

A Human Rights analysis of the Challenges in Mental Health Services during COVID-19 in South Africa

By

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The exact wording of the title of the dissertation as appearing on the ethical clearance submitted: "A Human Rights Analysis of the Challenges in Mental Health Services during COVID-19 in South Africa."

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DEDICATION

This dissertation is dedicated to my children.

Refiloe-Mpho (daughter) and Tumelo Kgampe (son)

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In His infinite mercy, God lifted me and placed me on the shoulders of giants to reach what I could only dream of. He bestowed good health, strength, wisdom, and stability of purpose to carry on with this dream of furthering my studies. This project became a reality with the kind of support and endeared assistance of many individuals.

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ABSTRACT

In South Africa, COVID-19 prevention and mitigation efforts were unexpected and challenging, with the extended lockdown straining socio-economic activities. Marginalized groups and individuals are particularly vulnerable to unfavorable effects of the pandemic, such as human rights abuse. This study analyzes human rights within the challenges in mental health care during the COVID-19 pandemic and has primarily targeted limitations of individual freedoms to shield public mental health. The right to enjoy the appalling physical and mental health standards provides the state with a binding normative obligation for healthcare systems, broader social responses, and international solidarity. The International Covenant on Economic, Social, and Cultural Rights recognizes the right to health needs wherein governments take steps to prevent, treat and manage widespread pandemics, endemic activity, and other diseases and to ensure health services and attention in the event of sickness. The appropriate health needs are that health goods, services, and facilities are offered in adequate numbers; accessible on a financial, geographical, and non-discriminatory basis; acceptable, as well as culturally applicable and respectful of gender and medical ethics; and of excellent quality.

However, South Africa has imbalanced difficulties in ensuring the provision and accessibility of COVID-19-related health coverage, resulting in shortages in essential medical care, diagnostic tests, and personal protection instrumentation for health care and other front-line staff. In some provinces, self-discipline measures, structural adjustment programs, and user fees have rendered essential services inaccessible for a few vulnerable individuals.

This study emphasizes the need to uphold human rights and address the challenges in mental health services in South Africa during the pandemic. South Africa may embed a proactive psychosocial response to medical management and existing prevention strategies

LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and People's Rights
CEDAW	Committee on the Elimination of Discrimination against Women
CERD	The International Convention on the Elimination of all Forms of Racial Discrimination
CESCR	The International Covenant on Economic, Social, and Cultural Rights
COVID-19	Coronavirus Disease 2019
CRC	Committee on the Rights of the Child
GDoH	Gauteng Department of Health
General comment No 14:	Attainable Standard of Health (Art.12)
General Comment No.20:	Non-discrimination in economic, social, and cultural rights https://sdgs.un.org/2030agenda
ICCPR	United Nations International Covenant on Civil and Political Rights
ICESCR	International Covenant on Social and Economic Rights
LE	Life Esidimeni
MCHA	Mental health Care Act
MHCU	Mental Health Care User
NCD	Noncommunicable diseases
NGO	Non-Government Organisation
NHA	National Health Act
OHCHR	Office of the United Nations High Commissioner for Human Rights
SAHRC	South African Human Rights Commission
SAJHR	South African Journal on Human Rights
U.N.	United Nations Protocol
UDHR	Universal Declaration of Human Rights
UNESCO	United Nations Educational Scientific and Cultural Organization
WHO	World Health Organization

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CHAPTER ONE INTRODUCTION

1.1. Introduction and Background

In most countries, the coronavirus disease of 2019 (COVID-19) was unexpected and presented a challenge for preventative and mitigation measures, extending the lockdown and placing pressure on socioeconomic activities, including mental health services.¹ South Africa was not excluded from this pandemic. Global and national mental health services provide unique and qualified services to disadvantaged groups and individuals susceptible to human injury, which may lead to a mental health disorder. Research opines that people who use² mental health services are misunderstood, discriminated against, and socially excluded due to some level of commitment and lack of facilities in South Africa. The term "mental health" is commonly observed to have a negative connotation and has developed a stigma in society.³

Furthermore, explicit or implicit discrimination in health care creates a significant barrier and contributes to poor quality of care. As a result, an individual with a mental illness is particularly vulnerable to poor or no mental health care. According to Marks, Verdelli & Willis, and in light of this stipulation, it is clear that the vulnerable groups' human rights to receive quality psychosocial therapy, rehabilitation, and access to adequate care, are indirectly violated.⁴

According to recent studies, South Africa was not isolated from previous incidents such as the Life Esidimeni tragedy or violating individual human rights in delivering quality mental health services.⁵ These include the lack of psychosocial support, causing feelings of insecurity, acute panic, anxiety, depression, obsessive-compulsive behaviour, social

¹ Layachi 2020:1332

² Mental Health Care ACT 17 of 2002: Section 1, means a person receiving care, treatment and rehabilitation services or using health services at a health establishment aimed at enhancing the mental health status of a user.

³ Rossler 2016:1250

⁴ Marks, Verdelli & Willis 2019:2

⁵ Makgoba 2017

disorders, stigma, fear, increased incidents of gender-based violence, and discrimination in the distribution of food aid.

Since the proclamation and implementation of the National Disaster Management Act due to COVID-19 in 2020, the lack of substantial protection resources has influenced the South African health system, showing an increase in mental health problems, including throttle abuse and reading noncommunicable diseases (NCD).⁶ Some individuals could not access treatment due to lockdown restrictions imposed by the government. In a press release, Dr. Tedros Adhanom Ghebreyesus, the Director-General of the World Health Organization (WHO), mentioned that, regardless of how countries manage COVID-19, it is vital to search for innovative ways to ensure that essential services for NCDs are provided.⁷

Despite the fact that the impact of COVID-19 has raised awareness and attention to the socio-economic status of South Africa, several challenges remain within mental health services that violate citizens' human rights. There is insufficient research concerning the challenges in mental health services that have emerged during COVID-19. Therefore, it is vital to discuss how challenges in mental health care impact human rights. The purpose of this study is to provide a broad overview of the significant challenges facing the South African mental health care system, to provide a greater understanding of the challenges identified during the COVID-19, and to highlight a human right understanding of what stakeholders perceive to be the best means of addressing the challenges.

Keywords to the study: Human Rights, COVID-19, Mental Health Services Policy and Framework, Challenges in Mental Health Services

⁶ Mbunge 2020:1809

⁷ WHO 2020: <https://www.who.int/news/item/01-06-2020-covid-19-significantly-impacts-health-services-for-noncommunicable-diseases>

1.2. The rationale of the research study

The researcher's motivation for the study stemmed from observing a decline in quality health care and personal interest in human rights. Maphumulo and Bengu demonstrate how the decline in quality healthcare delivery violates the human rights of people with mental health problems in South Africa.⁸ In addition, studies by Maphumulo et al. found that the quality of health care in South Africa has suffered, adversely affecting the quality of health care through various challenging situations combined with simple patient care requirements.⁹ Improving healthcare quality means fewer delivery delays of supply, accelerated performance, improved market shares, and lower prices related to access to services.

International human rights instruments are significant in mental health because it is the only method of implementation within the law that legitimizes international scrutiny of mental health policies and practices within a sovereign country. It provides fundamental protection that ordinary political processes cannot remove. Human rights and mental health are inextricably linked as complementary approaches to human improvement.¹⁰ A measure of mental health is required within human rights because only those with a reasonable level of functioning can participate in political and social life.

According to Gostin and Gable, human rights are an essential component of mental health as it protects the individual from harm or restraint and the freedom to form and express beliefs necessary for mental well-being.¹¹ As a result, international and regional systems have addressed the human rights of people suffering from mental illnesses through treaties, declarations, and thematic resolutions.

The researcher aims to add to this study's knowledge by focusing on human rights violations in mental health services during COVID-19 in South Africa. The researcher believes that the findings from this study will highlight the influence and risks associated

⁸ Maphumulo & Bhengu 2019:1

⁹ National Department of Health 2012:4

¹⁰ Ventura 2014:1

¹¹ Gostin and Gable 2004:121

with human rights and the effects that challenged mental health service delivery during COVID-19 in South Africa. Furthermore, the findings from the study will provide recommendations to improve mental health services and human rights methods used to deal with a pandemic.

1.3. Problem Statement

The right to health care is a fundamental human right that every country's constitution should protect. According to section 27 of the 1996 "Constitution of the Republic of South Africa" (hereinafter the Constitution) states that all citizens have the right to health care services, including reproductive health care services, and that no one may be denied emergency medical treatment.¹² According to Peruhoff, Alexandrov, and Hogerzeil, limited social insurance in the event of illness, insufficient funding for vital medications, frequent stock-outs in the public sector, and high prices in the private sector are persistent impediments to universal access to healthcare.¹³ The above issues are significant problems within healthcare systems worldwide, including South Africa.

Vergunst research indicates that South Africa has a significant disparity in mental healthcare, with those living in rural areas having less access to healthcare than those living in urban areas.¹⁴ Based on data researched by Vergunst, he reports that the density of psychiatrists in or around the largest city is 3.6 times greater than the national density of psychiatrists.¹⁵ Furthermore, he determined that rural areas in South Africa often do not have psychiatrists or psychologists and rely mainly on general practitioners, occupational therapists, and nurses for mental health interventions. Should someone need a psychologist or psychiatrist, they are often referred to the nearest town, which sometimes involves transport problems.¹⁶ In the province of Free State, only one

¹² Constitution of the Republic of South Africa, 1996 Chapter 2, Section 27 (1): Bill of Rights

¹³ Peruhoff et al 2019:2

¹⁴ Vergunst 2017:2

¹⁵ *Ibid*

¹⁶ *Ibid*

Psychiatric hospital serves five districts with 20 municipalities.¹⁷ In cognizance of the latter provincial psychiatric hospital, there are only 877 hospitalized beds for individuals requiring mental service in this province. The question then arises about how the state provides adequate mental health care services for South Africa's neglect of mental health services.¹⁸ Mental health service users¹⁹ reportedly died as a result of negligent relocation and treatment of mental health service users from a government facility to an unregistered nongovernmental hospital.²⁰

Similarly, according to the World Health Organization, disadvantage and marginalization exclude specific populations from enjoying good health.²¹ South African government agencies, such as UNAIDS, responded to the public health emergency to counterbalance public health protections against the Coronavirus by providing social protection packages and transport to obtain medical care to vulnerable individuals in communities as lockdown measures restricted them, including the freedom of movement and to access health care services. During this process of preventing the spread of the infectious disease, Coronavirus, there were possibilities of decreased fatalities and increased violation of individual rights. Various authors, such as Pillay, Barnes, and Naidu, have reported that the impact of COVID-19 has caused an impact on mental health issues.²² As the world imposed restrictions by keeping most of the general population indoors, several psychiatric symptoms and illnesses have occurred as a result of continued isolation and a significant lack of social interaction with others. Humans, as they are inherently social

¹⁷ Health Department of South Africa Free State: http://www.health.fs.gov.za/?page_id=1391 accessed pdf on Free State Psychiatric Complex: <http://www.health.fs.gov.za/files/health-facilities/mangaung/FS%20Psychiatric%20Complex%20Brochure.pdf>

¹⁸ Dhai 2017

Makgoba 2017

Pillay 2019

SAHRC 2019: Annual Report

¹⁹ “means a person receiving care, treatment and rehabilitation services or using a health service at a health establishment aimed at enhancing the mental health status of a user, State patient and mentally ill prisoner and where the person concerned is below the age of 18 years or is incapable of taking decisions, and in certain circumstances.”

²⁰ Makgoba 2017

²¹ WHO 2017 <https://www.who.int/news-room/fact-sheets/detail/human-rights-and-health> “A focus on disadvantage also reveals evidence of those who are exposed to greater rates of ill-health and face significant obstacles to accessing quality and affordable healthcare, including indigenous populations.”

²² Pillay & Barnes 2020; Naidu 2020

species, require interaction and cooperation from others to thrive and survive in their environment effectively.²³ An individual's social life comprises the various relationships formed with others, including family, friends, and work colleagues. COVID-19 has severely impacted the extent of individual social interaction and severely limited physical interaction among individuals. This lack of socialization and reduced interaction with the external environment has a severe impact on the mental health of people around the world. The COVID-19 pandemic is an additional stressor that individuals are exposed to as part of their daily lives. According to Lahav, the stress caused by COVID-19 can ultimately lead to mental disorders.²⁴ People previously exposed to traumatic events or who have experienced long-term traumatic stress are particularly vulnerable to the potential development of mental illness related to the COVID-19 pandemic.²⁵

Long-term isolation from others and pre-existing support structures are aggressors for possible mental disorders (WHO, 2020). Furthermore, Lahav found that factors such as income levels, social relationships, and living alone during the pandemic are among the stress-related psychiatric symptoms caused by the COVID-19 pandemic.²⁶ Stress-related symptoms caused by the COVID-19 pandemic are highly individual and can vary from person to person. A study by Rohde, Jeffsen, Norremark, Danielsen & Ostergaard reviewed clinical records made by health professionals when treating or hospitalized individuals for mental disorders.²⁷

Peled-Raz notes that human rights are fundamental rights that cannot be disputed.²⁸ A person has these rights solely because they are human. The Office of the United Nations High Commissioner for Human Rights (2008) states that "*the right to health is inextricably linked to many other human rights including the right to food, water, housing, work, education, life, non-discrimination, privacy, access to information, the prohibition of torture*

²³ Nature Human Behavior, 2020

²⁴ Lahav 2020

²⁵ *Ibid*

²⁶ *Ibid*

²⁷ Rohde, Jeffsen, Norremark, Danielsen & Ostergaard 2020

²⁸ Peled-Raz 2017:

and the right to life."²⁹ According to the World Health Organization (2021), universal health care means everyone, including individuals and communities, has the right to access the health care they require without financial hardship.³⁰ It includes all critical and high-quality healthcare services for people of all ages, from prevention to treatment, rehabilitation, and palliative care. Therefore, according to Article 5, in compliance with the fundamental obligations laid in article 2 of the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD), everyone should be treated equally, receiving the right to public health, medical care, social security, and social services, regardless of their financial, national or ethnic origin.³¹

An inadequate number of mental health hospitals and other mental healthcare facilities should provide services equally accessible to all. Koelbe and Siddler support research by Maphumulo and Bhengu, who believe that the South African healthcare system is ruined and thus needs a severe restoration intervention.³² Therefore it notifies that there has been a struggle in South Africa to address the human rights issues in mental health care. According to Harris and others, necessary services must be provided to the entire population without causing unnecessary burdens on individuals or families to achieve fair universal health coverage.³³ Every citizen is entitled to health. The right to health addresses individuals' rights to mental health and health care levels and the state's obligations to provide a certain level of public health care in the community.

Govender, a psychologist associated with Doctors Without Borders, found that, during Covid 19, various patients were sent home from public hospitals due to a lack of resources;³⁴ Research focussed on the latter confirmed that there was a decreasing number of mental health visits during the lockdown period in one of the facilities in

²⁹ Office of the United Nations High Commissioner for Human Rights 2008

³⁰ World Health Organization 2021

³¹ <https://www.ohchr.org/en/special-procedures/sr-health/international-standards-right-physical-and-mental-health>

³² Koelbe & Siddler 2014:1118

³³ Harris et al. 2011

³⁴ Govender et al 2020

Tshwane.³⁵ South Africa's poor mental health care has far-reaching consequences for people with identified mental illnesses. A mental health facility named “Life Esidimeni” in the province of Gauteng is an example of such a poor mental health services facility, which resulted in being closed.³⁶ The mental health care patients had to be transferred to alternative facilities managed by nongovernmental organizations (NGOs').³⁷ According to the Makgoba report, the other facilities to accommodate these patients were not ready or well prepared to receive these patients.³⁸ It is further mentioned that these institutions were not licensed and did not have the basic competencies and leadership experience to manage mental health patients.³⁹ The execution that transpired during the process showed a total disrespect for patients' rights and their families and violated their human rights.

In addition to poor mental health services, high numbers of mental health cases have plagued South Africa during the lockdown, where one in three individuals developed a psychiatric disorder.⁴⁰ The researcher furthermore states that an increase in mental health patients was perceived with low availability of mental health services amidst COVID-19, emphasizing the need for immediate and accessible psychological resources in South Africa.⁴¹ The latter implies that mental health relies on many support systems and resources that facilitate individual engagement at the highest level of gainful employment and other community roles.⁴² It is thus significant that there is a connection between mental health and human rights.

This study will address the gap in South Africa that explores a human rights analysis of challenges in mental health services during COVID-19. The various facets to be explored in the study include the National Mental Health Policy Framework (Legislation) and the

³⁵ *Ibid*

³⁶ Durojaye & Agaba 2018:1

³⁷ *Ibid*

³⁸ Makgoba 2017

³⁹ Ombuds report: <https://ohsc.org.za/final-report-into-the-circumstances-surrounding-the-deaths-of-mentally-ill-patients-gauteng-province/>

⁴⁰ Kim, Nyegarai & Mendenhall 2020:1

⁴¹ *Ibid*

⁴² Mann, Bradley & Sahakian 2016:264

impact of Human rights in South Africa. The challenges prevalent in mental health care delivery will be identified, and human rights violations will be discussed. The current practice methods will be highlighted for recommendations toward implementing the Legislation.

1.4. Aim and Objectives

This study analyzes human rights challenges within mental health services during COVID-19 in South Africa. Based on the aim, the researcher hopes that the findings will contribute to the decision-makers and human rights advocates' finding ways to cope with the various effects of COVID-19. The following objectives are identified in order to achieve the research aim:

- To explain and discuss the conceptual, theoretical, and contextual underpinnings of mental health and human rights.
- To investigate whether the South African government respected national laws, international laws, and human rights instruments on the issue of mental health during the COVID-19 pandemic.
- To find out the role of human rights instruments in response to mental health issues in South Africa.
- To identify the variables influencing human rights violations regarding mental services during COVID-19 in South Africa.
- To identify the international actions and best practices used in other countries to promote mental health and protect mental health patients during the COVID-19 pandemic.
- To provide possible and feasible recommendations.

1.5. Research Questions

- What is the conceptual, theoretical, and contextual underpinnings of mental health and human rights? (Literature review)
- What legislative guidelines determine human rights violations in mental health and services?

- Has the South African government complied with its obligations under international and national laws on the issue of mental health during the COVID-19 pandemic? (Variables influencing and critical challenges)
- What are the possible and feasible recommendations that can be made to improve mental health service responses and promote the rights of individuals?

1.6. Methodology

This research is based on secondary data from written documents and records available in public libraries and websites. The methodology followed in this research is a socio-legal study, an interdisciplinary approach to analyzing the law, legal phenomenon, and relationships between these and broader society. The social law approach is directly related to analyzing the social situation to which the law applies if the law is seen in the context of the situation's creation, maintenance, and/or modification.⁴³

There are two types of data within research: primary and secondary data. However, the difference between the two types of data is that secondary data is already published in books, newspapers, magazines, journals, online portals, and many more.⁴⁴ Peersman agrees that secondary data is retrieved from various sources, such as formal policy documents, implementation plans and reports, official statistics, program monitoring data, and program records.⁴⁵ On the other hand, Peersman describes primary data as information collected through interviews with critical informants, individuals, groups, focus group discussions, projective techniques, and questionnaires or surveys via email, web, and face-to-face mobile data.⁴⁶ This research study will use secondary data from various sources such as Books, Journals, Websites, Government documents, Case laws, and international human rights instruments.

1.7. Significance of the study

Media news reports that many celebrities have been found deceased in hotel rooms or their homes, and little to no explanation is provided as to what motivated them to commit

⁴³ <https://onlinelibrary.wiley.com/doi/pdf/10.1111/j.1468-2230.1976.tb01458.x>

⁴⁴ Dudovskiy 2018

⁴⁵ Peersman 2014:3

⁴⁶ Peersman 2014:3

suicide during the Covid 19 pandemic.⁴⁷ If an in-depth investigation could be made, the latter would be evident that mental health is an issue that affects all individuals from different life perspectives. Section 10 of the Mental Health Care Act in South Africa states that a mental health care user may not be unfairly discriminated against because of his or her mental health status. Furthermore, the Mental Health Care Act 17 of 2002 mentions that all mental health service users must receive the same level of care, treatment, and rehabilitation within limited resources.⁴⁸ Therefore, this study is significant in bringing the aspects of human rights violations to the fore when dealing with mental health care during the COVID-19 pandemic in South Africa.

1.8. Limitations of the study

As this study is a desktop review, the significant limitations include the lack of available data and locating specific data regarding the challenges in mental health services concerning the violation of human rights during COVID-19 in South Africa. Another disadvantage of desktop research is that finding reliable data for the research topic is complex. The published data may not always be reliable or precisely what is required to conduct the research. Before using published data, the researcher must conduct thorough research. Reliance on public data is undesirable and dangerous as it affects humans. The conclusions drawn from such data may be untrustworthy. In order to avoid such problems, the researcher will use data triangulation.

1.9. Definition of Key Concepts

The following concepts will be defined to explain the validity of this research study: COVID-19, Mental Health, and Mental Health Services. It is important to define these terms as they will be used more often throughout the study.

⁴⁷ Ntlebi 2022, <https://opera.news/za/en/entertainment/e700780d2594b3966fb3bdffeb646974>

⁴⁸ Mental Health Care Act 17 of 2002, Chapter 2 Section 3(i) & 6(i)

- Covid-19

The World Health Organisation (2021) reports that Coronavirus disease, known as COVID-19, is an infectious disease caused by the SARS-CoV-2 virus.⁴⁹ Most people infected with the virus will experience mild to moderate. Coronaviruses are common viruses that cause nose, sinuses, and upper throat infections. The majority of coronaviruses are not dangerous.

- Mental health

Human beings' emotional, psychological, and social well-being contribute to their mental health. It impacts how an individual thinks, feels, and acts. It also influences how people deal with stress, interacts with others, and make decisions. Mental health is essential at all stages of life, from childhood and adolescence to adulthood.⁵⁰

The literature review relevant to the study will be discussed based on the research aims and objectives.

- Mental Health Services (MHS)

Greene defines "mental health services as services which include the formal system of care, both specialty mental health care, and medical care; the lay system, such as friends, family and self-help groups; the folk system of religious leaders and alternative medicine; and the human-social system of the clergy and police."⁵¹ In addition, Samartzis and Talias also state that mental health services are responsible for preventing and treating mental illnesses and maintaining, improving, and restoring a particular population in terms of mental health.⁵² For the present study context, mental health services are primary services providing direct and indirect care to mental health care users within multidisciplinary engagements.

1.10. Chapters Outline

The research report's main findings will be divided into five chapters that elaborate on the study's scope, aim, and objectives. The chapter outlay for the study is as follows:

⁴⁹ World Health Organisation 2021

⁵⁰U.S. Department of Health & Human Services, 2020

⁵¹ Greene 2019:2

⁵² Samartzis and Talias 2020:1

- Chapter 1: Research setting

The chapter is based on the general introduction and methodology. This includes identifying the background and rationale for the research's problem statement and the different objectives and questions elucidated. The chapter argues that qualitative research methodology is followed by implementing a desktop type of research. The chapter also defines the possible keywords used frequently in the research study.

Further discussion of the historical context will be discussed in the following chapters.

- Chapter 2: Literature review

The chapter's primary focus is to discuss the arguments and results obtained from research conducted in the past by other authors. Furthermore, in this chapter, the key focus areas of the study are human rights, mental health services, and COVID-19. It will also include contextualizing challenges in mental health services internationally and locally. Aspects in the discussion include the historical origin of human rights, its instruments, and challenges in mental health services experienced during COVID-19. The legislative guidelines to determine the human rights violation in mental health care services during COVID-19

Chapter 3: Data collection- Legislative guidelines determining human rights violations in mental health and services. This chapter outline the legislative guidelines determining human rights violations in mental health and services. The role of human rights instruments will highlight how the violation of human rights occurred and the prevalent challenges of mental health service delivery during COVID-19 in South Africa.

- Chapter 4: Analysis

The chapter will discuss if the South African government complied with its obligations under international and national laws on the issue of mental health during the COVID-19 pandemic. The focus is on the different responses from global perspectives on the issue of human rights and the challenges of mental health services during the Covid-19 pandemic.

- Chapter 5: Conclusion and Recommendations

The chapter provides synthesis, conclusion, and recommendations. This chapter will list critical points discussed throughout the research study and conclude with the main

findings. The chapter provides a list of recommendations and areas for possible future studies and research.

1.11 Ethical consideration

Ethical considerations in research are principles that guide research designs and practices. These principles include voluntary participation, informed consent, anonymity, confidentiality, potential harm, and communication results. In other words, research is guided by certain principles and rules. Academic ethics for informed confidentiality, integrity, and honesty were among the study's key priorities. This included adhering to the University of Free State's strict non-plagiarism policies. This study uses secondary data; therefore, informed consent is not needed. The researcher will not falsify data or plagiarise any collected information. The University provided institutional clearance. The researcher places a high value on ethical principles, and the above standards were strictly followed throughout the study. Finally, it is important to note that this study contains no sensitive information in the form of secondary data-collection methods.

1.12. Conclusion

Chapter One provides a detailed introduction to the research topic, rationale, and the methodological foundation executed in the study's compilation. The introduction and rationale for the study emphasized the relevance and importance of investigating human rights analysis of challenges in mental health care services during COVID-19 in South Africa.

CHAPTER TWO

THE CONCEPTUAL AND THEORETICAL UNDERPINNING OF HUMAN RIGHTS AND MENTAL HEALTH

2.1. Introduction

Chapter two focuses mainly on providing arguments and explanations by authors who have written about and researched the topic. The chapter begins with the concepts of human rights, mental health services, and COVID-19. This section will focus on human rights, the different human rights instruments, mental health, mental health services, COVID-19, and the core human rights principles in mental health. In addition, the chapter analyzes the critical challenges of mental health services during COVID-19. Furthermore, the chapter will provide a perspective on human rights violations in mental health services during COVID-19, health and mental health services legislation, and human rights mechanisms/policies/laws supporting mental health services, which will be critically analyzed and discussed.

2.2. Concepts of human rights, mental health services, and COVID-19

The contents below will critically analyze the different concepts identified.

2.2.1 Human Rights

Human rights are the legal yardstick issued to measure a government's treatment of its people. Its historical origin was derived from an argument focused on a search for moral standards of political organizations and behaviour that is independent of the contemporary society

Kaur points out that the term "Human Rights" was coined in the twentieth century, replacing previous expressions such as "Natural Rights" or "Men's Rights."⁵³ It is further known that Greek philosophers developed the concept of 'natural law or natural right.' They claimed that man possesses "insight," which reveals the goodness and badness of

⁵³ Kaur 2014:997

things and teaches him absolute and eternal values.⁵⁴ Greek citizens had rights such as “isonomy,” meaning equality before the law, “isotonic,” equal respect for all; and “isogori,” equal freedom of speech.⁵⁵

According to UNICEF (2015), human rights are principles that recognize and protect the dignity of all people.⁵⁶ Human rights govern how individuals live in society, interact with the state, and their obligations. Human rights law requires governments to carry out certain obligations while prohibiting them from carrying others. Individuals are also accountable. When exercising their human rights, they must respect the rights of others. No government, group, or individual has the authority to violate the rights of others.⁵⁷

The South African Parliament (2021) states that in 1948, the United Nations issued the Universal Declaration of Human Rights, which outlined 30 human rights articles. Kaur states that the twentieth century endured two world wars, in 1914 and 1939, which led to the United Nations General Assembly adopting the universal declarations.⁵⁸ It established universal human rights based on humanity, liberty, justice, and peace. These universal declarations define the rights of all human beings. In addition, it places responsibilities on the shoulders of governments to promote and defend these rights. For example, the Bill of Rights, Chapter 2 of the Constitution of the Republic of South Africa, 1996, has included indivisible human rights.⁵⁹ The South African Constitution's articles can only be changed by a two-thirds majority in Parliament, making it difficult for anyone, including the government, to take away a citizen's fundamental rights.

Human rights, according to Weston, are rights that an individual or group of individuals have simply by virtue of being human, due to inherent human vulnerability, or because they are required for the possibility of a just society.⁶⁰ Regardless of the theoretical

⁵⁴ Kaur, 2014:997

⁵⁵ Kaur, 2014:997

⁵⁶ UNICEF 2015: <https://www.unicef.org/child-rights-convention/what-are-human-rights>

⁵⁷ UNICEF 2015: <https://www.unicef.org/child-rights-convention/what-are-human-rights>

⁵⁸ Kaur 2014:998

⁵⁹ The Bill of Rights, Chapter 2 of the Republic of South Africa Constitution, 1996

⁶⁰ Weston 2021:<https://www.britannica.com/topic/human-rights>

justification, human rights refer to a broad spectrum of values or capabilities thought to enhance human agency or protect human interests and are declared universal, in some sense equally claimed for all human beings, past, present, and future.⁶¹ It is well understood that humans worldwide require various values or capabilities to ensure their individual and collective well-being. Regardless of whether it is conceived as a moral or legal requirement, this requirement frequently results in painful frustrations brought on by social and natural forces, resulting in exploitation, oppression, persecution, and other forms of deprivation. These two observations are deeply rooted in the origins of what is now known as "human rights" and the accompanying national and international legal processes.⁶²

Furthermore, Donnelly defines human rights as "the rights of man, which means "the rights that one has because one is human."⁶³ Nweke adds that the term "human" refers to everyone, regardless of age, ethnicity, nationality, ideology, orientation, sex, or creed.⁶⁴ Rights are freedoms that everyone is entitled to regardless of age, ethnicity, nationality, ideology, orientation, sex, or creed. Character and application of rights are usually legally enforceable. Human rights are thus privileges and opportunities that a person is entitled to simply by virtue of being a human being. Dhupdale classifies human rights into two categories such as rights to basic human needs (medical care) and adequate development of human personality (right to free movement)⁶⁵

2.2.2 Mental health

According to the World Health Organization (WHO), cited by Galderisi, Heinz, Kastrup, Beezhold, Sartorius, and Toward, mental health is "*a condition of wellbeing in which an individual recognizes his or her own potential, can manage with typical life stresses, can work successfully and fruitfully, and can contribute to his or her community.*"⁶⁶ It should

⁶¹ Kaur 2014:998

⁶² Wetson 2021: <https://www.britannica.com/topic/human-rights>

⁶³ Donnelly 2013

⁶⁴ Nweke 2020 :2 https://www.researchgate.net/publication/342946672_UNDERSTANDING_HUMAN_RIGHTS

⁶⁵ Dhupdale 2017 : https://www.researchgate.net/publication/319451017_Introduction_to_Human_Rights

⁶⁶ Galderisi, Heinz, Kastrup, Beezhold & Sartorius 2015, available at :
<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4471980/>

be noted that different definitions have been attributed to mental health. Leighton and Dogra argue that the World Health Organization (WHO) broadly uses the term 'mental disorders' to include mental illness, intellectual disability, personality disorder, substance dependence, and adjustment to adverse life events.⁶⁷ Nevertheless, the word "disorder" is used to avoid the stigma associated with the illness, such as significant distress, impairment in functioning, or risk of self-harm. A fact sheet published by WHO in June 2022 mentioned an increase in people living with anxiety and depressive disorders (mental illness) because of the COVID-19 pandemic.⁶⁸ The latter is because most individuals with mental disorders do not have access to adequate care and experience stigma, discrimination, and human rights violations.⁶⁹

For this mentioned reason, Galderisi et al. argue that being aware that differences across countries in values, cultures, and social backgrounds may hinder the achievement of a consensus on the concept of mental health.⁷⁰ In other words, different organizations and regions define mental illness differently. The idea that mental health is more than just the absence of mental illness was universally accepted, but the equivalence of mental health and wellbeing/functioning was not, and a definition that allowed for a range of emotional states and "imperfect functioning" was drafted.⁷¹ Manwell et al. concur that there is little agreement concerning a general definition of 'mental health'. There is a widespread use of the term 'mental health' as a euphemism for 'mental illness'.⁷²

Bremberg and Dalman, in Granlund et al., demonstrate the overlap between mental illness and mental health constructs using the figure below.⁷³ This study adopts the following figure to point out the concept of mental health.

⁶⁷ Leighton and Dogra 2009:9

⁶⁸ <https://www.who.int/news-room/fact-sheets/detail/mental-disorders>: 8 June 2022

⁶⁹ *Ibid*

⁷⁰ Galderisi et al. 2015: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4471980/>

⁷¹ *Ibid*

⁷² Manwell et al. 2015 : <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4471980/>

⁷³ Granlund et al. 2021:5 Mental illness and Mental Health Problems

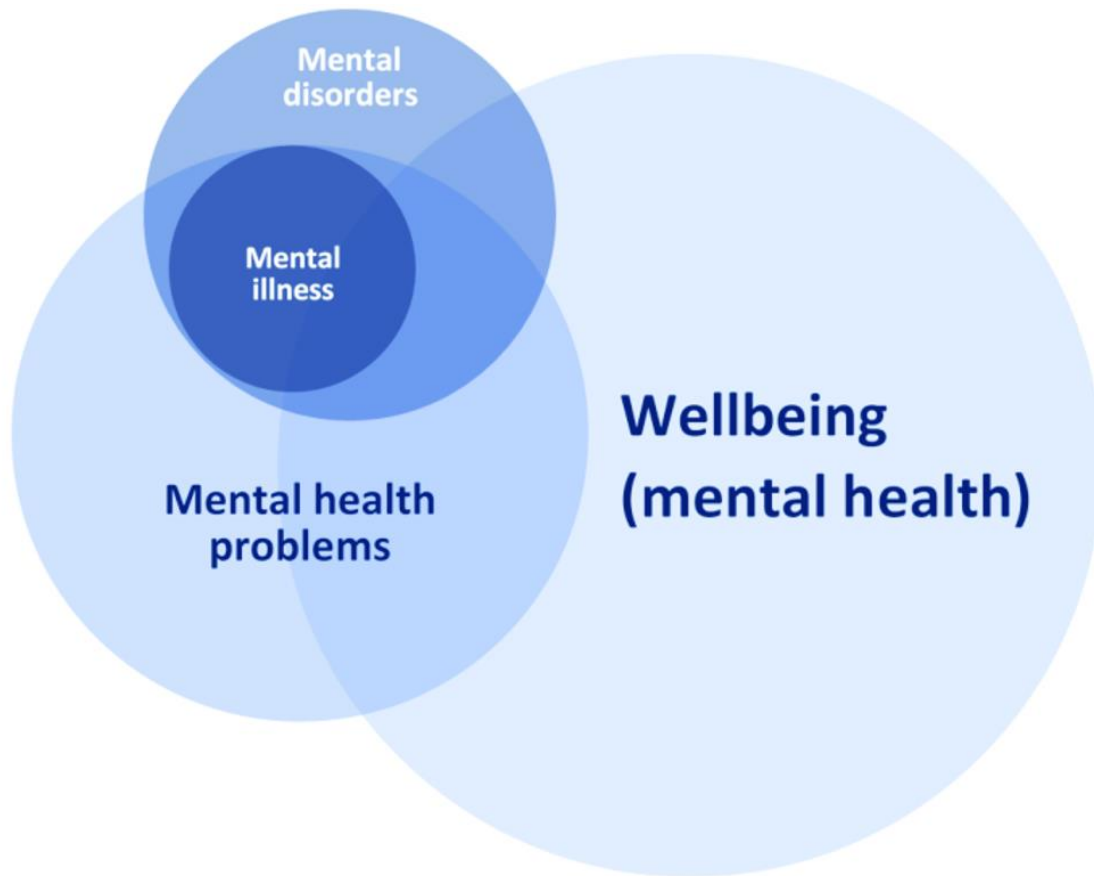


Figure 1: The relations between different concepts used when discussing mental health (Bremberg and Dalman,2015)

As shown in Figure 1, mental health problems frequently overlap with well-being. Mental health problems are a normal part of people's lives, but so is well-being.⁷⁴ However, Copeland, Adair, Smetanin, Stiff, Briante, Colman, Fergusson, Horwood, Poulton, and Costello point out that mental health problems and mental illness partially overlap. As a child, having persistent mental health problems increases the likelihood of being diagnosed with a mental illness as an adult.⁷⁵ In addition, figure 1 demonstrates that mental illness is completely subsumed within mental health problems, whereas some

⁷⁴ Granlund, Imms, et al 2021:5

⁷⁵ Copeland, Adair, Smetanin, Stiff, Briante, Colman, Fergusson, Horwood, Poulton, and Costello 2015:792

mental disorders do not automatically overlap with mental illness or mental health problems.⁷⁶

In addition, Granlund, Imms, et al. explain that mental health problems differ throughout life, with certain stages, such as adolescence, characterized by both biological change and changes in life role expectations that increase the likelihood of mental health problems.⁷⁷ Everyone goes through periods in their lives when they have more or less mental health issues.

Figure 2 is an illustration obtained from Halfon et al., showing that mental health problems can change over time: From no problems to severe mental health problems.⁷⁸ Neither complete well-being nor severe mental health problems or mental illness may occur frequently.⁷⁹

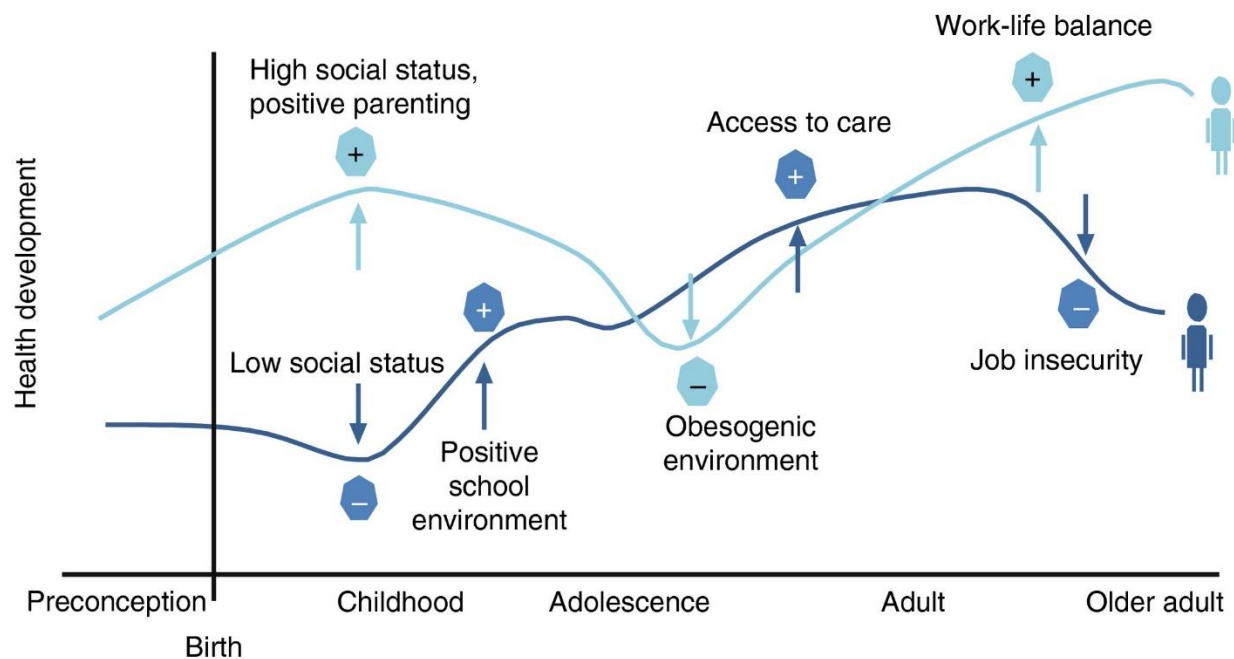


Figure 2: Wellbeing in a life span perspective (Halfon et al., 2014)

⁷⁶ Granlund, Imms, et al., 2021 :5

⁷⁷ Granlund, Imms, et al., 2021 :5

⁷⁸ Halfon, Larson, Lu, Tullis & Russ 2014 :352

⁷⁹ Granlund, Imms, et al., 2021:5

2.3 Mental health services in South Africa

Docrat, Besada, Cleary, Daviaud, and Lund point out that low- and middle-income countries (LMICs), such as South Africa, consider the mental health system scale-up as part of a broader universal health coverage-related health system where transformation requires detailed and locally derived estimates on existing mental health system resources and constraints.⁸⁰ On the other hand, Mlaba states that South Africans' mental health has deteriorated over the past year (2020) as a result of COVID-19. It appears to worsen as the country continues to suffer the socioeconomic consequences of the pandemic.⁸¹ According to Human Sciences Research Council's Dr. Priscilla Reddy, South Africans are increasingly diagnosed with depression, and the pandemic has played a large part in that.⁸²

On April 12 and 13, 2012, the National Mental Health Summit was convened by the Department of Health, Republic of South Africa. Lund, Petersen, Kleintjes, and Bhana called this summit “*a historic occasion for mental health in South Africa.*”⁸³ The summit provided an important platform for the department to engage stakeholders in mental health, evaluate progress toward transforming this work area, and identify critical challenges to be prioritized in reorganizing and transforming the healthcare system.⁸⁴

The objectives of the summit were to:

- Engage mental health stakeholders and mental healthcare users.
- Take stock of the progress made in transforming the mental health system.
- Identify key challenges.
- Identify and prioritize key interventions that must be undertaken as part of the activities being undertaken to reorganize and overhaul the health system.
- Determine a framework for mental health services in the Western Cape Province.

⁸⁰ Docrat, Besada, Cleary, Daviaud, and Lund 2019:706

⁸¹ Mlaba 2021

⁸² Moodley, 2021: <https://www.sabcnews.com/depression-anxiety-increased-among-south-africans/>

⁸³ Lund, Petersen, Kleintjes, and Bhana 2012:402

⁸⁴ <https://www.gov.za/summit-helps-transform-mental-health-south-africa>

National Mental Health Policy Framework and Strategic Plan 2013 – 2020: <https://pmhp.za.org/wp-content/uploads/2015/05/National-Mental-Health-Policy-Framework-and-Strategic-Plan-2013-2020.pdf>

Lund points out that this summit was convened by the former Minister of Health, Dr. Aaron Motsoaledi.⁸⁵ The event witnessed the attendance of over 400 mental health stakeholders from across the country. The summit marked the end of a lengthy consultation and research process that included over 4,000 stakeholders in provincial summits and a national mental health situational analysis.

The "Ekurhuleni Declaration," issued that day, signaled a new government commitment aimed at the neglected mental health field, leading to the July 2013 adoption of a new National Mental Health Policy Framework and Strategic Plan (2013-2020). The World Health Organisation (2017) reports that there are 3,460 outpatient mental health facilities, 80-day treatment facilities (about half of which are provided by the S.A. Federation for Mental Health), 41 psychiatric inpatient units located in general hospitals with a total of 2.8 beds per 100,000 population; and 63 community residential facilities.⁸⁶ According to the South African Government media newsletter (2022), a person with a mental illness may be admitted to a public mental health facility.⁸⁷ There are numerous mental health issues, each with its unique symptoms. Some are more severe than others in terms of their impact on the individual, family, and community.

According to the Mental Health Information Centre of Southern Africa, mental illnesses exist and have a substantial negative social and economic impact on South African Society.⁸⁸ These highly treatable conditions have received significant research attention since the 1990s, dubbed "*The Brain Decade*." Developing selective, effective, and safe medication for major psychiatric disorders is one of the most significant advances in diagnosis and treatment. Conversely, Robertson argues that South Africa ranked 103 out of 149 countries on the happiness index in 2020, a measure of population well-being based on six factors: GDP per capita, social support, healthy life expectancy, personal

⁸⁵ Lund 2017: Online publication 1 Mar 2017, <https://hdl.handle.net/10520/EJC-6a9d1fb08>

⁸⁶ WHO-AIMS (World Health Organisation) -2017:

https://www.who.int/mental_health/evidence/south_africa_who_aims_report.pdf

⁸⁷ <https://www.gov.za/services/health/admission-mental-health-institution>

⁸⁸ Mental Health Information Centre of Southern Africa 2022

freedom, goodwill of others, and trust in government.⁸⁹ While demographic and other inequities are not considered, people with psychosocial disabilities will likely face the worst. Unemployment, social exclusion, poor physical health, shortened life expectancy, loss of autonomy and liberty, being a victim of violence, and government neglect negatively impact wellbeing.⁹⁰

An account is given of Jostina Sangweni, accused of witchcraft and brutally murdered in 2021, while identified as having *schizophrenia*. The latter incident alerted Society that South Africa's mental health awareness fails to protect people with psychosocial disabilities (psychosocial disability refers to people with mental and intellectual disabilities). The following researchers, Petersen, Fairall, Bhana, Kathree, Selohilwe, Brooke, Sumner, Faris, Breuer, Sibanyoni, Lund, and Patel, state that in South Africa, the rising prevalence of chronic illness and its high comorbidity with mental disorders, highlight the need for district-level integration of mental health into chronic care.⁹¹

2.4 COVID-19 and Mental Health

According to the World Health Organisation fact sheet of 2021, Coronavirus is an infectious disease caused by the SARS-CoV-2 virus, and a person can get sick with COVID-19 and become seriously ill or die at any age.⁹² COVID-19 virus forms part of the Coronaviridae family in which the human coronaviruses can cause mild diseases similar to a common cold, while others cause more severe diseases such as MERS - Middle East Respiratory Syndrome and SARS – severe acute respiratory syndrome.⁹³ In December 2019, a new coronavirus that had not previously been identified in humans emerged in Wuhan, China. The Coronavirus led to a worldwide pandemic. Wiersinga, Rhodes, and Cheng also note that the coronavirus disease 2019 (COVID-19) pandemic, caused by the novel severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2), has

⁸⁹ Robertson 2021 : <https://www.wits.ac.za/news/latest-news/opinion/2021/2021-10/south-africa-urgently-needs-to-update-its-mental-health-policy.html>

⁹⁰ Robertson, 2021 : <https://www.wits.ac.za/news/latest-news/opinion/2021/2021-10/south-africa-urgently-needs-to-update-its-mental-health-policy.html>

⁹¹ Petersen, Fairall, Bhana, Kathree, Selohilwe, Brooke, Sumner, Faris, Breuer, Sibanyoni, Lund, and Patel 2016:S29

⁹² WHO 2021 factsheet: https://www.who.int/health-topics/coronavirus#tab=tab_1

⁹³ National Foundation of Infectious Diseases fact sheet: <https://www.nfid.org/infectious-diseases/coronaviruses/>

resulted in a worldwide sudden and significant increase in pneumonia hospitalizations with the multiorgan disease.⁹⁴

According to Wiersinga et al., SARS-CoV-2 is spread primarily through respiratory droplets during close face-to-face contact.⁹⁵ Asymptomatic, presymptomatic, and symptomatic carriers are able to spread infection. In the same vein, WHO (2021) states that respiratory symptoms such as fever, cough, and shortness of breath are signs and symptoms.⁹⁶ In more severe cases, an infection may result in pneumonia, severe acute respiratory syndrome, and, in extreme cases, death. In preventing the spread of COVID-19, standard recommendations include frequent hand washing with an alcohol-based hand rub or soap and water, covering the nose and mouth with a flexed elbow or disposable tissue when coughing and sneezing, and avoiding close contact with anyone who has a fever and cough. The graph below by Wiersinga et al. shows the history and timeline of the Coronavirus across the world.⁹⁷

The Government of South Africa (2022) provides a timeline of the virus' trajectory in South Africa. Furthermore, Statistics South (2020) explains that in South Africa, the first case was reported in early March in Kwazulu-Natal, followed by the first death near the end of the month, just as the lockdown began.⁹⁸ Little was known about the effect it would have on the population. Only China's experience and Europe's emerging crisis information were available to guide South Africa. Naidu commented that the HIV pandemic devastated South Africa. However, South Africa swiftly reacted to COVID-19, making the same mistakes.⁹⁹ Posttraumatic stress disorder (PTSD), grief, anxiety, and depression rose to unprecedented levels of public concern outside of wartime.¹⁰⁰ South Africa's government was slow to respond to Human Immunodeficiency Virus (HIV). It did not make the same mistake during the COVID-19 pandemic.

⁹⁴ Wiersinga, Rhodes, and Cheng 2020:783

⁹⁵ Wiersinga et al. 2020:783

⁹⁶ *Ibid*

⁹⁷ Wiersinga et al. 2020 :784

⁹⁸ *Ibid*

⁹⁹ Naidu 2020 :559

¹⁰⁰ *Ibid*

In addition, the pandemic in South Africa represents yet another threat to a society beleaguered by serial collective trauma. The pandemic's economic and health consequences for African countries are expected to be "*catastrophic*" (The Lancet Global Health, 2020). Considering South African mental health without considering the socio-historical context is unrealistic. Many South Africans suffer from "*protean sequelae of prolonged, repeated trauma*," which leads to complex PTSD.¹⁰¹ The latter is the constant threat of violent hijackings, such as home invasions, robbery, rape, murder, gangsterism, and everyday trauma, or "*common shock*," prevalent in South Africa. The research found that trauma exposure is high, with 73.8 percent of the general population reporting lifetime exposure to at least one potentially traumatic event.¹⁰² The trauma caused by the COVID-19 pandemic will aggravate pre-existing mental health conditions.¹⁰³

2.5 The Core Principles of Human rights in Mental Health

The Universal Declaration of Human Rights (UDHR) notes that "*all human rights are accepted universal, indivisible, interrelated, interdependent and at the same time mutually reinforcing, and all human rights ought to be dealt with honestly and equally, on equal footing and with the same emphasis.*"¹⁰⁴

Universality and Inalienability: Human rights are universal and inalienable. All people are entitled to these rights. The universality of human rights is encompassed in Article 1 of the Universal Declaration of Human Rights: "*All human beings are born free and equal in dignity and rights.*"

¹⁰¹ Naidu 2017 : <https://doi.org/10.1007/s40596-017-0752-y>

¹⁰² Atwoli et al., 2013:5

¹⁰³ Mon-temurro, 2020:1" Suicidal cases were reported in India (Goyal et al., 2020) but also in other countries, Italy included, where two infected Italian nurses committed suicide in a period of a few days probably due to fear of spreading COVID-19 to patients. It is possible that fear and anxiety of falling sick or dying, helplessness will drive an increase in the 2020 suicide rates. In the United States (US), the COVID-19 Pandemic's New Epicenter, a dedicated Lifeline (the National Suicide Prevention Lifeline) was activated for emotional distress related to COVID-19 to prevent suicide"

¹⁰⁴ UDHR 2016 :4

Indivisibility: Human rights are indivisible. Human rights are inherent in the dignity of every human being, whether they relate to civil, cultural, economic, political, or social issues. As a result, all human rights have equal status and cannot be ranked in any way. Denial of one right invariably makes the enjoyment of other rights more difficult. Everyone's right to a decent living cannot be sacrificed at the expense of other rights, such as health or education.

Interdependence and Interrelatedness: Human rights are interdependent and interrelated. Each one contributes to realizing a person's human dignity by satisfying his or her developmental, physical, psychological, and spiritual needs. The fulfillment of one right often depends, wholly or in part, upon the fulfillment of others. For instance, fulfilling the right to health may depend, in certain circumstances, on fulfilling the right to development, education, or information.

Equality and Non-discrimination: All individuals are equal as human beings by virtue of the inherent dignity of each human person. Individuals should not suffer discrimination based on race, color, ethnicity, gender, age, language, sexual orientation, religion, political or other opinions, national, social, or geographical origin, disability, property, birth, or another status as established by human rights standards.¹⁰⁵

Participation and Inclusion: All people have the right to participate in and access information about decision-making that affects their lives and well-being. Rights-based approaches require community participation, civil society, minorities, women, young people, indigenous peoples, and other identified groups.

Accountability and Rule of Law: States and other duty-bearers are answerable for observing human rights. In this regard, they must comply with international human rights instruments' legal norms and standards enshrined. Where they fail to do so, aggrieved rights-holders are entitled to institute proceedings for appropriate redress before a competent court or other adjudicators in accordance with the rules and procedures. Individuals, the media, civil society, and the international community play important roles in holding governments accountable for their obligation to uphold human rights.

¹⁰⁵ <https://www.equalityhumanrights.com/en/human-rights-act/article-14-protection-discrimination>

2.6 The link between human rights and mental health

The right to health is well documented in several human rights instruments and conventions. These documents include the International Committee of Economic, Social, and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC), the Committee on the Elimination of Racial Discrimination (CERD), the International Convention on the Elimination of all Forms of Discriminations against Women (CEDAW), the African Charter on Human and Peoples Rights, and the Protocol to the Convention of Rights on the People with Disability (CRPD) as identified by Rubin and Flores.¹⁰⁶

Furthermore, we must know that the right to health is enshrined in the South African Constitution of the Republic of South Africa of 1996 Chapter 2, Section 27 of the Constitution provides everyone the right to access health care services, including reproductive health care services, and no one may be refused emergency medical treatment.¹⁰⁷ Human rights principles protect ailing individuals from any form or type of discrimination. In the case of “*Soobramoney*,” the patient was denied emergency access which is a guarantee in section 27(3) that no person may be refused emergency medical treatment.¹⁰⁸ The World Health Organisation (2017) states that the right to healthcare must be enjoyed without discrimination based on race, age, ethnicity, or another status.¹⁰⁹ This includes mentally healthy patients who should not be discriminated against based on their mental health problems.

In addition, the right to healthcare contained in Article 12 was defined in General Comment 14 of the Committee on Economic, Social and Cultural Rights – a committee of Independent Experts responsible for overseeing adherence to the Covenant. The right includes the following core components:

- Availability
- Accessibility

¹⁰⁶ Rubin and Flores 2020

¹⁰⁷ The Bill of Rights, Chapter 2 of the Republic of South Africa Constitution, 1996 Section 2

¹⁰⁸ *Thiagraj Soobramoney v Minister of Health: Province of Kwazulu Natal* D&CLD 5846/97,21 August 1997, unreported

¹⁰⁹ <https://www.who.int/news-room/fact-sheets/detail/human-rights-and-health>

- Acceptability
- Quality

Mental health and human rights have a complicated and bidirectional link. As a result, following the U.N. Convention on the Rights of Persons with Disabilities and the WHO Quality Rights Initiative, global mental health movements should stress promoting human rights in mental health care.¹¹⁰ From the standpoint of human rights, society, particularly policymakers, must actively foster the conditions for all people to exercise their rights fully. A more comprehensive model should be developed that incorporates human rights into existing mental health treatments and practices.¹¹¹ This model recognizes that all persons with mental illness or psychosocial problems have rights.

According to Dainius Puras, a former U.N. right-to-health specialist, a recent study provided proof that there can be no health without mental health. Mental health is not treated equally to physical health in terms of budgeting, medical education, or practically anywhere in the world.¹¹² Another report by the National Investigative Hearing focused on the status of mental Health Care in South Africa (2017) and points out that in comparison to the general population, people with mental health conditions and those with psychosocial disabilities have disproportionately higher rates of poor physical health and have a shorter life expectancy – a 20-year drop for men and 15 years for women.¹¹³ Stigma is also a significant factor in determining the quality of care people receive and their ability to obtain the full range of treatments they require.

2.7 Critical challenges of mental health services during COVID-19

Historically, mental health care has encountered numerous challenges in pre-Covid-19 and during the Covid-19 period. In a study by Wainberg, Scorza, Shultz, Helpman, Mootz, and Johnson, mental health care has been severely under-resourced.¹¹⁴ Their study

¹¹⁰ Mahdanian, Laporta, Bold, Funk and Puras, 2022:

¹¹¹ *Ibid*

¹¹² OHCHR 2022:

¹¹³ [extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.sahrc.org.za/home/21/files/SAHRC%20Mental%20Health%20Report%20Final%2025032019.pdf](https://www.sahrc.org.za/home/21/files/SAHRC%20Mental%20Health%20Report%20Final%2025032019.pdf)

¹¹⁴ Wainberg, Scorza, Shultz, Helpman, Mootz and Johnson 2017:15

focused on ten (10) South American countries. A similar point is made in a report by the Organisation for Economic Co-operation and Development. However, the report points out that governments need to step up their efforts to improve mental health care, which remains poorly resourced and under-prioritized in too many countries.¹¹⁵ The World Health Organisation (2020) reports that before the pandemic, countries spent less than 2% of their national health budgets on mental health and struggled to satisfy their people's requirements.¹¹⁶

A study by Docrat et al. found that South Africa's public mental health expenditure represented 5.0% of the total public health budget, with wide disparities among provinces.¹¹⁷ Underfunded mental health is not unique to South Africa, as demonstrated above. It is a universal problem that many countries are faced with. However, Covid-19 has exerted the problem mainly because governments worldwide are forced to invest more money in Covid-19 response. This has led to many other issues, such as mental health being neglected. Deloitte (2022) reports that the South African government has been compelled to make reprioritizations across various health spending areas since the Supplementary Budget of 2020 aimed to support the COVID-19 response.¹¹⁸ For example, the “*Health Facility Revitalisation Grant*” experienced a One billion rand reprioritization away from infrastructure spending towards the immediate COVID response.

¹¹⁵ OECD 2021: “Mental health services were already over-stretched before 2020. The scale of mental distress since the start of the pandemic requires unprecedented levels of mental health support if it is not led to permanent scarring. OECD countries have taken immediate steps to increase mental health support.”
<https://www.oecd.org/coronavirus/policy-responses/tackling-the-mental-health-impact-of-the-covid-19-crisis-an-integrated-whole-of-society-response-0cca0b/>

¹¹⁶ <https://www.who.int/news/item/05-10-2020-covid-19-disrupting-mental-health-services-in-most-countries-who-survey>

¹¹⁷ Docrat, Besada, Cleary, Daviaud and Crick Lund 2019:706 <https://doi.org/10.1093/heapol/czz085>

¹¹⁸ Deloitte 2021: “the South African health system has continued to be buffeted by the pandemic, and has forced government to make significant budget adjustments, shifting funding across commitments, as well as moving funding obligations from outer years to the immediate term to provide an adequate response.”
<https://www2.deloitte.com/za/en/pages/tax/articles/health-system-spend-pushed-out-as-COVID-response-takes-precedence.html>

The World Bank (2022) reports that South Africa's proposal for a \$750 million development policy loan (DPL) was approved by the World Bank Group Board of Executive Directors. This financing would help the South African government speed up its COVID-19 response, aiming to protect the poor and vulnerable from the pandemic's adverse socioeconomic effects while promoting a resilient and long-term economic recovery. A vast sum of money is spent on Covid-19 responses at the expense of other issues, such as mental health care. As Nguse and Wassenaar stated, resources and energy have been concentrated on the biomedical aspect of the virus with relative disregard for the mental health impact.¹¹⁹

Additionally, at the height of the Covid-19 pandemic, access to mental health facilities was a significant challenge. Pillay and Barnes point out that while essential services, including mental health care, were provided and accessible during the lockdown period, as stipulated by the government (Lockdown regulations, No.: 43232, April 2020), some mental health care users were unable to do so due to the limitations and risks posed by physical contact and in-person consultations.¹²⁰ A similar observation was made by Govender, a psychologist for Doctors Without Borders in the South African city of Tshwane, where the author argues that they reported a decrease in mental health visits during the lockdown period in one of their facilities.¹²¹ In other words, the nationwide lockdown measures, which shut down most primary health centers to limit the spread of the epidemic, were the main reported hurdles to accessing mental health treatments, including psychotherapy and other types of care.

According to Antiporta and Bruni, access to mental health care is at risk due to a lack of resources to restructure mental health services, including virtual forms and appointment procedures.¹²² Virtual therapies and interventions rely on the availability of services and the patient's knowledge of how to use technical tools, both of which are not ideal in the current situation. Given the decreased availability of psychiatric drugs relative to those

¹¹⁹ Nguse and Wassenaar 2021:307

¹²⁰ Pillay and Barnes 2020:149

¹²¹ Govender et.al, 2020:2

¹²² Antiporta and Bruni 2020:3

used in general health and for illnesses related to COVID-19, access to pharmaceuticals was mentioned as a potential barrier.¹²³ Similarly, Peng, Wang, and Xu point out that patients' anxiety and shame are necessarily heightened by high contagion, intrinsic scientific ambiguities, and the implementation of strict isolation, which creates barriers to obtaining help for proper medical therapy and psychological crisis intervention.¹²⁴

Ali & Agyapong notes that family caregivers and psychiatrists speak out against the low priority of mental health when policies are drawn up¹²⁵. The authors above are bringing into play the structural challenges to mental health. These issues arise from institutional policies and processes that limit the rights and opportunities of people with mental illnesses.¹²⁶ Various authors and researchers such as Balhara et al. (2016); Kovacs et al. (2018), Azman, Jamir, and Sulaiman (2019); Hanlon et al. (2017), and Keynejad et al. (2016) have focussed on the issue of structural barriers by arguing that an absence of planning and Legislation and the development of inadequate public health policies are frequent and contribute to the stagnation of the system and makes it difficult to access treatment¹²⁷. Malik and Khan point out that the government's lack of will and commitment also affects creating of specific budgets, resulting in an underfunded system and services that are not given.¹²⁸ Sahithya and Reddy, as well as Vigo, Kestel, Pendakur, Thornicroft, and Atun, argue that regardless of whether they are high or low-income countries, the treatment difference is more significant in countries with socioeconomic conflicts—war, unemployment, economic recession, unequal distribution of wealth, budget cuts, and so on. Some of these challenges identified an impact directly on individuals' human rights.¹²⁹

¹²³ Antiporta and Bruni, 2020:3

¹²⁴ Peng, Wang and Xu 2020:1

¹²⁵ Ali & Agyapong 2015:8

¹²⁶ Carbonell, Navarro-Pérez, and Mestre, 2020 :1367

¹²⁷ Carbonell, Navarro-Pérez, and Mestre, 2020 :1372

(Balhara et al. 2016, Kovacs et al. 2018, Azman, Jamir, and Sulaiman 2019, Hanlon et al. 2017 & Keynejad et al. 2016)

¹²⁸ Carbonell, Navarro-Pérez, and Mestre, 2020:1373

(Malik and Khan 2016)

¹²⁹ Sahithya and Reddy 2018

Vigo, Kestel, Pendakur, Thornicroft, and Atun, 2019

2.8 Conclusion

The chapter discussed various concepts, such as human rights, COVID-19, and mental health. Furthermore, the chapter provided international and local Legislation regulating physical and mental health. Finally, it linked the two main concepts of our discourse, human rights and mental health, including the critical challenges to mental health during the COVID-19 pandemic. Chapter three will discuss the legislative guidelines for determining human rights violations in mental health care services.

CHAPTER THREE

LEGISLATIVE GUIDELINES DETERMINING HUMAN RIGHTS VIOLATIONS IN MENTAL HEALTH and SERVICES

3.1 Introduction

International human rights law, the South African Bill of Rights, and other enabling Legislation are discussed to establish whether the South African State has complied with its duties to the Rights of individuals within the context of mental health services during the COVID-19 in South Africa. The substantive and procedural aspects of law affecting the challenges in mental health services during COVID-19 in South Africa are discussed in Chapter four. The framework (instruments) of human rights in this chapter will be used to analyze if South African legislative Legislation is up to standard and “where and how” it may be improved. The conclusion of this chapter highlights the role of human rights instruments.

3.2 National laws about health and mental health

South Africa has various policies and Legislation focusing on mental health issues. Firstly, the researcher notices that the Constitution is South Africa's Supreme Law that informs all other legislative, executive, administrative, and judicial acts to comply with the values set out in the Constitution. The Constitution contains a bill of rights that stipulates the rights and freedom granted to all citizens and the corresponding state obligations. In addition, according to the Interpretation Clause of Article 39, the Constitution provides that courts must consider international law when interpreting and developing the law and is explained in Section 39 (2) provides that the law's interpretation that promotes the Bill of Rights' spirit, purpose, and purpose.

Furthermore, Section 9 of the Constitution of the Republic of South Africa (1996) draws attention to equality. According to Swanepoel, equality (non-discrimination) is inherent in the Bill of Rights and opposes laws and practices that reinforce the subordination of disadvantaged groups and persons with incapacities.¹³⁰ It is thus a central concept in

¹³⁰ Swanepoel 2011:

human rights that all individuals have inherent value, worth, and dignity, and individuals should be protected from discrimination and abuses of fundamental rights from any cause.¹³¹ In “*S v Makwanyane and another 1995(6) BCLR 665 (CC) at par 111, the court stated that respect for life and dignity are values of the highest order in the Constitution*”. Sections 8 (1) and (2) of the Constitution, state that the Bill of Rights governs all laws and binds states, individuals, and groups, considering the nature of rights and the nature of the obligations imposed by the law.¹³²

Secondly, the national laws cover the Mental Health Care Act 2002(MCHA). "*The MCHA was widely admired as one of the most advanced parts of mental health legislation.*" Regrettably, it was an unfunded mission with little preparation and training.¹³³ Facilities were developed at no district or regional level, and the government did not allocate a budget to implement the ACT.¹³⁴ The latter statement resulted in an incline of chronic complications facing healthcare services across the country.¹³⁵ Burns states that a substantial gap exists between South African mental health care resources and the enormous mental illness suffering and disability burden.¹³⁶

3.3 International laws and human rights instruments

International law and regional human rights instruments are essential in the context of mental health because they are the only source of law that legitimizes international scrutiny of a sovereign country's mental health policies and practices, as well as because they provide fundamental protections that cannot be revoked through the ordinary political process.¹³⁷ The International Bill of Rights, comprised of the United Nations (UN) Declaration of Human Rights (UDHR, 1948), the ICESCR, and the International Covenant on Civil and Political Rights, is one of these legal instruments (1966). Although the UDHR

¹³¹ Section 7(1) of the Constitution affirms the democratic values of human dignity, equality, and freedom in South Africa.

¹³² Constitution Bill of rights Section 8

¹³³ Burns 2011:100

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷ Ferlito & Dhali 2017:52

is not legally binding, it establishes fundamental human rights that apply to all nations. Other treaties include the Convention on the Rights of Persons with Disabilities (CRPD, 2006), the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (1983), and the Convention on the Elimination of All Forms of Discrimination Against Women (1989). (CEDAW, 1979). The African Charter on Human and People's Rights is a regional human-rights law instrument (1986). The United Nations Human Rights Office of the High Commission (2014) notes that ten bodies are responsible for monitoring the implementation of these treaties and optional protocols through two main channels: periodic reports on specific rights in a state party and individual communications. Some treaty bodies have the authority to visit countries and conduct investigations.

It should be noted that these human rights treaty bodies are committees consisting of independent experts.¹³⁸ The former Commission on Human Rights, the Human Rights Council, and the Special Procedures body are charter bodies, including the Human Rights Council, which replaced the Commission on Human Rights, and convened for the first time on 19 June 2006. The following paragraphs discuss in brief the international human rights instruments that protect and promote the rights of people with mental health conditions:

- Universal Declaration of Human Rights (UDHR) 1948

The Universal Declaration of Human Rights articulates individuals' fundamental rights and freedoms, always promoting respect for these rights through education and their universal and effective recognition through progressive national and international policies and attention. Therefore, the Legislation forms the basis of all human rights in all aspects of life.

According to Article 25 (1), every individual has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing, medical care, and necessary social services, and the right to security in the event of

¹³⁸ OHCHR 2021: Monitoring the core international human rights treaties.
<https://www.ohchr.org/EN/HRBodies/Pages/Overview.aspx>

unemployment, sickness, disability, widowhood, old age, or other lack of livelihood in the circumstances beyond his control.

- International Covenant on Economic, Social and Cultural Rights, ICESCR (1966)

Article 12 (1) states that every

"Individual has the right to enjoy the highest attainable physical and mental health standards."

The article requires the government to provide all individuals with access to essential healthcare services without discrimination, which benefits all. (2) It further informs to cater for improvements of any aspects related to environmental and industrial hygiene. Thus, it commits that services should be delivered in a well-structured and hygienic atmosphere. Lastly, it assures that in conditions such as COVID-19, it will assure that all medical services, including mental health services, are delivered with extended attention to the event of illness. This international Legislation thus places the responsibility of health on the government to recognize every individual's right to health, either physical or mental. It also requires the government to take the necessary steps to provide individuals with quality healthcare. The government can build mental health facilities, train mental health practitioners, and develop a budget to cover mental health services. Moreover, finally, the Legislation places the responsibility on the government to find means to prevent mental health and other health-related issues. In the case of "*Soobramoney v. Minister of Health (Kwazulu-Natal)*, a patient was refused health care because the hospital did not have sufficient resources to provide specific treatment. Further, the hospital budget does not make any provisions for vast expenditures".¹³⁹

- International Convention on the Elimination of All Forms of Racial Discrimination, ICERD (1965)

Article 5, in compliance with the fundamental obligations laid down in article 2 of this Convention, as well as States Parties, undertake to prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction of

¹³⁹ Thiagraj *Soobramoney v Minister of Health: Province of Kwazulu Natal* D&CLD 5846/97,21 August 1997, unreported

race, color, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights. However, we find that state mental health care is limited, catering to those who are poor or from a disadvantaged group. The latter example is tabulated below and shows the Public mental Health care in the Province of Free State.

Clinical Health Services Facilities

Districts	Clinics	CHCs	District Hospitals	Regional Hospitals	Tertiary Hospitals	Psychiatric Hospital & MDR/XDR Specialised Units	Central Hospital	Population	Uninsured population
FezileDabi	Fixed Clinics:34 Non Fixed Clinics:12	5	4	1				520210	427092
Lejweleputswa	Fixed Clinics:44 Non Fixed Clinics:11	1	5	1		1 MDR Unit		596065	489369
Mangaung	Fixed Clinics:40 Non Fixed Clinics:10	2	3		1	1 Psy Hosp 1 XDR Unit 1MDR Unit	1 Cent Hosp	795414	653175
Thabo Mofutsanyana	Fixed Clinics:72 Non Fixed Clinics:24	1	9	2				714060	586243
Xhariep	Fixed Clinics:20 Non Fixed Clinics :12	1	3					137275	112703
Free State Total	Fixed:210 Non Fixed Clinics: 69	10	24	4	1	1 Psy Hosp 1 XDR Unit 2MDR Units	1	2 763 024	2 268 443 (82%)

Figure 3: FSDoH - Clinical Health Services Facilities

- Regional human rights instruments

Regional human rights systems, including regional instruments and mechanisms, are becoming increasingly important in promoting and protecting human rights. Regional human rights instruments (e.g., treaties, conventions, declarations) assist in localizing international human rights norms and standards by reflecting the region's specific human rights concerns. URG further explains regional human rights mechanisms (such as commissions, special rapporteurs, and courts) and then assists in implementing these instruments.¹⁴⁰ The three most established regional human rights systems exist in Europe, the Americas, and Africa.

a) African Union

The African Union has established various human rights instruments within the African continent. Some of these instruments have been mentioned and discussed below.

¹⁴⁰ URG 2021

According to Keetharuth, the African Commission, established by Article 30, is the treaty body monitoring the African Charter's implementation.¹⁴¹ It was established in 1987 with the mission of monitoring states' compliance with the human and people's rights enshrined therein and ensuring their protection.

- African Charter on Human and Peoples' Rights (African Charter)

The African Charter, which came into effect in 1986, incorporates universal human rights standards and principles while reflecting African traditional virtues and values. As a result, the African Charter is distinguished by a reciprocal relationship between the individual and the community, connecting individual and collective rights. The African Charter established the African Commission for Human Rights, headquartered in Banjul, Gambia. It is a quasi-judicial body comprised of eleven independent experts tasked with promoting and protecting human rights and collective (peoples') rights throughout the African continent (via periodic reports from States Parties on the implementation of the Charter's provisions), as well as interpreting the African Charter and considering individual complaints of Charter violations.

- Protocol to the African Charter on the Establishment of the African Court of Human and Peoples' Rights

This court protects the rights of those abused by the government across the African continent. Mental health patients can take their governments to this court if they believe their rights have been infringed upon. The African Charter on Human and Peoples' Rights (African Charter) do not appear to provide for the qualification of progressive realization and maximum available resources for realizing (ESC) Economic, Social Cultural rights.¹⁴² However, given the economic realities within Africa, this argument would have far-reaching implications for the very nature of ESC rights.¹⁴³ ESC rights, including the right to health, are justifiable in the African human rights system, alongside civil and political

¹⁴¹ Keetharuth 2009:163

¹⁴² African Charter

¹⁴³ Odinkalu 2001:

rights.¹⁴⁴ The latter is because the primary human rights instruments have combined ESC and civil and political rights into a single document. In the Ogoniland case, the Commission "confirmed the justiciability of ESC rights," ruling that "there is no right in the African Charter that cannot be made effective."¹⁴⁵

- Protocol to the African Charter on the Rights of Women in Africa

The second, the African Charter on Human and Peoples' Rights Protocol on the Rights of Women in Africa (hereinafter the Women's Protocol), was adopted in Maputo, Mozambique, in 2003 and entered into force on 25 November 2005.¹⁴⁶ The Women's Protocol has been ratified by 26 countries so far.

- African Charter on the Rights and Welfare of the Child

The second sentence of Article 23(1) of the Convention stipulates the right to health care services that no child should be deprived of. The Charter does not expressly provide for such a right but seems to assume that a similar right is contained in the general right to the best state of health. The Charter lists specific measures that governments should undertake to implement the right in its entirety. For example, in Article 14(2)(b), the Charter obligates the State Party to ensure the necessary medical assistance and health care to all children.

Below, the researcher points out all standards relating to the right to physical and mental health, listed in hierarchical order, beginning with the Universal Declaration of Human Rights. These standards include Core International Human Rights Treaties, International Human Rights Treaty Bodies, Other Universal Standards, Standards for specific groups, International Humanitarian Law, and regional standards.

¹⁴⁴ See generally the African Charter on the Rights and Welfare of the Child and Protocol to the African Charter on the Rights of Women (which provide civil). The Preamble of the Protocol to the African Charter on the Rights of Women in particular provides that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception'.

¹⁴⁵ Communication 155/196, Social and Economic Rights Action Center and Another v Nigeria (Ogoniland case) 2001) AHRLR 60 (ACHPR 2001) para 52.

¹⁴⁶ *Ibid*

3.4 The role of human rights instruments on mental health issues

"*The right to health is a vital aspect of our human rights and our understanding of a life in dignity,*" according to the Office of the United Nations High Commissioner for Human Rights.¹⁴⁷ The World Health Organization's 1946 Constitution defines health as "a state of complete bodily, mental, and social well-being, rather than merely the absence of sickness or disability." The connection between mental health and human rights is fundamental and interrelated. Human rights breaches like torture and displacement, for example, severely impact mental health. Second, abusive treatment procedures, mental health practices, programs, and laws can obstruct human rights. Finally, human rights growth is beneficial to mental health. These advantages go beyond mental health to include the close link between physical and mental well-being. As a result, there are clinical and economic reasons and moral and legal obligations to promote mental health treatment as a human right.

In a 2014 report, WHO estimated that mental health accounts for less than 5% of government health care, much lower in low-income countries.¹⁴⁸ In short, mental health does not receive the same spending and attention as physical health, resulting in an unintended hierarchy in which mental health is placed lower than physical health. According to the OHCHR, psychiatric institutions are the only option for people with mental illness in some countries, many of which are associated with severe human rights abuses, including harsh treatment and living conditions such as bondage and long-term detention.¹⁴⁹

Mann, Bradley & Sahakian state that there are at least three aspects to the connection between mental health and human rights.¹⁵⁰ First, human rights abuses such as torture and eviction negatively impact a person's mental health.¹⁵¹ Secondly, laws, policies, and practices related to mental health, such as coercive treatment procedures, may affect

¹⁴⁷ OHCHR 2022

¹⁴⁸ WHO 2015

¹⁴⁹ Asanbe, Gaba and Yang 2018

¹⁵⁰ Mann, Bradley and Sahakian 2016

¹⁵¹ *ibid*

human rights.¹⁵² Gostin and Gable argue that expanding human rights may positively affect mental health systems.¹⁵³ These advantages reach beyond mental health to address the interdependence of physical and mental health.¹⁵⁴ Thus, advancing human rights in mental health care is required on ethical, moral, and legal grounds, as well as clinical and economic grounds.

According to Eaton, the CRPD's provisions guarantee "*equal recognition before the law.*"

Article 12 outlines legal capacity, which implies a right to self-determination and autonomy (e.g., in treatment decisions) and "liberty and security of the person"
*Article 14, which forbids deprivation of liberty based on a disability (physical or chemical restraint, more), has drawn the most attention to national legislation on mental health.*¹⁵⁵

According to the CRPD Committee's periodic national reports, almost all nations—including South Africa—violate these articles.¹⁵⁶ Despite ratifying the Convention, numerous nations have stated that they want to keep practicing treatment, guardianship, and containment as they already do. This is mainly based on so-called "proxy decisions," where decisions are made on behalf of the data subject.¹⁵⁷ The CRPD advocates "*supported decision-making,*" which always puts the needs and desires of the affected person first.

3.5 Case laws on Human rights and mental health

In reference to Section 9 of the Constitution of the Republic of South Africa mentioned above, in the case of *Lane v. Harksen*, *differences between individuals or groups must be investigated to determine if the equality clause may be used. If such a distinction is made, it must be decided whether it makes sense for an acceptable government goal.*

¹⁵² Steel 2009

¹⁵³ Gostin and Gable 2009

¹⁵⁴ *Ibid*

¹⁵⁵ Eaton 2019

¹⁵⁶ CRPD 2017

¹⁵⁷ Eaton 2019

The court continued by saying that even if there is a legitimate link, discrimination may still be present.

The “*Life Esidimeni*” case in Gauteng is a farce in many ways. Perhaps most importantly, it serves as an example of how deinstitutionalization and the transition to community-based care can go awry if the justification is focused on cost-cutting measures rather than a human rights-based perspective.¹⁵⁸ Even though the Department of Health ordered and approved research on ideal standards for community-based mental health care in South Africa, the tragedy occurred.¹⁵⁹ According to the Ombudsman's report (2017) by Makgoba, the Department of Health was negligent in transferring patients from Life Esidimeni to other institutions operating under invalid licenses.¹⁶⁰ South Africa has done considerably well by signing international laws and enacting legislation to realize mentally ill people's human rights. While this is laudable, the Life Esidimeni tragedy indicates how far South Africa is from realizing the human rights of the mentally ill. Protecting the rights of mentally ill people is essential, as they safeguard patients from neglect and abuse.

However, implementing laws to defend these rights remains vital if we avoid tragedies like those in the Life Esidimeni situation. Our state is accountable to all its citizens – even those with mental illness. Everyone has the legal right to access health care, including reproductive health care, according to Section 27(1)(a) of the Constitution. Section 27(2), which mandates that the state must adopt reasonable legislative and other steps within its resources to facilitate the gradual realization of fundamental rights, imposes internal restrictions on this right.¹⁶¹ Only the limited right of access to health care services is guaranteed by the Constitution, not a right to health. The type and degree of care to which people are entitled is an additional query crucial to comprehending the right of access to health care services.

¹⁵⁸ Lund 2017

¹⁵⁹ Lund and Fischer 2009

¹⁶⁰ Life Esidimenini Ombudsreport 2017: <https://www.lifeesidimeni.org.za/what-happened/uncovering-the-truth/the-ombuds-report>

¹⁶¹ Swanepoel 2011:

3.6 Conclusion

This chapter focused on objective number two, identified in chapter one of the study, which discussed the legislation implemented in South Africa to protect individuals' rights in terms of health. Also, it identified the different international human rights laws and instruments and highlighted the role of human rights instruments on mental health issues. This part of the chapter provided reasons why it is essential to have laws protecting individuals' rights. The last section of the chapter provided different case studies of individuals' human rights violations due to mental health. The next chapter will focus on the findings to examine and evaluate whether the South African government has respected and followed the domestic and international obligations to protect individuals within the challenges of mental health services during COVID-19 in South Africa.

CHAPTER FOUR

DID THE SOUTH AFRICAN GOVERNMENT RESPECT ITS OBLIGATION TO PROTECT AND PROMOTE THE RIGHT OF INDIVIDUALS IN THE MENTAL HEALTH CARE

4.1 Introduction

The CRPD aims to recognize persons with disabilities with an equal legal capacity, equal right to free and informed consent, and respect for their physical and mental integrity.¹⁶² South African legislature has expressed no concern when identifying areas where people with disabilities may face discrimination.¹⁶³ Neither is the public informed nor provided with guidelines to influence the development of legally binding standards to protect people with disabilities of all kinds.¹⁶⁴ According to the South African Constitution, "*the State should take appropriate legislative and other measures to bring about the phased realization of their respective rights within the limits of their available resources.*"¹⁶⁵ Article 27 of the Constitution states: '*While we have ensured that access to healthcare will be phased in for all, it is still necessary, but in poorer and more remote areas, healthcare is either unavailable or too far away, leaving a sizable portion of South Africans unable to travel to existing facilities*'. The latter is attested by researchers Wettstein, Tlali, Joska, Cornell, Skrivankova, Seedat, Mouton, van den Heuvel, Maxwell, Davies, Maartens, Egger & Haas, stating that hospital admission rates for any mental disorder fell significantly after the lockdown was implemented (OR 0.38; 95% CI 0.33-0.44) and did not return to pre-lockdown levels until June 1, 2020.¹⁶⁶ According to the constitution, mental health services were not provided accordingly, which is a human rights violation.

This chapter thus focuses on whether the South African government has respected its obligations to protect and promote the right of individuals within mental health care during COVID-19. This chapter will also attempt to link each section to the appropriate human right it deals with.

¹⁶² OHCR 2022:7 - Article 5

¹⁶³ South African Law Reform Commission (SALRC) 2020:

¹⁶⁴ *Ibid*

¹⁶⁵ Bill of Rights 2006 Section 27(2)

¹⁶⁶Wettstein, Tlali, Joska, Cornell, Skrivankova, Seedat, Mouton, van den Heuvel, Maxwell, Davies, Maartens, Egger & Haas 2022 :7

4.2 SIRACUSA Principles

Todrys, Howe, and Amon refer to the Siracusa Principles as limitations on human rights under the ICCPR that must be adhered to legality, necessity supported by evidence, proportionality, and gradualism.¹⁶⁷ In particular, restrictions on rights must be "*strictly essential*," which implies that they must address an urgent public or social need, reasonably pursue a legal objective, and represent the least restrictive method possible for attaining that objective.¹⁶⁸ Additional safeguards include that the restriction is legal and adheres to the law, that it is not discriminatory nor arbitrary, and that the State attempting to limit a right is responsible for justifying the restriction.¹⁶⁹

In response to the unprecedented public health crisis of COVID-19 transmission, the President and Minister of Cooperative and Traditional Affairs invoked the Disaster Management Act and implemented several additional containment measures as part of the national lockdown to limit infection spread.¹⁷⁰ As of April 15, 2020, the restricted areas for forced isolation were formed due to a changed high proportion of cases, such as in eThekweni District (383/587) and high mortality in Kwazulu Natal.¹⁷¹

The Siracusa Principles specifically addresses limits based on "*public health*," noting that the State may cite public health as a justification for restricting some rights if necessary to take action "aimed at avoiding sickness or harm or providing care for the sick and wounded."¹⁷² Moodley et al. state that the public health justification for isolation or quarantine is unquestionable; however, civil liberties will inevitably be violated, and such restrictions on individual liberties have historically been associated with abuse and discrimination.¹⁷³ Sun argues that these principles are challenging when put into practice in public health situations since they are designed to be widely applicable to all public

¹⁶⁷ Todrys, Howe and Amon 2013:8

¹⁶⁸ *Ibid*

¹⁶⁹ *Ibid*

¹⁷⁰ Government Gazette of 15 March 2020, No. 43096(313):4

¹⁷¹ Moodley & Obasa 2020:1

¹⁷² Todrys, Howe and Amon 2013:8

¹⁷³ Moodley & Obasa 2020:1

catastrophes.¹⁷⁴ It is particularly true given the variety of public health crises. The dynamics of transmission, the severity of the sickness, the accessibility to care, and the effectiveness of control efforts all vary greatly. It is exceedingly difficult to determine if new disease outbreaks' reactions are evidence-based or arbitrary because of the ambiguity surrounding the abovementioned elements.¹⁷⁵

Sun further reasons that governments use the COVID-19 crisis to justify rolling back human rights protections.¹⁷⁶ Some of the rollbacks concerning human rights protections include the protection and provision of services for mental health. Sun contends that the United Nations' human rights mechanisms should denounce nations that exploit the COVID-19 pandemic as an excuse to ignore their duties in the area of human rights as the epidemic spreads.¹⁷⁷

4.3 Human rights violations in South Africa

South Africa has a history of human rights violations in many aspects of society, especially during the Apartheid era. Bongard notes that South Africa's situation remains highly influenced by its past.¹⁷⁸ However, as Williams mentions, post-Apartheid South Africa recognizes the rights of the majority, which were denied during the era.¹⁷⁹ Nevertheless, many social problems continue to undermine the fulfillment of these rights. For instance, the South African Human Rights Commission reports that between 2012 to 2017, the right to healthcare, food, water, and social security was among the top 5 human rights violations in South Africa.¹⁸⁰ It is important to note that mental health, the primary focus of this study, is a component of healthcare. The report, however, does not go into specifics about the types of violations in the healthcare domain, and it could be argued that a lack of access to mental health facilities is also a violation of human rights.

¹⁷⁴ Sun N 2020:387

¹⁷⁵ Sun N 2020:387

¹⁷⁶ *Ibid*

¹⁷⁷ *Ibid*

¹⁷⁸ Bongard 2018:

¹⁷⁹ Williams 2010:

¹⁸⁰ South African Human Rights Commission 2017:

The Capabilities approach¹⁸¹ seeks to provide the resources to meet the demands, such as the right of access to healthcare which, according to the Constitution, stipulates that all South Africans' fundamental rights shall be safeguarded and upheld. The Bill of Rights includes a list of these rights and the conditions under which they may be restricted.¹⁸² Jordaan argues that the story of democratic South Africa and its approach to human rights in the rest of the world is a tale of woe.¹⁸³ For two-and-a-half decades, South Africa failed to defend the human rights principles in its Constitution internationally – and quite often contradicted them. Despite having one of the most remarkable constitutions in the world, South Africa is now known for destroying its democracy through corruption, incompetence, maladministration, and human rights abuse of people suffering from mental health. The sections below provide case studies on the abuse of a person with mental abuse.

4.4 South African government's failure to protect and promote individuals' right to mental health

Human Rights Watch (2020) reports that governments are required to uphold the right to freedom of speech, which includes the freedom to look for, receive, and disseminate information of all types without regard to national boundaries.¹⁸⁴ The latter can express that acceptable constraint on freedom of expression may not jeopardize the right.

According to Heywood, on March 5, 2020, COVID-19's first case in South Africa was officially verified.¹⁸⁵ The government used the Disaster Management Act of 2002 to proclaim a State of National Disaster ten days later, on March 15, 2020. In order to stop the spread of SARS-Cov-2 and "flatten the curve," the government established the National Command Council (NCC), composed of Cabinet Ministers. According to the Disaster Management Act, the President may designate a cabinet minister (in this case, the Minister of Cooperative Governance and Traditional Affairs) to issue special rules.

¹⁸¹ Stanford Encyclopedia of Philosophy April 14, 2011: <https://plato.stanford.edu/entries/capability-approach/>

¹⁸² Bill of Rights

¹⁸³ Jordan 2021:

¹⁸⁴ Human Rights Watch 2020

¹⁸⁵ Heywood 2020

This authority has resulted in the practically weekly publication of such regulations. Furthermore, the amnesty international report 2021/22 – South Africa informed that there were numerous cases of alleged corruption in provincial health departments.¹⁸⁶ The prediction of this corruption could have been caused by the following:

- Inadequate access to sanitation and water. - Xenophobic attacks on foreign-owned businesses and undocumented migrants were denied vaccines.
- Security forces continued to use excessive force against peaceful protesters, resulting in the deaths of hundreds.
- Former President Jacob Zuma's arrest, sparked violent unrest in two provinces, resulting in at least 360 deaths and job losses, deepening inequalities.
- The authorities failed to ensure that the mining industry followed human rights standards to protect communities.

Thus, many individuals' constitutional rights were affected during the South African government's response to Covid-19. To follow are the discussions of different instances highlighting the violation of rights within the challenges in mental health services.¹⁸⁷

4.4.1 South African National Defence Force and Collins Khosa

The South African Broadcasting Cooperation (2020) reports that there have been allegations of cruelty by certain SANDF and SAPS personnel who were sent to ensure that the national lockdown is observed. A 40-year-old male from the north of Johannesburg has died after reportedly being attacked by South African National Defence Force personnel (SANDF).

Although the story provided above does not relate to health issues, the actions of the members of the SANDF and the government's responses may cause mental health issues for the deceased's family. When the government's actions are responsible for someone's mental breakdown, one could argue that it is a direct violation of human rights as the government has the responsibility to protect individuals' rights and not engage in

¹⁸⁶ <https://www.amnesty.org/en/location/africa/southern-africa/south-africa/report-south-africa/#:~:text=SOUTH%20AFRICA%202021,of%20school%20during%20the%20pandemic.>

¹⁸⁷ Moreno et al. 2020:813

actions that will endanger the lives of its citizens, whether mental or physical. Human Rights Advocacy (2022) mentions that over the past two decades, a consensus has emerged that international human rights states have a threefold responsibility: to respect, protect, and fulfill their obligations. Nelson and Dorsey mentioned that states must respect human rights by abstaining from interfering with or restricting the exercise of such rights.¹⁸⁸ States are required under the duty to protect to defend persons and groups from violations of human rights. States are required to behave in a way that makes it easier for people to enjoy their fundamental human rights under the commitment to fulfill them.

Chapter two of this research study demonstrated that a person's mental health might alter depending on various conditions. A person's mental health may be affected if their demands are more significant than their capacity for coping and resources. A study by Slewa-Younan, Nguyen, Al-Yateem, Rossiter, and Robb found that causal factors such as trauma exposure may lead to mental health issues such as depression.¹⁸⁹ Another study by Stansfeld, Rethon, and Das-Munshi supports the argument by reporting that exposure to violence is a significant risk factor that raises the likelihood of developing post-traumatic stress disorder (PTSD), depression, suicidal thoughts, and risky behaviors.¹⁹⁰ Both household and communal contexts can be places where violence is present, linked to a higher risk of mental health.

In other words, the actions of the SANDF and SAPS members could cause PTSD, depression, or any other mental health problems for the family of the deceased and individuals in the community. Not only for the victims but also create mental health issues for the soldiers and the police officials involved in the altercation. Public officials represent the government, and their behaviour should be of the highest standard. Maintaining high standards of behaviour in the public sector has grown for governments. The OECD 2022 reports that the importance of maintaining high standards of behaviour in the public sector has grown for governments. As complicated as the phenomena of misbehaviour,

¹⁸⁸ Nelson and Dorsey 2008:

¹⁸⁹ Slewa-Younan, Nguyen, Al-Yateem, Rossiter and Robb 2020:

¹⁹⁰ Stansfeld, Rethon & Das-Munshi 2017

preventing it requires various integrated approaches, including ethical solid management systems.¹⁹¹ Governments have been driven to examine their approaches to ethical behaviour due to growing concerns about the erosion of public trust in politics and corruption.¹⁹² Reports are not visible nor provided for the public to evidence whether or any mental health support was provided to the deceased's family and those involved in the altercation.

4.4.2 Lack of accurate data as a human right violation

The Constitution makes provisions for the right to health. As such, the government ought to create institutions, facilities, and mechanisms to make this right a reality for most of the population. In other words, the government must mobilize all available resources to deal with mental health issues.

Collecting data and statistics regarding mental health is crucial to know how many people require mental health services and find the appropriate services to provide. However, as Docrat et al. pointed out, the scale-up of attempts to address the burden of mental illnesses in most LMICs has been hampered by the lack of these statistics.¹⁹³ The use of statistics helps the government with making informed decisions that will be able to respond to the need of the communities. Isola supports the views above by arguing that there is a need for improved statistics to assist policy implementation, track progress, assess the results and effects of development projects, and establish and plan policies based on evidence.¹⁹⁴

Official statistics are a crucial component of the information system of a democratic society, serving the government, the economy, and society by providing information about economic, demographic, social, and environmental situations. Good statistics are needed by society in general and governments in particular. Because resources are valuable in developing nations like South Africa, there is an even greater need for accurate statistics

¹⁹¹ OECD 2022

¹⁹² *Ibid* .

¹⁹³ Docrat, Besada, Cleary Daviud & Lund 2019

¹⁹⁴ Isola 2009

to guarantee the limited resources' effective and efficient use. In the same line of argument, the United Nations Human Rights (2018) point out that a vital component of a human right and a state's commitment to upholding human rights is collecting and disaggregating data that enables population group comparisons.¹⁹⁵ Disaggregated data can provide information on potential discrimination and inequity severity. The availability of data is crucial. As Galaitsi, Cegan, Volk, Joyner, Trump, and Linkov pointed out, policymakers must analyze the evidence to make decisions that will affect the public's health during the coronavirus pandemic that is already available.¹⁹⁶

It should be emphasized that without relevant and trustworthy data, policymakers would have difficulty formulating successful public policies that consider people with mental health needs. Therefore, the lack of data concerning mental health services harms patients and individuals suffering from mental health problems. The COVID-19 pandemic has not only had a disproportionate impact on mental health persons, and it has magnified existing violations of their rights. The lack of available data means that government is unable to deliver on its legal mandate and obligations. The government abuses human rights when it cannot fulfill its legal mandate and obligations.

One of the tenets of democracy is public participation and consultation. The lack of data demonstrates a lack of public participation and consultation, which in turn is in direct violation of the prescriptions stated in the Constitution of the country. Maphazi, Raga, Taylor, and Mayekiso's view that the need for enhanced community consultation and participation is clearly articulated in the Constitution of the Republic of South Africa, 1996 (Constitution).¹⁹⁷ The government becomes aware of the people's needs through public consultation and participation and can respond accordingly.

¹⁹⁵ UNHR 2018:8 chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.ohchr.org/sites/default/files/Documents/Issues/HRI/indicators/GuidanceNoteonApproachtoData.pdf

¹⁹⁶ Galaitsi, Cegan, Volk, Joyner, Trump & Linov 2021:

¹⁹⁷ Maphazi, Raga, Taylor & Mayekiso 2013:

4.4.3 Mental Health Programmes

One of how the government can promote and protect the rights of individuals suffering from mental health is by formulating programs to educate communities on the topic. There are a few reports in the public domain or on the Departments of Health website on the current actions, activities, or plans for tackling mental health during Covid-19 or post-Covid-19.

During the pandemic (Covid-19), the government developed an educational program to educate the public about the dangers of Covid-19. The programs were done by partnering with the private sector and civil society organizations through mass communication campaigns on good hygiene and effective prevention behaviours.¹⁹⁸ The message communicated was such:

- Wash frequently hands with soap and water or hand sanitizers for at least 20 seconds;
- Cover nose and mouth when coughing and sneezing with a tissue or flexed elbow;
- Avoiding close contact with anyone with cold or flu-like symptoms.

Furthermore, to close the gap in learner equity and inclusion, institutions ensure that learners' social and emotional needs are met and that the most vulnerable continue receiving extra services. However, this was a challenge for many due to the lockdown, which restricted free movement. Given the negative impact, it is understandable that most vulnerable learners did not have access to digital learning resources. Municipalities across the country have been on the frontline in the crisis response and in partnership with the education fraternity and civil society organizations to provide essential services to the vulnerable population.

4.4.4 Corruption as a human right violation

The Special Investigating Unit and the Health Sector Anti-Corruption Forum investigated numerous incidents of alleged corruption in provincial health departments. After being linked to the shady acquisition of a Covid-19-related communication services deal that

¹⁹⁸ <https://www.gov.za/speeches/statement-president-cyril-ramaphosa-measures-combat-covid-19-epidemic-15-mar-2020>.

resulted in the alleged misuse of ZAR150 million (more than US\$10 million), former health minister Zweli Mkhize resigned in August.

Corruption and human rights violations are social phenomena that involve the distribution of benefits among various groups of people and individuals. Corruption is also considered a violation of fundamental human rights in international law discourse. Corruption can devastate the availability, quality, and accessibility of goods and services related to human rights. Furthermore, it jeopardizes the operation and legitimacy of institutions and processes, the rule of law, and, ultimately, the State itself. Peters argues that clients and end users are frequently harmed by corruption in public procurement because they must pay higher prices or receive a product that is not worth the money.¹⁹⁹ After all, funds were diverted during the manufacturing process. From the standpoint of social human rights, whose proper fulfillment includes the element of 'affordability' (for example, the affordability of essential medicine as a component of the human right to health), the fact that bribery in procurement processes may cause the medicine to be more expensive could be viewed as a human rights violation.²⁰⁰

Africa Research Bulletin (2021) showed that the coronavirus pandemic exacerbated corruption in South Africa in 2020, exposing numerous flaws in the country's healthcare system. According to Aikins, South Africa's health minister was placed on leave at the time while irregular contracts worth \$10 million were investigated.²⁰¹ There was also public outrage in the country over the alleged inflation of government contracts worth \$900 million for medical supplies. There is also widespread concern that the public health sector has succumbed to political patronage and corruption, as evidenced most recently by the Special Investigations Unit (SIU) investigation into the irregular tendering of services from Digital Vibes, the subsequent resignation of health minister Dr. Zweli Mkhize, and the suspension of director-general Dr. Sandile Buthelezi.

¹⁹⁹ Peters 2019:

²⁰⁰ *Ibid*

²⁰¹ Aikins 2022

The obligation to protect under human rights law requires the State not only to protect individuals from the actions of other private individuals but also to reduce structural human rights risks involving the State's officials. Corruption is a constant structural threat to numerous human rights of people subject to the power of officials. As a result, in cases involving the State's complete inaction or inadequate anti-corruption measures, the State is held liable under international law for failing to fulfill its human rights obligations to prevent and protect against corruption. Drawing from a study recently conducted in Vietnam by Sharma and Singhal reports that the incidence of corruption and levels of mental health were found, which is regarded as one of the least transparent and most corrupt nations.²⁰² The latter instances of corruption prove that this creates stress and anxiety. Zhang argues that depression is significantly in danger due to perceptions of corruption, which can negatively affect mental health.²⁰³ On a psychological level, people will experience bad feelings due to the corruption perception. Higher perceptions of corruption may indicate a more unjust social environment, which is detrimental to people's health on a physiological level. However, the exact mechanism connecting depression with the impression of corruption is not yet fully known.²⁰⁴

4.4.5 Lack of infrastructure and funding

The lack of sufficient funding and facilities for mental health directly violates the State's obligation to uphold human rights for individuals with mental health. According to Emmet, most of South Africa was built before 1910.²⁰⁵ Although the SAHRC inquiry yielded an overall negative picture, there are significant differences in the availability, suitability, and condition of facilities from province to province. According to international best practices, governments should begin investing in community mental healthcare services and general hospital psychiatry while decreasing support for existing stand-alone hospitals. According to the South African Society of Psychiatrists, the country has a severe shortage of psychiatrists, and the limited community-based care available for people with psychosocial and intellectual disabilities is under-resourced. At the governance level,

²⁰² Sharma & Singhal 2021:126

²⁰³ Zhang 2022:9

²⁰⁴ *Ibid*

²⁰⁵ Emmet 2021:1

"dysfunctional or absent" mental health directors and review boards are joint, and there are few services for children and adolescents.

The SAHRC prioritized the implementation of the mental health policy framework by national and provincial governments. The commission proposed a budgeting approach that considers the prevalence of mental illness, with a particular emphasis on rural communities, to ensure that budgets are not concentrated in urban areas and are only directed at psychiatric facilities.

There were no fire alarms in any institutions inspected by the commission, and most lacked burglar bars on windows or security fencing. The commission was shown an isolation room for housing psychiatric patients at the new De Aar Hospital in the Northern Cape, where the air conditioner was broken, and the windows were not fitted with burglar bars, and this was the worst or lowest scoring during the inspection, according to the commission.²⁰⁶

In Limpopo, mental health patients were found in deplorable conditions, with no functional bathrooms and deteriorating showers. There were no doors in the bathrooms or showers. Similar conditions were discovered in the psychiatric section of Madadeni Hospital in KwaZulu-Natal, where patients were forced to shower and use bathrooms without privacy.²⁰⁷

Most hospitals visited by the Commission did not have dedicated wards for mental health patients, and there were insufficient beds in psychiatric hospitals across the country. The Kimberley Mental Health Hospital's chief executive confirmed that the hospital only operates with one wing due to staff and equipment shortages, including beds. The commission was informed that due to a lack of beds, it took an inordinate amount of time

²⁰⁶ South African Law Reform Commission 2021:chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.justice.gov.za/salrc/dpapers/dp154-prj141-Medico-Legal-Claims.pdf

²⁰⁷ *ibid*

to transfer psychiatric patients from the 72-hour observation wards to the mental hospital.²⁰⁸

According to a report by the Parliamentary monitoring group, the lack of resources for mental services is not limited to one province.²⁰⁹ A Parliamentary monitoring group report stated that the lack of resources for mental health services is not limited to one province.²¹⁰ The SAHRC paid particular attention to mental health patients incarcerated in prisons. According to information provided to the Commission, there were 4304 mental health care users in the correctional system in 2017.²¹¹ It has also been discovered that mental health services are insufficient in South Africa's criminal justice, forensic, and correctional systems. People with mental illnesses' human rights will continue to be ignored unless various government sectors buy-in and collaborate, and necessary investments in mental health will not be made.²¹² It has also been discovered that mental health services in South Africa are indigent within the criminal justice, forensic, and correctional systems. Without buy-in and collaboration from various government sectors, people with mental illnesses' human rights will continue to be ignored, and necessary investments in mental health will not be made. Mental health institutions in the Eastern Cape were still experiencing severe under-resourced during the pandemic when it most needed.²¹³ In a news report, the Health MEC Nomakhosazana Meth revealed that “there were only two psychiatrists employed in State hospitals in the Eastern Cape with one of these being an unfunded post. Also, there were only 13 psychiatrist nurses in the seven institutions catering to mental health patients in the province. About 125 of these posts are unfunded and vacant.”²¹⁴ Information such as the latter informed evidence that there is a failure or poor planning in infrastructure, and immediate action has to be implemented to avoid vulnerable citizens being treated in inhuman environments.

²⁰⁸ Emmet 2021:1

²⁰⁹ Parliamentary Monitoring Group report by Dunjwa 2018: <https://pmg.org.za/committee-meeting/26653/>

²¹⁰ Parliamentary Monitoring Group report by Dunjwa 2018: <https://pmg.org.za/committee-meeting/26653/>

²¹¹ *Ibid*

²¹² *Ibid*

²¹³ Matavire 2021: <https://health-e.org.za/2021/08/16/eastern-cape-mental-health-services-running-on-empty/>

²¹⁴ *Ibid*

4.4.6 Mental health and other issues

SA's commitment to human rights and the rights of asylum seekers and refugees makes it an appealing destination for people fleeing their home countries and seeking a more dignified and humane life. The African continent considers South Africa to have the most advanced economy, which has contributed to an exponential increase in the number of people seeking asylum from the continent and around the world.

The South African Refugees Act guarantees asylum seekers and refugees the right to work and study, as well as clinical services, life-saving treatment, and freedom of movement.²¹⁵ The lockdown measure negatively impacted the refugees, asylums, and undocumented migrants as many were left without a job, hungry, evicted from their homes, and trapped in dormitories or camps where no social distancing was impossible.²¹⁶ These conditions are a high risk of exploitation and abuse because of a lack of social support, such as providing primary health care and social services. The figure below presents the negative impact of the lack of resources on these people, including the SA nation.²¹⁷

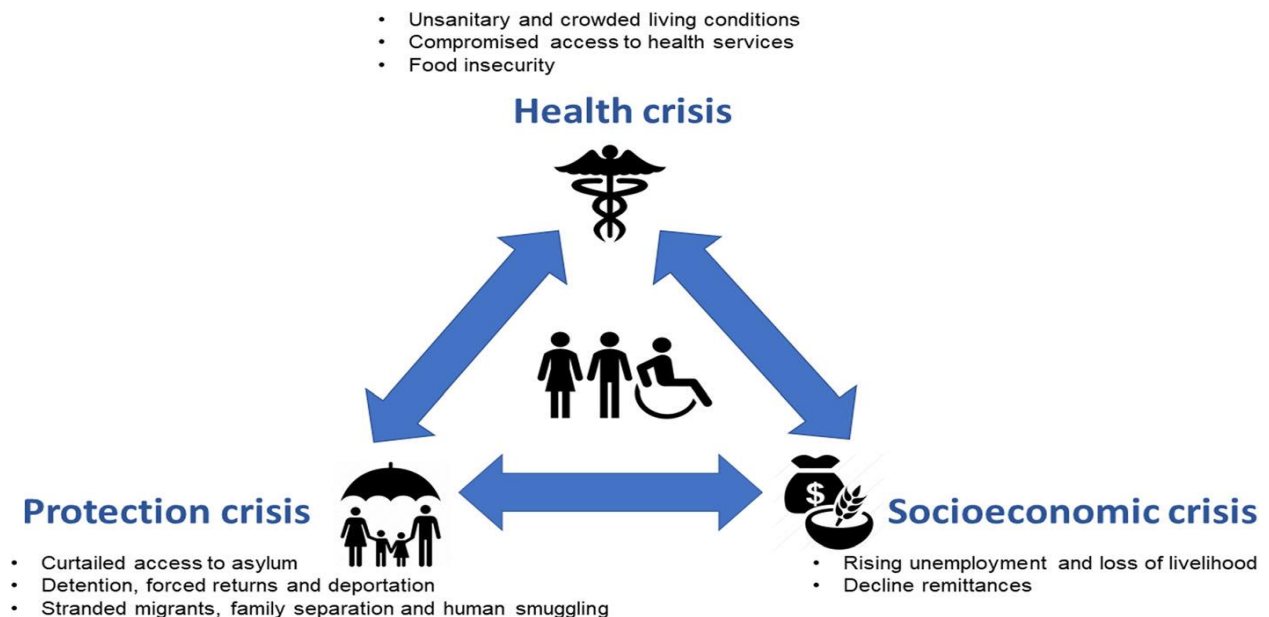


Figure 4 Crisis impacting foreign-born migrants – Adapted from United Nations

²¹⁵ Government Gazette 1998 Chapter 5, Section 27:19

²¹⁶ Mukumbang, Ambe & Adebisi 2020:3

²¹⁷ *Ibid*:3

The Social relief of Distress Grant was only provided to individuals with a South African Identity, and undocumented immigrants were not considered; consequently, it potentially increased their vulnerability regarding mental health and secondary health concerns of those already prone to mental health-related conditions.²¹⁸ According to Kruger, when someone suspected of having SARSCoV-2 symptoms refuses to take a test, an enforcement officer should apply to a magistrate for a warrant to compel such testing.²¹⁹ Unfortunately, this does not apply to undocumented migrants because, in most parts of South Africa, individuals must provide information on their 'nationality' and identification details to take a SARS-CoV-2 test. As a result, because COVID-19 is associated with clusters and outbreaks, early detection, testing, diagnosis, contact tracing, and seeking care for undocumented migrants become difficult, increasing the risk of outbreaks among migrants and the general population.²²⁰ Their inability to access testing, treatment and palliative measures implemented during the COVID-19 period will ultimately undermine the government's efforts to contain the virus's spread. Thus, the South African government failed in its obligation to protect these individuals from their legislature.

South Africa, as a country, is battling many socio-economic problems. Some of these issues contribute directly to mental health. In other words, failing to address these issues is a human right violation. In November 2017, the South African Human Rights Commission (SAHRC) convened a national consultative hearing on the status of mental health care in South Africa. Although the Esidimeni tragedy catalyzed it, the focus of the hearing was on capturing "*a picture of the lived experiences of all people with psychosocial and intellectual disabilities in South Africa*" and the impact of systemic, social, cultural, political, and economic concerns that affect mental health and the realization of human rights. The discussion below highlights the human rights violations and the Ombudsman's feedback on the investigation:²²¹

²¹⁸ Mukumbang, Ambe & Adebiyi 2020:4

²¹⁹ Kruger 2020:

²²⁰ *Ibid*

²²¹ SAHRC 2017: chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.sahrc.org.za/home/21/files/SAHRC%20Mental%20Health%20Report%20Final%2025032019.pdf

- First was the "*prolonged and systemic neglect of mental health at the level of policy implementation.*"

According to Article 1 of the UDHR, Article 3 of the CRPD, Article 5 of the African Charter, and Section 10 of the Constitution, everyone has a right to dignity. According to the African Charter, "*every individual shall have the right to respect the dignity inherent in a human being, as well as to the recognition of his legal status.*"²²² All forms of human exploitation and degradation, ruthless, inhuman, or degrading punishment and treatment, are prohibited. Unfortunately, some patients were forced to sleep on the floor, went hungry, and became dehydrated, depriving them of their dignity and subjecting them to cruel, inhumane, and degrading treatment in violation of the Convention Against Torture. Section 72 of the MHCA regulates the transfer of mentally ill patients. This means that patients should be transferred in a suitable and dignified manner. However, the investigation revealed that this was not the case. Several articles in the CRPD emphasize the dignity of people with mental disabilities. Article 19 establishes the right of people with mental disabilities to live in society alongside others. This aims to ensure the development and growth of people with mental disabilities in order for them to achieve self-worth and dignity. Furthermore, article 25 requires 'health professionals to provide care of the same quality to persons with disabilities as to others, raising awareness of the human rights, dignity, autonomy, and needs of persons with disabilities through training and the promulgation of ethical standards.' The GDoH, on the other hand, blatantly violated these patients' right to dignity by openly failing to follow ethical norms and standards.

- Secondly, the under-resourcing and lack of professional expertise in the sector resulted from "*system-wide failures to protect and promote the rights of this group.*"

Because health is an indispensable human right required for the realization of other human rights, such as life and dignity, every person "*is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity.*" The ICESCR contains the most comprehensive article on the right to health. According to ICESCR article 12.1, states recognize "*everyone is right to the highest attainable standard of*

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physical and mental health." The right to health is also recognized in articles 5(iv) and 14(b) of the International Convention on the Elimination of All Forms of Racial Discrimination. Regionally, the right to health is recognized in the African Charter (article 16). Nationally, the right to health is enshrined in Section 27 of the Bill of Rights as the right to "*healthcare, food, water, and social security.*" The South African state must gradually realize the right to health within its available resources. The ICESCR Committee on Economic, Social, and Cultural Rights provides a detailed account of what the right to health entails, and these can help improve a country's health system. These are availability, accessibility, acceptability, and quality.

Acceptability refers to healthcare facilities and services that uphold medical ethics while improving patients' health. There was a complete disregard for medical ethics values. The patients' transfer from LE facilities to under-resourced NGOs resulted in morbidity and mortality rather than an improvement in health status. The GDoH took no steps to ensure the acceptability of the NGOs. In terms of healthcare quality, principle 1(1) of the MI principles states that "*all persons have the right to the best available mental healthcare,*" while article 25(a) of the CRPD states that "*persons with mental illness should be provided with quality mental healthcare.*" Furthermore, section 66(b) of the MHCA states that quality treatment for mentally ill people is required. Unfortunately, the Act does not define what this quality treatment entails.

However, the investigation discovered that patients received "*substandard care.*" The investigation also discovered that several NGOs were residential properties (rather than healthcare facilities) and lacked the necessary infrastructure to house these patients. The NHA defines a health facility as "*a building or place designed to provide inpatient or outpatient treatment.*" The MHCA uses the exact definition. As a result, housing patients at these residential NGOs directly violated both Acts.

Furthermore, Section 24(b) of the Constitution states that "*everyone has the right to an environment that is not harmful to their health or wellbeing.*" The ombudsman's investigation discovered that the NGO environment was not conducive to patients' mental

health. Many NGOs lacked adequate security, placing patients in danger. Furthermore, many of the NGOs lacked the capacity, skills, and competence to care for mentally ill patients, which was a direct violation of section 6(1)(a) of the MHCA, which states that mental healthcare must be provided at health establishments within their scope of practice.

According to Article 3 of the UDHR, Article 10 of the ICESCR, Article 10 of the CRPD, Article 4 of the African Charter, and Section 11 of the Constitution, every human has a right to life. Regardless, the ombudsman's investigation concluded that patients died unlawfully and that their right to life was violated. While the right to health is contingent on the realization of other rights, there is a compelling case to be made that the right to life is contingent on the right to health and dignity. To illustrate, article 10 of the CRPD, on which South Africa based its "White Paper," states that "*state parties reaffirm that every human being has the inherent right to life and shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others.*" The key concept in this affirmation takes all the necessary measures, including realizing the rights to health and dignity. The Gauteng Department of Health (GdoH) did not take all the necessary steps to ensure these patients' right to life. Perhaps their unjust deaths could have been avoided if it had done so.

There is a chasm between policy development and implementation. The lack of a sustainable funding model for mental health perpetuates the lack of mental health services because there is no clear funding source for implementing the policies above and plans. Furthermore, while South Africa has made some progress in legislation and the provision of mental health care services compared to other African countries, the ratio of physical/biological to psychiatric/psychological health care remains unbalanced.²²³ Burns describes the disparity in physical and mental health services as a violation of human rights. Indeed, mental health treatment in South Africa violates human rights and

²²³ Marais & Petersen 2015
Petersen et al., 2017

disregards the lives of those suffering from mental illnesses.²²⁴ It borders on ableism and a lack of empathy for people who are mentally ill. According to Marais et al., the inadequacy and scarcity of mental health care services may reflect (1) the exclusion of mental health practitioners and service users from the consultative process that leads to policy development and (2) limitations in the implementation of experiential knowledge-informed policies.²²⁵ Furthermore, other policy proposals and academic research have documented the mental health care service gap in South Africa.²²⁶

4.5 Conclusion

From the researchers' perspective, the above discussions highlight the government's failure to implement necessary constraints within mental health services. Nonetheless, there was no dynamic understanding of human rights concerning health, health services, and epidemics within the government or their advisors, which generally excluded civil society and human rights activists.

When people are exposed to trauma for which they are unprepared, they are forced to act conversely or cannot take action that violates their moral code. These challenges, typically observed in military contexts, have been faced by healthcare personnel during the COVID-19 pandemic, which has necessitated intimidating decisions about prioritizing scarce or insufficient resources, potentially resulting in deaths that would not have occurred under normal circumstances.

South Africa has adequate legislative tools and policies, regardless of how complex the situation may be. However, gaps exist in the implementation thereof. The final chapter will elucidate the possible and feasible recommendations that can be made to improve mental health service responses and promote the rights of individuals.

²²⁴ Burnes 2011

²²⁵ Marais et al. 2020:

²²⁶ Burns 2011

October 2019

Pillay 2019

Pillay & Barnes 2020

SAHRC 2019

WHO 2017

CHAPTER FIVE

SUMMARY, FINDINGS, RECOMMENDATIONS, AND CONCLUSION

5.1 Introduction

This study addressed the gap in South Africa that explores a human rights analysis facing challenges in mental health services during COVID-19. Various facets were explored in the study, including the National Mental Health Policy Framework (Legislation) and the impact of Human rights in South Africa. The challenges prevalent in mental health care delivery were identified, and human rights violations were discussed. The current practice methods were highlighted for recommendations toward implementing the Legislation. The researcher aimed that findings contribute to the decision-makers and human rights advocates finding ways to cope with the various effects stemming from COVID-19.

5.2 Key Findings

South Africans' mental health has deteriorated over the past year, 2020/1, as a result of COVID-19. The situation worsens as the country continues suffering the pandemic's socioeconomic consequences. One of the ways to solve the issue, the government, through the Department of Health, has to organize different summits to tackle the issue. The summits provide an essential platform for the department to engage stakeholders in mental health, evaluate progress toward transforming this work area, and identify critical challenges to be prioritized in reorganizing and transforming the healthcare system. The Covid-19 pandemic has led to a depressed society where the number of individuals suffering and seeking mental health services increased dramatically. The study has identified in chapter two that South African mental health is highly linked to the socio-historical context of the country that can, to a certain extent, be seen and add to the deprivation of the realization of Human rights.

Moreover, the study argues that certain human rights principles guide mental health. The study established the universality and inalienability of the following principles; indivisibility, interdependence and interrelatedness, equality and non-discrimination, participation and inclusion, accountability, and the rule of law. Mental health care has encountered

numerous challenges pre-Covid-19 and during the Covid-19 period, such as the components of preparedness for the pandemic for effective service delivery.²²⁷ One of the main challenges of mental health in South Africa is that mental health care has been severely under-resourced. However, the underfunding of mental health is not unique to South Africa, as many countries worldwide face similar problems. The South African government has been compelled to make reprioritizations across various health spending areas since the Supplementary Budget of 2020 to support the COVID-19 response.

At the height of the Covid-19 pandemic, access to mental health facilities was a significant challenge. While essential services, including mental health care, were provided and accessible during the lockdown period, as stipulated by the government, some mental health care users could not do so due to the limitations and risks posed by physical contact and in-person consultations.

The right to health is enshrined in the South African Constitution of the Republic of South Africa of 1996. Section 27 of the Constitution provides everyone the right to access health care services, including reproductive health care services, and no one may be refused emergency medical treatment. In other words, international and local laws recognize individuals' right to mental health.

The national laws covering mental health include the Mental Health Care Act 2002. Under international laws, the country is guided by the UN charters and international human rights instruments such as the Universal Declaration of Human Rights (UDHR) 1948, the International Covenant on Economic, Social and Cultural Rights, and ICESCR (1966), amongst others. In addition, the study has demonstrated that the government used the SIRACUSA principles when implementing the Covid-19 lockdowns to combat the virus. However, this led to other human rights violations, such as corruption and police brutality, directly affecting individuals' mental health.

²²⁷ Vadivel R, Shoib S, El Halabi S, El Hayek S, Essam L, Gashi Bytyçi D, Karaliuniene R, Schuh Teixeira AL, Nagendrappa S, Ramalho R, Ransing R, Pereira-Sanchez V, Jatchavala C, Adiukwu FN, Kudva Kundadak G 2021:2

According to the study's findings, South Africa lacks mental health infrastructure. South Africa has 22 such institutions, most built before 1910. There are significant differences between provinces regarding facility availability, suitability, and condition. According to international best practices, governments should begin investing in community mental healthcare services and general hospital psychiatry while decreasing support for existing stand-alone hospitals. There is a lack of data on mental health patients in the country. Collecting data and statistics regarding mental health is crucial to know how many people require mental health services and what services to provide. The use of statistics helps the government with making informed decisions that will be able to respond to the need of the communities.

5.3 Recommendations

From the findings obtained in this study, the following pointers have been recommended: The study recommends that more human rights programs be visible so that any misappropriation of resources or services may be recorded. The findings above clearly show that the government has not implemented mental health programs, whether pre-Covid or post-Covid-19. As this pandemic affected mental health care delivery because of the redeployment of practitioners and resources, there is a need to review more practical approaches for adequate care and service delivery. Below are a few of the activities or programs to be delivered:

- Telepsychiatry should be developed through a government-supported service platform centered on community health service centers to improve access to psychiatric care, particularly among vulnerable populations (e.g., the elderly). However, significant barriers to telepsychiatry services in LMICs include the digital divide, access to marginalized populations, and poverty. This may impact the viability and acceptability of telepsychiatry in many countries. Given this challenge, healthcare professionals must reach out to patients and strive for equitable access to telepsychiatric facilities.
- Infodemic management - To combat the spread of fake news, the anti-vaccine movement, and polarizing content, more stringent regulation of social media

companies by non-partisan, non-corporate, global regulators is required. By developing guidelines for responsible media reporting, all countries should take stringent steps toward infodemic management in General Psychiatry. Furthermore, infoveillance (information monitoring), eHealth literacy and capacity building, knowledge refinement, and accurate and timely knowledge translation should be encouraged.

- Integrative care - National public health policies should be designed to provide integrated mental health care in settings such as hospitals, primary care services, communities, schools, universities, colleges, and workplaces. Formalizing liaison between these settings and mental health services would aid in the timely identification and holistically addressing emerging mental health needs. Creating support groups, screening at-risk groups, providing peer counseling services, establishing dedicated crisis helplines, preparing long-term plans, and expanding support services can all help to facilitate early access to mental health needs.
- Community mental health services should be prepared to screen and identify at-risk individuals, provide psychological first aid, and facilitate referral to appropriate services. Primary care providers and organizational gatekeepers (pharmacists, geriatric caregivers, and schoolteachers) should be trained to identify at-risk individuals and refer them to appropriate evaluation and treatment.
- Human capital, education, and training - The current redeployment of MHPs in the COVID-19 setting and potential burnout among MHPs is affecting preparations for providing mental health services in the post-pandemic era. Policymakers and stakeholders should prioritize this. In many countries (including India), grassroots medical staff (Accredited Social Health Activists- ASHA, teachers) play an essential role in COVID-19 pre-screening and triage, door-to-door visits, follow-up, and on-site screening. As a result, grassroots workers must be trained to recognize and manage pandemic-related psychiatric and psychosocial issues.
- Develop guidelines and protocols - Many people have faced similar health risks, isolation, grief, and economic uncertainty, both individually and as members of families. As a result, specific common themes should be used to develop guidelines for improving access to care.

- Assessment and intervention - Using a toolkit, stepped care, or matched care model through primary care physicians can improve post-pandemic mental health service coverage by allowing them to manage common mental disorders of mild severity.
- Suicide prevention - In anticipation of increased suicide rates, efforts should be made to limit access to means (e.g., stricter gun control) and improve collaboration with suicide prevention organizations, as well as global decriminalization of suicide/attempts (s). Furthermore, early detection and treatment of mental illnesses should be encouraged. Research Prospective cohort studies should be conducted to identify risk factors and levels of exposure, track outcomes, and compare outcomes across subgroups. These studies are critical for tracking the effectiveness of various interventions and strategies. Discrimination and stigma Interventions are required to reduce stigma and discrimination against minorities and vulnerable groups and inform policy changes. General and specific interventions should focus on identifying drivers (e.g., misinformation) and facilitators (e.g., lack of regulations) and intersecting factors (e.g., occupations such as healthcare workers) towards reducing stigma and discrimination.
- Services and networks - A global network of MHPs should be established in collaboration with the World Health Organization (WHO) to facilitate sharing of research and clinical practice paradigms in the post-COVID-19 era. This network should focus on fostering resilience in both the community and the individual.

Secondly, the finding is that there were no sufficient matters reported and documented due to people not being well informed of what to report. The findings highlight that the legislation protecting mental healthcare is not binding to conform to or identify human rights violations. Therefore, the South African government should provide a budget that will be used by the South African Human Rights Commission and other Human rights NGOs for capacity building focusing on human rights in the South African community. If this is done, more valid data will be available. For that, there is a need to investigate how many resources are needed to support mental health care, including individuals in all areas needing the services.

Furthermore, the study recommends that the South African government strengthen its institutions to fight human rights violations such as corruption which impedes the government's ability to deliver services such as mental health programs. Institutions such as the South African police, the prosecuting authorities, or any other independent body charged with fighting corruption.

Access to mental healthcare facilities will be limited in the post-pandemic era due to a lack of preparedness, increased prevalence of mental health issues, overburdened mental health services, and interrupted mental health services, particularly in LMICs. COVID-19 is currently being managed in several psychiatric facilities and outpatient departments. As a result, people suffering from mental illnesses may avoid seeking help from these services out of fear of infection. Many pharmaceutical companies have shifted their focus to developing COVID-19-related drugs, vaccines, and preventive kits (sanitizers), which may impede the production of psychopharmacological drugs. Perceived job insecurity, financial difficulties, and unemployment increase the risk of psychiatric disorders and are significant barriers to mental healthcare. The country lacks mental health infrastructure, contributing to the lack of data. Therefore, this study recommends collecting data through different means, such as hospitals, clinics, and other mental health facilities.

Moreover, this will require the government to invest more resources in mental health services. The study recommends increased funding to eliminate medication stock-outs, long waiting lists, staff shortages, and limited physical infrastructure for more ward space and beds. National and provincial governments must ensure that the most recent National Mental Health Policy Framework and Strategic Plan are implemented and followed. Such evaluations are required to track progress and ensure accountability.

Lastly, it is a recommendation for further study concerning this topic as human research in the form of a comparison of statistics. There is a need for more reports specifically related to mental healthcare as most report speaks of public healthcare, making the

research difficult to analyze only mental healthcare challenges. This note that the country lacks resources to cater to mental healthcare.

5.4 Possible Future research

There is a need for future research on the link between Human rights and mental health services during a pandemic. This study was conducted as desktop research. Therefore, there is a need to conduct more in-depth research with data collected from various participants such as doctors, nurses, government officials, individuals, and others.

5.5 Concluding statement

The risk of new virus pandemics is likely to increase due to global population growth, urbanization, and the frequency of international travel and live animal markets in densely populated areas. The European Committee of Social Rights' Declaration on the right to health in times of pandemic builds on the solid international legal framework for the right to health and provides an encouraging basis for further development.

This study has analyzed South African human rights violations during the COVID-19 pandemic and identified issues that challenged mental health care at such an extraordinary time. We argue that the current right to health is insufficient to address these issues. The current South African constitution is at odds with the international human rights framework. However, states' obligations must be clarified to adapt to public mental health care responses during a pandemic. Simultaneously, public health documents on pandemic preparedness alone are not enough to protect everyone's right to health. We offer some recommendations for this.

Many deaths were caused by the COVID-19 pandemic that could have been prevented had there been preparedness with rights-based solid regulations. These are essential lessons to learn, and the human rights community has a critical role in ensuring that responses to pandemics in the future are grounded in human rights law.

COVID -19 is a historic global threat, and human rights must be at the heart of the global response because states have legally binding obligations to do so, and there is evidence that human rights-based policies strengthen public mental health services. In response to COVID-19, governments must enact legislation that is proportionate, necessary, and non-discriminatory toward the most vulnerable societies.

Furthermore, the invisibility of human rights that the pandemic underscores the need for more effective coordination within an isolated human rights community. Secondly, governments must be open and transparent and ensure participation so people can be held accountable in decision-making. Finally, global resources for augmentation and mental health care must be accessible worldwide. COVID-19 underscores those human rights fundamental to effective global and public health. The scale of this crisis provides an opportunity to radically rethink governmental obligations focussed on the protection of health systems and preparation for the future.

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