the right to health in its General Comment No. 14 on the Right to Health (CESCR 2000).[26]According to the Committee, the right to health does not mean the right to be healthy since being healthy is determined in part by health care but also by genetic predilection and social factors.[27]

Thus, the right to health contains both freedoms and entitlements. The scope of the right covers firstly, the specific elements of the health system and secondly, the realization of other human rights that contribute to health.

2.1 Elements of the health care system

As earlier stated, the right to health means the right to uninterrupted access to conditions necessary for the realization of healthy lives. Therefore, the state has a duty to ensure the presence of these conditions through government services and regulated markets.

The committee of ICESCR has enunciated a framework of how to measure existence of these determinants of health. They must be available, accessible, acceptable and of good quality.[28] These are briefly discussed.

a) Availability;

The right to health requires sufficient availability of public health and health-care facilities, goods and services, as well as programs within the state.[29] However, the nature of what amounts to sufficient facilities, goods and services

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25 General comment 14 Paragraph 3. See also the decision of the African commission In Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah v. Zaire (Communication Nos. 25/89, 47/90, 56/91, 100/93

26 General Comment 14 paragraph 12

27 General comment 14 Paragraph 8

28 General comment 14 paragraph 20

29 Availability of Effective Primary Health Care Services | PHCPI (improvingphc.org) [accessed 14 July 2021]

depends on several factors such as the State party's development level. Notwithstanding this, states are mandated to provide underlying determinants of health such as safe drinking water, adequate sanitation facilities, hospitals, clinics or other health-related buildings, trained professional medical personnel receiving domestically competitive salaries and, as termed by the WHO Action Program, essential Drugs.

b) Accessibility;

Health facilities, goods and services have to be accessible to everyone within the state without discrimination.[30] Accessibility has four overlapping dimensions: these are accessible without discrimination, physical accessibility, economic accessibility (affordability), and accessibility of health-related information.

c) Acceptability;

This requires respect for medical ethics and cultural sensitivities.

d) Good quality.

The quality-of-care dimension relates to health facilities, goods and services being scientifically and medically appropriate or of good quality. This includes having skilled medical personnel, scientifically approved unexpired drugs and hospital equipment, safe water and adequate sanitation.

2.2 Health related human rights.

The right to health is closely related to and dependent upon the realization of other human rights.[31] The ICESCR committee listed 14 rights as integral components of the right to health. These are the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, the freedoms of association,

30 General comment 14 Paragraph 12
31 General comment 14 Paragraph 3

assembly and movement. Thus, a violation of any of these rights may ipso facto violate the right to health.[32]

3.0 THE OBLIGATION OF THE STATE TO RESPECT, PROTECT, PROMOTE AND FULFIL HUMAN RIGHTS.

A discussion of the right to health inextricably requires an analysis of duties or obligations that accrue to the state with regard to the right to health.

The African Commission in its Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter has explained that all human rights including economic, social and cultural rights generate a combination of negative and positive duties on States.[33]

The popular framework for analysing the nature of the duties imposed by Economic, Social and Cultural Rights is the duty "to respect, protect, promote and fulfil" these rights.[34]

a) Obligation to respect.

The obligation to respect requires a State to refrain from interfering directly or indirectly with the enjoyment of the right to health. This entails respecting the freedom of individuals to use all of the resources at their disposal to meet their health needs and obligations.[35]

Further, the obligation to respect also requires States to take positive measures to ensure that all branches of government (legislative,

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32 ibid

33 The Centre for Health, Human Rights and Development (Cehurd) And Others Vs. the Executive Director, Mulago National Referral Hospital and Attorney General, Civil Suit No. 212 Of 2013

34 African Commission on Human and People's Rights Principles and guidelines on the implementation of economic, social and cultural rights in the African Charter on Human and Peoples Rights, adopted on 24 October 2011. See also the Commission's Communication No. 155/96 Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) v. Nigeria. ICESR General comment 14 Paragraph 33

35 ibid

executive and judiciary) at all levels (national, regional and local), as well as all organs of state, do not violate the right to health.[36]

b) Obligation to protect

The obligation to protect requires the State to take positive measures to ensure that non-state actors such as multi-national corporations, local companies, private persons, and armed groups do not violate the right to health. This includes regulating and monitoring the commercial or non-commercial activities of non-state actors that are likely to affect people's access to or equal enjoyment of the right to health. Lastly, this obligation entails ensuring the effective implementation of relevant legislation and programs while providing remedies for such violations.[37]

c) Obligation to promote

The duty to promote economic, social and cultural rights requires States to adopt measures to enhance people's awareness of their rights and to provide accessible information relating to the programs and institutions adopted to realize them. In this regard, the African Charter explicitly places an obligation on States Parties to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter in order to see to it that these freedoms and rights as well as corresponding obligations and duties are understood.[38]

d) Obligation to fulfil

The duty to fulfil the right to health requires States parties to take positive steps to advance the realization of the rights. Such measures should be comprehensive, coordinated, transparent, and contain clear goals, indicators and benchmarks for measuring progress.

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36 ibid

37 The Social and Economic Rights Action Centre, et al v Nigeria, Communication No. 155 of 1996.

38 ibid

> This obligation is a positive expectation on the part of the State to move its machinery towards the actual realization of the rights. The State should continually aim at improving both the range of individuals, communities, groups and peoples who have access to the relevant rights as well as the quality of enjoyment.[39]

3.1 Progressive Realization of the Right to Health

The African Commission in its Principles and Guidelines explained that the obligation to progressively and constantly move towards the full realization of economic, social and cultural rights within the limits of the resources available to a State, including regional and international aid, is referred to as progressive realization.[40]

While the African Charter does not expressly refer to the principle of progressive realization, this concept is widely accepted in the interpretation of economic, social and cultural rights and has been implied into the Charter in accordance with Articles 61 and 62 of the African Charter.

State parties are therefore under a continuing duty to move as expeditiously and effectively as possible towards the full realization of economic, social and cultural rights.[41]

The concept of progressive realization means that States must implement a reasonable and measurable plan, including set achievable benchmarks and timeframes, for the enjoyment over time of economic, social and cultural rights within the resources available to the state party.

States need sufficient resources to progressively realize Economic, Social and Cultural rights. Unfortunately, states like Uganda are constrained in terms of

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39 ibid

40 African Commission on Human and People's Rights Principles and guidelines on the implementation of economic, social and cultural rights in the African Charter on Human and Peoples Rights, adopted on 24 October, 2011.

41 General comment 14 Paragraph 31

resources. In *Purohit and Moore v. The Gambia*,[42] the African Commission expressed that "it is aware that millions of people in Africa are not enjoying the right to health maximally because African countries are generally faced with the problem of poverty which renders them incapable to provide the necessary amenities, infrastructure and resources that facilitate the full enjoyment of this right.

Notwithstanding resource constraints, some obligations have an immediate effect such as the undertaking to guarantee the right to health in a non-discriminatory manner, to develop specific legislation and plans of action or other similar steps towards the full realization of this right as is the case with any other human rights. Secondly, the general existing standard, expressed in the International Covenant on Economic, Social and Cultural Rights (ICESCR), is that States must realize the right to health not only within existing resources but 'to the maximum of its available resources.'

It is not enough to show that a state is utilizing the existing resources because for the obligation to be dispensed, the state must utilize the available means to the maximum capacity. Clearly, the notion of progressive realization within available resources must not be viewed as an excuse to defeat or deny economic, social and cultural rights like the right to health.

4.1 THE STATUS QUO AS REGARDS THE EFFECT OF COVID-19 ON THE HEALTH CARE SYSTEM OF UGANDA.

According to data uploaded by the Government of Uganda COVID 19 Response Information Hub[43], there were 84,592 confirmed cases of Covid-19 then 57,147 recoveries and 1,995 Covid 19 related deaths as of 4th July, 2021. This data reflects only the documented cases and as such, there exists an undetected portion of people infected by the virus and those who have succumbed to it.

42 Communication No. 241/2001 (2003)

43 The Government of Uganda COVID-19 Response Information Hub. Available at https://covid19.gou.go.ug/. [accessed 16 August 2021]

By 1st July, 2021, 990,902 people had received at least 1 dose of the Covid 19 vaccine which is only 2.2% of the total population. Additionally, 4,129 had been fully vaccinated which is less than 1% of the total population.[44] There is an upward progression in the curves of the total number of confirmed cases and deaths. It is expected that the curves will further progress upwards given the unexpected resurgence of the pandemic with a new wave which is picking up speed, spreading faster and hitting harder as reported by the World Health Organization.

The treatment of Covid 19 patients is undertaken by both the public and private health facilities. Uganda's doctor-patient and nurse-patient ratio is approximately 1:25,000 and 1:11,000 respectively,[45] which is below the 1:1000 doctor-patient ratio recommended by the World Health Organization. Public health facilities are characterized by under staffing and inadequate medical supplies.

The staffing level in public health facilities in Uganda were pegged at 71% in the financial year 2017/2018[46] which is below the acceptable standard. The national budget allocation to the health sector is 3.1% for the financial year 2021/2022.[47] This allocation is 11.9% lower than the acceptable health sector allocation according to the Abuja Declaration of 2001 to which Uganda is signatory.

In Uganda, there are 2 national referral hospitals, 4 specialized government hospitals, 14 regional referral hospitals and hundreds of lower rank

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44 World health Organisation, Map of Vaccination, available at https://support.google.com/websearch/answer/10339795?p=cvd19_vaccine_stats&hl=en-UG&visit_id=637612482792918448-2633654725&rd=1. [accessed 16 August 2021]

45 Mwesigwa A, Lule BB, Nakabugo z. Cost of sacking 1, 000 doctors. The Observer, 2017. Available: https://observer.ug/news/headlines/56053-cost-of-sacking-1-000-doctors.html. [accessed 16 August 2021]

46 Uganda Bureau of Statistics: 2020 Statistical Abstract. Available at https://www.ubos.org/wpcontent/uploads/publications/11_2020STATISTICAL__ABSTRACT_2020.pdf. [accessed 16 August 2021]

47 On 7 May 2021, the parliament of Uganda approved a Shs44.7 trillion budget for 2021/2022 of which the ministry of health was allocated only Shs1.4 trillion. Read more at https://www.parliament.go.ug/news/5110/parliament-approves-shs44-trillion-budget-20212022. [accessed 16 August 2021]

hospitals.[48] Of these, only one of the national referral hospitals, one of the specialized government hospitals and the 14 regional referral hospitals have been designated as COVID-19 treatment sites by the Ministry of Health as at May 30, 2020.[49]

Most of these facilities, especially the regional referral hospitals, are ill equipped to handle COVID-19 cases.[50] On top of all these, there is limited accessibility to critical care services in Uganda[51] as of February 2020 yet studies report that 5%-7% of patients sick with Covid 19 require Intensive Care Unit admission. Moreover, 83% of these ICU facilities are located in Kampala city and 75% in private hospitals.[52] The uneven distribution of these facilities further impedes access to intensive health care.[53]

By September, 2022, the 1,300 hospital beds set aside for the treatment of Covid 19 were no longer sufficient to handle the rising numbers.[54] With the designated public hospitals filled to capacity, desperate patients have had to turn to private health care facilities.[55] Unfortunately, in many private health facilities, a patient will not be touched until a huge upfront payment is made.[56]

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48 Esther Ejiroghene Ajari and Daniel Ojilong: Assessment of the preparedness of the Ugandan health care system to tackle more COVID-19 cases. Available at http://www.jogh.org/documents/issue202002/jogh-10-020305.htm. [accessed 16 August 2021]

49 Ibid

50 Ibid

51 Patience Atumanya & Peter Agaba: Assessment of the current capacity of intensive care units in Uganda; A descriptive study, available at https://pubmed.ncbi.nlm.nih.gov/31715537/. [accessed 16 August 2021]

52 Ibid

53 Ibid

54 Uganda's health system overwhelmed with COVID-19 cases- Experts, 'The Independent,' available at https://www.independent.co.ug/ugandas-health-system-overwhelmed-with-covid-19-cases-experts/. [accessed 16 August 2021]

55 The Daily Monitor reported on 23 June, 2021 that many families of Covid-19 patients end up in private facilities after failing to get admission in public health facilities due to lack of space. Available at https://www.monitor.co.ug/uganda/news/national/covid-treatment-hospitals-defend-shs5m-per-day-bill-3447714. [accessed 16 August 2021]

56 Hamza Kyeyune: Ugandan health facilities charging COVID-19 patients a fortune, 01.07.2021. Available at https://www.aa.com.tr/en/latest-on-coronavirus-outbreak/ugandan-health-facilities-charging-covid-19-patients-a-fortune/2290793. [accessed 16 August 2021]

These charges range from UGX 2 million to UGX 5 million per day which is largely unbearable to many Ugandans.

In other cases, relatives of patients have been presented with extremely high bills which the hospitals demand total clearance of before the discharge of those who recovered or the bodies of those who did not make it. This state of affairs raised numerous grievances which have culminated into the dragging of the Ugandan government to the high court for failure to regulate the exorbitant fees for the management and treatment of COVID-19 patients in private health facilities.[57]

Private hospitals have, on the other hand, defended the charging of these high prices arguing on basis of the high the cost of essential drugs used in the treatment of COVID-19 and other supplies. The high charges have also been pinned on the greatness of the risk as well as the requirement of critical attention involved in the treatment of the disease.[58]

4.2 The status quo visa v the performance of the state in its obligations pertaining to the right to health.

Discussion of the extent to which the state has complied with the stipulations to uphold the right to health laid down by the 1995 Ugandan Constitution and international human rights instruments is done in a three-part manner. First, we examine the performance of the public health system followed by that of private health system and lastly the aspect of vaccination equity.

4.2.1 Performance of the public health system.

The statistical data contained in the preceding section of this paper reveals that public hospitals in Uganda are understaffed, ill-equipped and under-funded to handle the treatment of Covid 19.

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57 https://www.cehurd.org/regulate-the-rates-hospitals-are-charging-for-management-and-treatment-of-covid-19/. [accessed 16 August 2021]

58 https://www.monitor.co.ug/uganda/news/national/covid-treatment-hospitals-defend-shs5m-per-day-bill-3447714. [accessed 16 August 2021]

This directly speaks to the fact that the state has failed to execute its duty to fulfil the right to health which in itself is a positive duty that requires taking active steps to achieve availability, accessibility and provision of good quality health services. The availability and accessibility requirements have been offended by the fact that public hospitals designated to treat Covid 19 are now full to maximum capacity and turning away patients[59] while the good quality requirement is breached by absence of the necessary medicines and equipment to treat the patients.

The state machinery has barely been moved towards the creation of more treatment centres, provision of personal protective equipment as well as proper stocking of health facilities with the essential drugs necessary in the treatment of Covid 19.

While the government may argue that it is acting within the limits of the available resources, the fronting of such an argument requires demonstration of maximum allocation of the available resources and those that can be solicited from the international community. This is not the case with the Ugandan government simply because the country's resources are not being maximally utilized for the fulfilment of the right to health.

This is reflected in the FY2021/2022 budget allocation where more funds were moved to sectors like defence and transport as compared to the allocation made to the health sector yet the state of the health sector is in urgent need of refurbishment to enable the combating of the deadly virus[60]. More of resource

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59 On 15 June 2021, The Guardian reported about an interview where Mukuzi Muhereza, the Uganda Medical Association secretary general confirmed that there is a dire inadequacy of oxygen and human resources from public hospitals hence turning away of patients. Available at https://www.theguardian.com/global-development/2021/jun/15/vaccines-and-oxygen-run-out-as-third-wave-of-covid-hits-uganda. [accessed 16 August 2021]

60 The health sector was allocated only 3% of the total budget funds in the financial year 2021/2022. This is much lower than the 6% that was allocated to it in the financial year 2020/2021. See, David Rupiny, 'Uganda National Budget 2020/2021: Key Investment Takeaways' available at https://www.ugandainvest.go.ug/uganda-national-budget-2020-2021-key-investment-takeaways/. [accessed 16 August 2021]

squandering is reflected in the continued payment of allowances to members of parliament despite the suspension of parliamentary sittings.[61]

Similarly, an argument may be made that the state is progressively realizing the fulfilment of the right for example by making attempts to increase supply of oxygen tanks in Mulago Hospital.[62] However, as earlier mentioned, some obligations under the right to health have an immediate effect such as the undertaking to guarantee the right to health in a non-discriminatory manner. As the number of oxygen tanks was being increased at Mulago hospital, Kabale Hospital stopped oxygen supply to neighbouring health facilities due to inadequacies.[63] There have been minimal efforts to create equitible access to the necessary equipment to treat Covid 19 in all designated treatment centres which can be said to be discriminatory.

It is irrefutably evident that the public health system has not been empowered to appropriately handle the treatment of Covid 19 patients and as such the state fails to meet the obligations imposed by the Constitution and international human rights instruments.

4.2.2 Private Health Facilities and the State Obligation to Protect the Right to Health

61 On 5 July, 2021, a section of Members of Parliament questioned the continued dishing out of payments and allowances to Members of Parliament without work. See MPs question their continued payment without work (independent.co.ug). [accessed 16 August 2021]

62 Nobert Atukunda, 'Mulago to install new plant as oxygen crisis worsens,' Daily Monitor,Friday June 18 2021. Available at https://www.monitor.co.ug/uganda/news/national/mulago-to-install-new-plant-as-oxygen-crisis-worsens-3441914. [accessed 16 August 2021]

63 Robert Muhereza, 'Covid-19: Kabale hospital stops oxygen supply to neighboring health facilities, Daily Monitor,Friday June 25 2021. Available at https://www.monitor.co.ug/uganda/news/national/covid-19-kabale-hospital-stops-oxygen-supply-to-neighboring-health-facilities-3449232. [accessed 16 August 2021]

As earlier stated,[64] the state has an obligation to protect through taking positive steps to ensure that non-state actors such as local businesses and private persons do not violate the right to health.

This can be done through the creation and maintaining of a framework or atmosphere through legislation or any other appropriate measures to ensure that private actors do not render health facilities unavailable or unaffordable to the citizens.[65]

Businesses and private persons can affect the right to health in several ways. Private healthcare providers, at least, under the UN Guiding Principles have a direct responsibility to respect the right to health.[66] Such responsibilities rise to the level of legal human rights duties in some domestic jurisdictions as the UN Committee on Economic, Social and Cultural Rights has acknowledged.[67] At the most essential level, this means adhering to recommended standards while delivering affordable and accessible health-related goods and services on a non-discriminatory basis.[68]

This responsibility of businesses to 'respect' the right to health can be converted into a domestic legal requirement pursuant to the State's obligations to protect.[69] Whereas private health facilities contribute positively to the enjoyment of the right to health, they may also make health care more difficult to access or afford, for instance by keeping the price of medicines or health services high.[70] Following the privatization of the health care system through liberalizing the receiving and treating of covid patients in Uganda, private healthcare providers have become key players in the fight and treatment of COVID19.

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64 supra
65 ICESCR General comment 14 at Paragraph 35
66 UN Guiding Principles on Business and Human Rights Principle 13-16
67 General comment 14 para 42
68 UN Guiding Principles on Business and Human Rights
69 Gorik Ooms and Rachel Hammonds: Global constitutionalism, responsibility to protect, and extra-territorial obligations to realize the right to health.
70 supra

The government is thus obligated to intervene and regulate private practices that affect the right to health such as regulating fees charged to such reasonable levels and also ensuring that the services provided in these facilities are of good quality. This stance is legally fortified by Sections 28 and 29(k) of the Public Health Act,[71] under which the Minister of Health is mandated to make statutory orders for the regulation of hospitals used for the reception of persons suffering from an infectious disease and of observation camps and stations.

Similarly, the Medical and Dental Practitioners Act[72] in Section 46 mandates the Minister, on the recommendation of the Medical and Dental Practitioners Council, to make regulations which include prescribing the fees as indicated under the Act[73] a case in point being the fees charged by medical practitioners for their services.

The current medical fees are overly exorbitant, inspired by profiteering and do not commensurate with the services given. The result of this is that medical services are unaffordable by the significant majority of the citizenry. This engages the state's responsibility. Indeed, different governments around the world have adopted different measures to ensure health services remain available, accessible, acceptable and of good quality to people.

Various Governments in the world have enlisted the support of private health providers while at the same time effectively regulating their operations. In Spain, for instance, the government has 'nationalized' private hospitals to increase treatment capacity, which may better allow it to fulfil its obligations.[74] In the United Kingdom, there have been agreements between the government

71 Cap 281
72 Cap 272
73 Section 46(a)
74 Coronavirus: Spain Nationalizes All Private Hospitals, Enters Lockdown (businessinsider.com) [accessed 16 August 2021]

and private hospitals where these hospitals have been contracted to work 'at cost' and without profit to bolster the State's capacity to combat COVID-19.[75]

Further, other states have taken measures to prevent profiteering from COVID-19 by those operating in the private health sector. In Bangladesh, for example, the government has prevented private laboratories from conducting COVID-19 tests for fear that it would be unable to assure quality control of such testing.[76] With private businesses involved, there is always a fear of profiteering as historically experienced with HIV and other epidemics.

In anticipation of the potential for such abuses, the South African government has enacted regulations to empower it to 'set maximum prices on private medical services relating to the testing, prevention and treatment of the COVID- 19 and associated diseases.[77]

A state might also, in accordance with heightened 'social expectations' arising in the crisis situation of the pandemic, compel more proactive measures to assist in the fulfilment of the rights. This could mean measures such as converting production priorities and eliminating or adopting lower profit margins for certain goods and services.

It follows therefore, that the state as the primary custodian has a duty to protect its citizens against exorbitant medical fees through either partnering with private entities to provide subsidized services or enact legislations fixing the criteria of charges.

To this end, the Ugandan government has been indifferent towards the extortion by private health facilities by failing to take any positive measures to check on the freedom of private medical practitioners in the pandemic and thus failing in its obligation to protect.

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75 REVEALED: The Tories' deal with private hospitals amounts to a government bailout | Left Foot Forward: Leading the UK's progressive debate [accessed on 16 Aug. 21]

76 4 Dhaka laboratories banned from conducting Covid-19 tests for travellers | Dhaka Tribune [accessed 16 August 2021]

77 Regulations to the Disaster Management Act 2020

4.2.3 Vaccine equity

It has been observed that the most effective way to recover from the Covid19 crisis is ensuring access to vaccination to as many people as possible.[78] Therefore, there is need to vaccinate more people quickly.

However, due to the inequitable vaccine distribution, people in rural areas have been left vulnerable to the virus. The biggest threat posed by inequitable vaccine distribution is that the virus is capable of ricocheting. The virus mutates and renders first generation vaccines ineffective in a short period.[79] Whereas vaccine equity has been predominantly advocated for at the global scene to ensure equitable distribution of vaccines between wealth countries and low developed countries,[80] there is need to examine the equal distribution of vaccines at the national level.

It is argued that there has been no equitable distribution of vaccines in Uganda.[81] The vaccination sites are situated in urban centres and thus not physically accessible to rural dwellers.[82] Most vaccination sites are at health Centre III hospitals or above with a maximum of only 4 centres in 138 districts. Moreover, most of these centres are not stocked with the vaccine. This means that the greater majority of Ugandans in rural areas stay far away from health Centre III. There are also reports of payment for vaccination which is supposed to be free of charge.

Furthermore, the government has not carried out educational and other health related awareness programs to counter misleading narratives as regards to the

78 Human Rights and Access to Covid-19 Vaccines: OHCHR. Available at https://www.ohchr.org/Documents/Events/COVID-19_AccessVaccines_Guidance.pdf. [Accessed 9 July 2021].

79 COVID-19 Vaccines And Coronavirus Mutations: Shots - Health News: NPR [accessed 16 August 2021]

80 Vaccine Equity. Available at https://www.who.int/campaigns/annual-theme/year-of-health-and-care-workers-2021/vaccine-equity-declaration. [Accessed 9 July 2021].

81 The Last Mile: Uganda's Covid-19 vaccine struggle (nbcnews.com) [accessed 16 August 2021]

82 COVID-19 VACCINATION SITES BY DISTRICT IN UGANDA, available at https://www.health.go.ug/2021/03/30/covid-19-vaccination-sites-by-district-in-uganda/. [accessed 16 August 2021]

effect of the vaccine.[83]This generally affects people's willingness to turn up for vaccination as many continue to harbour stereotypes like the vaccine causing death.[84]

The state has a duty to ensure that people are aware and have access to educational and health related information. To this end, Uganda has relented in its obligation and by extension has facilitated the misguided attitude towards the effects of the vaccination which has kept only elites and a lucky few willing to be vaccinated.

5.1 RECOMMENDATIONS

This section recommends the possible practices and solutions on how to enhance the realization of the right to health in Uganda during the Covid19 pandemic.

The provision of adequate and accurate information about health treatment to patients and the general public is vital in enhancing the realization of the right to health. The committee on economic, social and cultural rights in general comment 14 stated that information accessibility includes the right to seek, receive and impart information and ideas on health.[85]

In *Green watch (u) limited v Attorney General and Anor*,[86] the right to access information was found to be applicable to information in possession of the state. Court further noted that, if accurate and adequate information is availed, the right to health and clean environment would be promoted.

Therefore, providing education and health related information about vaccination and its benefits would exponentially change the attitude and

83 Therapeutic Advances in Infectious Disease: COVID-19 vaccine acceptance among high-risk populations in Uganda.

84 Kelechukwu IRUOMA, 'How misinformation drives low uptake of COVID-19 vaccine in Nigeria.' Available at https://www.icirnigeria.org/how-misinformation-drives-low-uptake-of-covid-19-vaccine-in-nigeria/.[Accessed 9 July 2021].

85 paragraph 12

86 High court Miscellaneous Cause No. 139 of 2002

numbers of people submitting to vaccination. The government should therefore conduct educational and other awareness programs to correct the narrative and thus improve vaccine equity.

In *Centre for health, human rights and development and 2 others v the executive director v Mulago referral hospital and Anor*[87], it was held that realization of the right to health requires an improved financing of the health system. As earlier showed, the major challenges in the healthcare system mainly result from under resourcing. Therefore, there is an urgent need for improved financing, so as to actualize the effectiveness of health facilities through quality, quantity of and equity in service delivery.

This may, for example, be through increasing the salaries and allowances given to medical workers so as to increase their willingness to attend to patients. Further, the state should consider ensuring that even remote areas have at least one vaccination site to improve people's access to vaccine. A case in point is that health center II hospitals should be gazetted as sites for administering vaccines.

There is also need to monitor and enforce accountability in the implementation of the right to health to ensure an effective mechanism. There have been cases and allegations of corruption and mismanagement of funds allocated to improve health facilities.[88] However, the government has not carried out its due diligence obligation to investigate or prosecute those involved.

The existence of a slow and unenthusiastic response to resource misdirection makes it close to impossible to realize the right to health. While pursuing this end, the funds allocated to the health sector should be increased in preference of allocating much greater funds to sectors that are not in urgent need of refurbishment.

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87 Civil suit No. 212 of 2013

88 U.S. Ambassador, Deborah Malac. 'It's Time for the Government to Invest in Ugandans' Health and Future,' Available at https://ug.usembassy.gov/its-time-for-the-government-to-invest-in-ugandans-health-and-future/ [Accessed 10 July 2021].

There is need for the government to intervene and regulate medical charges by private health facilities. This can, for example, be done through enlisting the support of private health facilities through agreements to subsidize health charges. This practice has proved to be effective in Spain and United Kingdom. This would greatly enhance the realization of the right to health.

The government should also intervene with a regulatory framework which is scientific, location sensitive and accurate in terms of the actual costs incurred to deliver covid19 treatment. This would make costs reasonable as opposed to being exorbitant.

6.2 CONCLUSION

The efforts of the government to sustain its citizenry in the face of a pandemic by putting in place stringent measures like total lockdowns are commendable. However, what ideally crowns the attempt to avert the crisis is a healthcare system that is readily available, affordable and most importantly of a good quality.

The absence of such a healthcare system in Uganda, not only breaches legally imposed obligations on the state but also makes the target of economic development elusive. It is very unlikely that an already destitute population whose life is now threatened by a novel mutating disease would later on come to be productive.

The absence of reality-based policies in the governance of this country is a conversation that should not be avoided. The priorities of the government reflect aloofness towards the general wellbeing of the citizenry at large. This reality not only works to the detriment of the citizens but also to those who benefit from the society-insensitive policies of the state. At the end of the day, the cow they are milking will have nothing left to give.

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