Making Access to Health Care a Basic Right under the Papua New Guinea Constitution

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Introduction

Papua New Guineans continue to die from treatable illnesses and experience recurring medical conditions as a result of limited or lack of basic health care facilities or medicines. Malaria, tuberculosis, pneumonia, typhoid and inadequate prenatal care continue to add to premature deaths and mortality rates.[1]

Better health care however remains a high priority for government. A number of policies and laws have been put in place by successive governments with the aim of improving health care.[2] These include the National Goals and Directive Principles (NGDP) under the *Constitution*, legislation and numerous development plans such as the National Strategic Plan 2010-50 (Vision 2050), the National Health Plan 2021-2030, the Sustainable Development Goals and the Medium-Term Development Plans.

Although a priority, the achievement of these health care ambitions depend on funding, resources and adequate health care professionals. The health sector must therefore continue to compete with other basic services or socio-economic priorities for funding and other resources. Essentially, funding is provided to health care, but it is the governance and management aspect that need attention.

Whilst the country's development needs and socio-economic challenges must be addressed, basic health care remains inadequate. This will continue if mismanagement, malpractice and corruption remain prevalent. Whilst a certain percentage of health care services are provided by Churches, non-government organizations, the private sector and development partners, government must not be complacent as the primary health care provider.

Efforts in the health sector aimed at improving health care service delivery and access include the enactment of the *Provincial Health Authorities Act* 2007 (PHA Act). This new paradigm in the 'age of the market state'[3] provides a facility into which health care and its management can be liberalised and provided through public-private partnerships in a bid to better standards and accessibility. However, this approach cannot succeed without repercussions to the health care needs of society where profitability and corporate sustenance considerations

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1 Whilst specific data is needed to verify the main causes of death there are number of reports from mainstream media and external sources that indicate weaknesses in the health care system. See for example https://www.postcourier.com.pg/mother-dies-result-no-proper-health-care-remote-village/ (accessed 12/01/24).

2 See also the Millennium Development Goals at https://www.un.org/millenniumgoals/

3 Faunce, Thomas. *Who owns our health?: medical professionalism, law and leadership beyond the age of the market state* (Sydney, University of New South Wales Press Ltd, 2007) 174. Faunce describes the 'age of the market state… to refer to a period of state promotion of global privatization that is half physically realised or imminent and half ideologically immanent in health care policy and institutions.'

prevail. Although not immediately apparent, this is likely to affect the delivery of health care services unless health care is accorded adequate protection.

The NGDP are redundant in offering protection and providing an impetus under which government can ameliorate its health care efforts towards the people. In that generally, the NGDP are 'non-justiciable'. Therefore, entrenching 'access to health care' as a fundamental right under the *Constitution* will not only oblige the government to duly address health care needs, but also require the government to 'justify' its position when health care needs are not met. This provision will serve as a prelude under which accountability and justice may be served through the intervention of the judiciary or alternate dispute resolution mechanisms.

In discussing this constitutional and human rights paradigm, the paper will highlight the existing means of giving effect to the NGDP pertaining to health care with a view to establishing its ineffectiveness. Thus, focusing on the essence of categorizing health care as a 'basic right' and giving it appropriate 'content' for purposes of implementation. The question of resource constraint and enforceability will also be considered with reference to the *South African Constitution*, which provides an example of how these countervailing issues may be correlated to health care in PNG.

The NGDP and Protecting Health Care Access

The NGDP, particularly Directive 1(4) regarding 'integral human development', calls for:

> … improvement in the level of nutrition and the standard of public health to enable [Papua New Guineans] to attain self-fulfillment.

Although this directive may attract criticism from both health and constitutional jurists as lacking in content,[4] Schedule 1.5 of the *Constitution* provides that 'all provisions of, and all words, expressions and propositions in, a Constitutional Law shall be given their fair and liberal meaning.' It is suggested that Directive 1(4) is taken to include the various facets of the right to health which includes 'curative and preventive services provided to the individual …as well as population-based services such as immunizations.'[5] Although the directive is non-justiciable[6], it has to be observed by 'all persons and bodies, corporate and unincorporate' when dealing with the health of Papua New Guineans. This is a conventional process that has sufficed in providing *guidance* especially to the government in formulating health policies, reforms and delivering health care services.

The NGDP cannot be enforced *proprio vigore* (by its own force) but can be given effect to in accordance with Section 25(3) of the *Constitution.* This provision provides that:

> Where any law, or any power conferred by any law (whether the power be of a legislative, judicial, executive, administrative or other kind), can reasonably be understood, applied, exercised or enforced,

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4 Kristen Hessler and Allen Buchanan, 'Specifying the Content of the Human Right to Health Care' in Rosamon Rhodes, Margaret P. Battin and Anita Silvers (eds), *Medicine and Social Justice, Essays on the Distribution of Health Care* (Melbourne: Oxford University Press, 2002) 84 at 86.

5 Ibid.

6 See Section 25(1) and Schedule 1.7 of the *Constitution* regarding 'non-justiciable' which states that: Where a Constitutional Law declares a question to be non-justiciable, the question may not be heard or determined by any court or tribunal, but nothing in this section limits the jurisdiction of the Ombudsman Commission or of any other tribunal established for the purposes of Division III.2 (*leadership code*). See generally Kwa, E., *Constitutional Law of Papua New Guinea* (Sydney: Law Book Co, 2001).

> without failing to give effect to the intention of the Parliament or to this *Constitution*, in such a way as to give effect to the National Goals and Directive Principles, or at least not to derogate them, it is to be understood, applied or exercised, and shall be enforced, in that way.

The application of this constitutional provision was considered by the Supreme Court in *Supreme Court Reference No 2 of 1992*.[7] Kidu, CJ, stated that the NGDP can be given effect to under Section 25(3) provided that their application is not contrary to the intention of Parliament or the *Constitution*. His honour then referred to NGDP 5 regarding 'Papua New Guinean ways' and how it was given effect to under the *Customs Recognition Act.*[8] That is, 'custom' as an integral part of 'Papua New Guinean ways' can be considered in determining penalties in criminal cases, which give effect to NGDP 5.

Dr. Narokobi observed that a careful interpretation of Sections 25 and 63 of the *Constitution* may support the implementation of the NGDP.[9] He submits that the liberal interpretation of Sections 25 and 63 strongly suggests that the NGDP can be implemented indirectly and that bodies established by the *Constitution* have a duty to facilitate their implementation. The view expressed by the learned scholar and now Judge demonstrates that the enforceability of the NGDP is not limited to the courts, but also through other administrative or alternative dispute resolution methods where the attainment of justice is imperative. This view is encouraging, as essentially this paper hopes to explore some of the means by which the NGDP are enforced specifically to address health care.

Narokobi's research concludes that there is no case law that 'reconciles the non-justiciable and justiciable aspects of the NGDP and Basic Social Obligations'.[10] Therefore, the issue of the NGDP being non-justiciable continues to be a point of contention. A case on point that held that the NGDP are non-justiciable despite the existence of Sections 25 and 63 of the *Constitution* is *Medaing v Ramu Nico Management (MCC) Ltd*.[11] Although Narokobi offers an alternate view to the interpretation of Sections 25 and 63 of the *Constitution* that favours the implementation of the NGDP, judicial pronouncements such as the Medaing case perpetuates the judicial view that the law must be explicit if basic services such as health care are to be made enforceable.

In the health context, Directive 1(4) is given effect through the enactment of the PHA Act,[12] which gives further content to health care by explaining the obligations of the PHA Act under Section 11. Section 11 is set out in full below:

> 11. Purpose of Provincial Health Authorities.
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> Subject to the provisions of a provincial health partnership agreement, the purpose of a provincial health authority shall be to-
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> (*a*) provide relief to sick and injured persons through the provision of care and treatment; and
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> (*b*) promote, protect and maintain the health of the community; and
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> (*c*) make the provincial health authority accountable to the local community; and

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7 [1992] PNGLR 336.

8 Chapter 19 of the Revised Laws of PNG.

9 Vergil Narokobi "The Implementation of Papua New Guinea's National Goals and Directive Principles and Basic Social Obligations' (PhD Thesis, Victoria University of Wellington, 2016). See also Kari, SS., *Decolonisation and the Birth of Papua New Guinea's Constitution 1959-1975* (Goroka: NGDP Consultancy Services, 2009).

10 Id at 33.

11 (2011) SC114.

12 See Section 3 of the PHA Act and Section 38 of the *Constitution*.

(*d*) encourage the local community to participate in planning and in the decision-making process in relation to the provincial health authority; and
(*e*) deliver public health services appropriate and acceptable to the local community; and
(*f*) deliver curative services from the premises of a provincial hospital or provincial health authority or other place as the case may be which are appropriate and acceptable to the local community.

This provision inadvertently serves to indicate the grounds under which a citizen may enforce the right to access health care against a PHA as a separate legal entity. This approach is more transparent than allowing the NGDP to exist on its own as a directive. In that, it provides a means under which the people can be involved in the process of decision making that affects them. This also offers a sense of security should a province so choose to establish a PHA.[13]

However, for present purposes, the protection that needs to be ascertained is that which is 'independent' from the control of government. This is particularly important given that an Act of Parliament will continue to be susceptible to 'parliamentary supremacy' which can be changed by a 'simple majority of votes' to suit contemporary political interests, or a 'provincial health partnership agreement' that favours market ethics rather than virtue ethics. This can result in 'sporadic' health care considerations and the prevalence of the dire health care situation.

Entrenching the right to access health care

The PHA is a separate legal entity which 'is capable of doing and suffering all acts and things which bodies corporate may by law do or suffer'. It has the mandate to contract, raise funds and outsource health care functions to which it is responsible.[14] This indicates an evolution in the health sector for better delivery of health care services through potentially exposing the management and provision of health care to corporate participation. This may be a means by which the standard of health services is improved both in quality and accessibility. However, the need for the PHA to sustain itself and the 'profit-focused' concern of such ventures remains unaffected, which may disorientate the social ambitions of the government in addressing the people's basic needs as 'patients' as opposed to being 'consumers'.

Although the PHA Act clearly defines the types of health care which a citizen may expect to receive, there is no guarantee that those services will be distributed equally throughout the provinces. Under this new paradigm, the PHA are to be jointly funded by the national government and the provincial government. In resource rich provinces, benefits from mining royalties or other commercial projects are most likely to boost the ability of their PHA to provide better services compared to those that do not have the same opportunity.[15]

It is uncertain whether the national government will honor its commitment to fund PHA. The national government must honor its commitment by ensuring that the 'margin of appreciation' in health care service delivery is both proportionate and equal throughout the country. It is suggested that this approach can be best achieved through a centralised legal mechanism that is not dependent on differing provincial socio-economic situations, but is premised on distributive justice according to the national interest.

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13 Section 7 of the PHA Act indicates that establishing a provincial health authority is optional.
14 Section 13, PHA Act.
15 Section 98 of the *Organic Law on Provincial Governments and Local-level Governments* provides for the sharing of benefits from the development of natural resources within the jurisdiction of provinces.

For instance, a PHA may capitalize on budgetary shortfalls by introducing exorbitant fees for medical treatment. In other cases, health care may continue to be provided at a substandard level and not necessarily satisfy philanthropic health care needs where outsourced medical services are focused on economic interests.[16] This was the case in *Fly River Provincial Government and Pioneer Health Services Limited*.[17] The Fly River people were abandoned by Pioneer Health Services Ltd when the national government refused to assist the Fly River Provincial Government with additional funding to pay for the services rendered under a contract. The national government argued, however unsuccessfully, that the contract was void because the provincial government had not conformed to specific financial procedures and that the national government was not obliged to compensate for the services provided.

Enforceability may now be an option under the PHA Act should such a situation occur. However, for the ordinary villager, subsistence farmer or average Papua New Guinean, enforceability remains impracticable. As observed by Brunton and Colquhoun-Kerr, the appreciation of justice at least for the average Papua New Guinean is not 'according to colonial law, or justice according to the values of the legal system, but rather real or substantive justice, the justice of social and economic equality.'[18] This will remain ambitious unless better protection is accorded to the citizen to correlate with the government's efforts to improve health care service delivery in the 'age of the market state'. Health law jurists suggest that the best means of achieving this is through constitutional protection. For example, Faunce suggests that:

> A human right to health, based on either a domestic constitution or international human rights law, will be an important means by which health professionals in the age beyond the market state may be able to calibrate (that is, evaluate for coherence with foundational professional virtues and principles) health policy and legislation. The human right to health will be generally regarded as imposing duties on a market state to protect, respect and fulfill economic, social and cultural (rather than civil and political) obligations towards its citizens.[19]

Hence, an appropriate constitutional provision will serve independently to 'wrest global and domestic health care policy development from the profit-focused concern of that alliance of government and globalised industry.'[20] This would not restrict efforts in involving corporate players for the better, but will introduce a safeguard to the people who are guaranteed fulfillment of health care obligations by the government.[21] As will be seen, had health care been a fundamental right, the national government's response to the assistance request by the provincial government in the *Fly River case* could have been less political and more humanitarian.

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16 David Blumenthal and William Hsiao "Privatization and its Discontents-The Evolving Chinese Health Care System" (2005) 11 *The New England Journal of Medicine* 1165 at 1166.

17 (2000) SC705.

18 Brian Brunton and Duncan Colquhoun-Kerr, *The Annotated Constitution of Papua New Guinea* (Port Moresby, University of Papua New Guinea Press, 1984) 310.

19 Faunce, above, n3, 175. Faunce also describes 'health professional' to include policy makers and health lawyers.

20 Thomas A Faunce, 'Health and Human Rights' (2008) 13(2). *Australian Journal of Human Rights* 233 at 236.

21 George M S Muroa, 'The Extent of Constitutional Protection of Land Rights in Papua New Guinea' (1998) 4 *Melanesian Law Journal* 5 (http: www.paclii.org/journals/MLJ/1998/4.html/.) Muroa discussed the level of protection accorded to customary landownership under Section 59 of the *Constitution* which provided adequate safeguard against abuse and inconsiderate decisions by government.

Health Care as a Basic Right and its Contents

In order for health care to receive the same respect domestically as other 'basic rights' enshrined under Division 3 of the *Constitution,* it has to be *determined* as a 'basic right' and inducted into the *Constitution*. This may appear redundant to health professionals in PNG as well as the many citizens who unconsciously label health care as a basic right. Although this argument may emanate from the purported application of international human rights law, it has to be noted that international law does not have any *opinio juris* application to PNG unless it is ratified constitutionally or adopted through domestic legislation. It would be a misrepresentation of the *Constitution* and importantly to society to continuously assert that the right to health care is a 'basic right' as to date it remains a 'social directive' to government.

Henry Shue provides a useful analysis in determining whether health care can be inducted into the category of 'basic rights'. He states that:

> [T]he substance of a basic right can have its status only because, and so only if, its enjoyment is a constituent part of the enjoyment of every other right, as…enjoying not being assaulted is a component part of the enjoyment of anything else, such as assembling for a meeting.[22]

It can be suggested that 'health care' in PNG is a basic right in order to appreciate other goals and guarantees provided under the *Constitution*. These include NGDP No 1 (Integral Human Development), NGDP No 2 (Equality and Participation), NGDP No 5 (Papua New Guinea Ways), the 'Basic Rights' and the 'Basic Social Obligations in the Preamble and the 'Basic Rights' under Division 3. To reiterate, a citizen cannot enjoy the basic right to freedom, movement, or life, if health care is not also a fundamental right.[23]

However, 'the thesis that health care is necessary to securing people's abilities to enjoy other human rights does not eliminate the need to specify further the content of the human right to health care.'[24] Most jurisdictions have drawn the contents of their constitutional provision dealing with health care from Article 25 of the *Universal Declaration of Human Rights* (UNHR) It states:

> Everyone has the right to a standard of living adequate for health and well-being 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* (emphasis added), disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.[25]

An example of the entrenchment of this right is in the South African *Constitution*, particularly Section 27 which provides as follows:[26]

> 27. Health care, food, water and social security –
> (1) Everyone has the right to have access to-
> (a) health care services, including reproductive health care;
> (b) sufficient food and water; and
> (c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.

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22 Note 4, above, at p90.
23 See *United States v. Carolene Products Company*, 304 U.S. 144 (1938) for a comparison.
24 See, n22, supra at p91.
25 Adopted by the United Nations General Assembly on 10 December 1948.
26 *Constitution of the Republic of South Africa Act*, (No. 108 of 1996).

(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.

By contrast, the complexity associated with PNG's social and cultural structure, varying from province to province, makes it impracticable to devise an appropriate constitutional provision that can be effectively implemented. For the most part, Article 25 of the UNHR remains 'aspirational'[27] and this can be realised by making a comparison with the South African *Constitution.* For example, 'sufficient food and water' under Section 27(1)(b) cannot be replicated by PNG given the different acceptable social standards of living. A villager in rural PNG may consider as 'sufficient' accessing water from a river or borehole compared to a person in Port Moresby who considers 'sufficient'; affordable and uninterrupted water supply from a tap. As for Section 27(1)(c) 'social security' in PNG is premised on the extended family ties, clans and cultural groups that continue to exist in contemporary PNG.

This goes against arguments advocating for an *opinio juris* application of the UNHR as part of customary international law. As stated by Brigit Toebes:

> Irrespective of their available resources, States have to provide access to maternal and child health care, including family planning; immunization against the major infectious diseases; appropriate treatment of common diseases and injuries; essential drugs; and adequate supply of safe water and basic sanitation. In addition, they are to assure freedom from serious environmental health threats. [28]

The conclusion by Toebes did not address the cultural variances that exist in different countries that have an impact on the universal application of the human right to health care.[29] As Kinney observed:

> Such legalistic visions of the right to health may also not be appropriate or effective as there is still some uncertainty about the content of the international human right to health. Indeed, getting a handle on the content of the right to health is a necessary first step to effective implementation. But this is no easy task. To have meaning, the content of the right to health must be essentially the same for all nations and people. Yet implementation is dependent on the resources, as well as cultures, of individual countries. How do we articulate the right to health in countries with vastly different economic resources and cultural traditions?[30]

The content of the right to access health care is a practical issue that can be appropriately determined by the Constitutional and Law Reform Commission of Papua New Guinea. But as a theoretical suggestion, a general provision such as section 27(a) (health care services) together with Section 27(2) of South Africa may be considered. There is also the avenue to have the courts determine the scope of application of these provisions in accordance with Sections 18, 19 and Schedule 1.5 of the *Constitution*.

A similar provision to Section 27(3) of the South African *Constitution* may not only be directed to emergency medical treatment at a health care facility but also extend to the outbreak of infectious diseases in PNG. This contention follows from the many disease

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27 Dieter Giesen, 'A right to health care? A comparative perspective' in Andrew Grubb and Maxwell J. Mehlman (eds), *Justice and Health Care: Comparative Perspectives* (New York: Wiley, 1995) 287 at 289.
28 See, supra at 92.
29 Id at 93.
30 Kinney Eleanor D, 'International Human Rights to Health: What does this mean for our nation and the world?' (2001) 34 *Indiana Law Review,* 1457 at 1467.

outbreaks including the 'cholera outbreak' in the Morobe Province in 2009.[31] The term 'emergency' is defined under Section 226 of the *Constitution* as including '…outbreak of pestilence or infectious disease, or any other natural calamity whether similar to any such occurrence or not on such an extensive scale as to be likely to endanger the public safety or to deprive the community or any substantial proportion of the community of supplies or services essential to life.' There was much resentment against the government's intervention in addressing the cholera outbreak which claimed many lives in 2009.[32] A provision that provides for emergency medical treatment may have the government react quickly in providing the essential health services, or even better, develop strategies in advance to address disease outbreaks.

HIV/AIDS is also an epidemic in PNG where lack of 'human rights' protection has also led to discrimination and stigmatization of infected persons resulting in lack of treatment and early deaths. It has also been reported that lack of '…[anti]-discriminatory measures and failure to observe human rights fuel the epidemic, rather than containing and decreasing it.'[33] As a result of the Papua New Guinea National HIV/AIDS Medium Term Plan 1998-2002, the *HIV/AIDS Management and Prevention Act* 2003 was enacted to protect infected persons against discriminatory practices so they can voluntarily access treatment and counseling.

However, according to Stewart there is more that can be done to enhance the human rights protection already provided.[34] Stewart's analysis of existing constitutional provisions pertaining to 'equality of citizens' and the 'right to life' and 'right to privacy' can coincide with the present proposal of a 'basic right' to access health care. As mentioned above, the contents of the relevant provision may be determined to include the protection of persons suffering from HIV/AIDS and access to treatment. Such persons can have that right enforced if they are denied treatment.

Resource Constraints and Enforceability of the Right to Health Care

There are other social obligations besides health care which continue to influence political judgment with regard to resource distribution to the health sector. This situation may render enforceability of the right to access health care impractical where a particular health care service could not be provided given budgetary constraints. This has been realised in other jurisdictions that has led the courts to reserve judgment with deference to the authority charged with making budgetary appropriations in government run health care systems. For instance, in *R v Cambridge Health Authority; ex parte B,* it was contended that:

> Difficult and agonizing judgments have to be made as to how a limited budget is best allocated to the maximum advantage to the maximum number of patients. That is not a judgment, which the court can make.[35]

Similarly, in *R v Central Birmingham Health Authority; ex parte Collier*, it was held that 'it is not for this court, or any court, to substitute its own judgment for the judgment of those

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31 Editorial, 'Govt Response disappointing', The National, 07 September 2009 at http://www.TheNational.com.pg

32 Ibid.

33 National AIDS Council of Papua New Guinea, 'Review of Policy and Legislative Reform relating to HIV/AIDS in Papua New Guinea' (2001) 26.

34 Christine Stewart, 'Towards a Climate of Tolerance and Respect: Legislating for HIV/AIDS and Human Rights in Papua New Guinea' (2004) 8 *Journal of South Pacific Law* 2.

35 [1995] 2 All ER 129 at 137.

who are responsible for the allocation of resources… The courts of this country cannot arrange the [waiting] lists in the hospital…[36] These cases are indicative of the general judicial practice under administrative law where matters that involve 'polycentric'[37] considerations pertaining to governance are usually 'non-justiciable'. This is so given the institutional capacity of the courts to determine these issues in light of prevailing socio-economic implications and the doctrine of separation of powers.[38] So in effect, although the right to access health care may be an enforceable obligation under the *Constitution*, the question of determining resource allocation that is fundamental in implementing that obligation may remain 'non-justiciable'. This may cause mismanagement and human rights abuse in terms of health care to prevail through the non-intervention of the judiciary.

Nonetheless, the *Soobramoney v Minister of Health (Kwazlu-Natal)*[39] case illustrates how government as primary health care provider can still account for its decision in refusing treatment based on resource constraints. That case concerned the interpretation and application of Section 27(1) and (2) of the South African *Constitution*. Section 27(2) serves as a correlation under which management of available[40] resources is taken into account when the State is discharging its obligation to deliver health care services, let alone, the nature of the provision itself provided room under which the court was able to take into consideration the hospital 'guidelines' pertaining to the management of available dialysis machines to determine whether Section 27(2) was satisfied. It was held that the guideline followed by the hospital was a discharge of the State's obligation to deliver health care services 'within its available resources'. The 'margin of appreciation' was demonstrated through the use of the guideline which was consistent with available funding, nursing staff and viability of treatment per patient. There was no way the State could increase funding to address the needs of the appellant or any other person with a similar condition without affecting treatment to patients who could be cured and other obligations to which the State had.

It is important to observe that having a similar provision to that of South Africa allows the courts to consider 'guidelines' or other policy references on available resources in determining whether the human right to health care has been given due consideration in light of the 'margin of appreciation'. Or as put by Sir Thomas Bingham MR, '[t]he more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable.'[41] This balancing formula is indicated under Section 39(1) of the *Constitution* which states:

> The question, whether a law or act is reasonably justifiable in a democratic society having a proper regard for the rights and dignity of mankind, is to be determined in the light of the circumstances obtaining at the time when the decision on the question is made.

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36 Eng. C.A. Jan 6, 1988; See also Dieter, above n27 at 289.

37 See Peter Cane and Leighton McDonald, *Principles of Administrative Law, Legal Regulations of Governance* (Melbourne: Oxford University Press, 2008) 84.

38 See section 109 of the *Constitution*. See also Bhalla, R.S, *Administrative Law of Papua New Guinea* (Port Moresby: PNG Publishers, 2001) 37 and Kwa, E, Bhalla, S, Muroa, G, Linge, G, Tennent, D and Yapao, G (ed)., *The Development of Administrative Law in Papua New Guinea* (New Delhi: UBSPD, 2000).

39 *Soobramoney v Minister of Health CCT* 32/97 27 November 1997, available at http://www.law.wits.ac.za/judgements/soobram.html.

40 'Availability' means that the state party has sufficient facilities and services for the population given the country's state of development: General Comment 14, United Nations, Committee on Economic, Social and Cultural Rights, U.N.

41 See the discussion in Richard H.S.Tur, 'Resources and Rights: Court Decisions in the United Kingdom' in Rosamond Rhodes, Margaret P. Battin and Anita Silvers (eds.), *Medicine and Social Justice, Essays on the Distribution of Health Care* (Oxford: Oxford University Press, 2002) 157 at 166.

Hence, in determining whether the government's denial of health care is 'reasonably justifiable…', the courts can be assisted by the practices mentioned above. This is allowed under Section 39(3) of the *Constitution* where the courts can consider international human rights law and particularly, laws, practices, judicial decisions and opinions in other countries.

Enforceability

Including access to health care as a basic right under Division 3 will immediately bring it under the ambit of Section 57 of the *Constitution*. This provision provides that:

> 57. Enforcement of guaranteed rights and freedoms.
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> (1) A right or freedom referred to in this Division shall be protected by, and is enforceable in, the Supreme Court or the National Court or any other court prescribed for the purpose by an Act of the Parliament, either on its own initiative or on application by any person who has an interest in its protection and enforcement, or in the case of a person who is, in the opinion of the court, unable fully and freely to exercise his rights under this section by a person acting on his behalf, whether or not by his authority.
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> (2) For the purposes of this section-
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> (a) the Law Officers of Papua New Guinea; and
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> (b) any other persons prescribed for the purpose by an Act of Parliament; and
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> (c) any other persons with an interest (whether personal or not) in the maintenance of the principles commonly known as the Rule of Law such that, in the opinion of the court concerned, they ought to be allowed to appear and be heard on the matter in question,
>
> have an interest in the protection and enforcement of the rights and freedoms referred to in this Division, but this subsection does not limit the persons or classes of persons who have such an interest.

This constitutional provision allows for the courts to act *motu proprio* (on its own initiative)[42] in ensuring that the human right to health care is fulfilled. This provision provides an avenue under which this right can be protected not only at the volition of those affected but also by others who have an interest in the fulfillment of the right to health care toward society and fellow citizens who are disadvantaged. This addresses the situation where most people, who are affected, are unable to have recourse to legal proceedings given the procedures involved and the legal costs. Hence, when the court discovers that this right has been violated, it can award compensation under Section 58 of the *Constitution*.

As observed above, health care as a basic right can be enforced through the Law Officers of PNG who are, the Attorney-General, the Public Prosecutor and the Public Solicitor, through relator actions or special references.

Conclusion

The introduction of *access to health care* as a 'basic right' under the *Constitution* will act as a 'shield'[43] by which the citizen is protected against 'unjustified' acts or omissions by the government that affect health care service delivery. It will also stand to protect the individual as well as the health care system against corporate influence that is imminent given the latest health reforms indicating the 'age of the market state' in the health sector.

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42 See for example *University of Papua New Guinea v More & Ors* [1985] PNGLR 48.

43 Tur, n41, supra at 166.

However, a contentious issue is whether a constitutional provision will in fact make a difference in the prevalent health care situation. As Brunton observed:

> Papua New Guinea's social and political development is of such complexity that altering the substantive constitutional law is unlikely to be an effective remedy. Indeed, changing the text of constitutional laws can be seen as deflecting attention away from issues of effective management and implementation. Changes in content do not necessarily produce results. Freedom comes only with hard work. This does not mean that changes must cease; rather it is the quality of change that is important.[44]

It is acknowledged that incorporating access to health care as a basic right provides 'a level of protection, but not a guarantee of invincibility.'[45] However, unlike other constitutional changes, introducing access to health care as a basic right provides an entrenched obligation for government to exercise virtuous judgment in the 'face of obstacles'[46], which is *resource availability*. Given the 'level of protection' accorded to health care under the *Constitution*, the government will be obliged to account for its actions in cases where health care needs have not been met. This was demonstrated in the *Soobromoney case*. In the PNG context, arguably it will be socially acceptable if the government could not purchase dialysis machines if there is also a need to build classrooms in a village to educate children. However, 'resource availability' cannot perpetuate as a pretext under which deaths from lack of basic treatment for diseases such as malaria or lack of prenatal care and immunization continues to be recurring contributors to the mortality rates.

Thus, '[h]aving a right requires a higher level of justification from government and its agencies…'[47] which in turn will ensure that proper management decisions are made for the benefit of Papua New Guineans. If not, then that right can be *easily enforced* like other human rights incorporated under the *Constitution* where compensation can be awarded to the affected individual or group, or that authorities are compelled to undertake certain health care responsibilities.

If the provision of health care remains 'non-justiciable', the likelihood of complacency, mismanagement and corruption prevailing and circumventing efforts at improving health standards will remain. Therefore, it is strongly recommended that with deference to other legislative efforts to address this situation, the independence and supremacy of the *Constitution* makes it an ideal vehicle to entrench the citizen's right to access health care in contemporary PNG.

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44 Brunton, n18 supra at 305.
45 Tur, id, n41.
46 Faunce, above n3 at 215.
47 Tur, id, n43, supra. Where he further states that 'the more important or fundamental the right, the greater the need for justification…'