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Gate-keeping, Refugees and Ethics

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A Research Report submitted to the Faculty of Humanities,

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requirements of the Degree of Master of Arts, Applied Ethics for Professionals.

Johannesburg, 2017

ABSTRACT

Many asylum seekers and refugees in South Africa reportedly find it difficult to access basic health care services. The issue about foreign nationals in relation to health care can be considered from different angles. The concept of access, though, points to gate-keeping. Gate-keeping is the practice that guides decision making about who has access to what and to what extent they might enjoy benefits. In this essay, the question of whether gate-keeping is a morally justifiable practice in South Africa in relation to asylum seekers and refugees' right to basic health care services is explored. It is concluded that carefully considered and consistently implemented gate-keeping might be a morally justifiable practice that could contribute to ensuring that resources are distributed fairly. It is also argued that the kind of gate-keeping often observed is inconsistent with human rights and *Ubuntu* precepts. These moral frameworks seem to be the main ones shaping the view of most South Africans as well as our institutional arrangements. Considering the current South African context in which asylum seekers and refugees have difficulty in accessing basic health care services, patriotic bias claims are considered. However, it is concluded that partiality towards compatriots ought not to hold sway when any human being's basic needs are at stake.

DECLARATION

I declare that this research report is my own unaided work. It is submitted for the Degree of Master of Arts, Applied Ethics for Professionals, in the University of the Witwatersrand, Johannesburg. It has not been submitted before for any other degree or examination in any other university.

_____

Zelda Kruger

21 February 2017

ACKNOWLEDGEMENTS

Gratitude goes to Dr Brian Penrose for his guidance throughout the Applied Ethics for Professionals Programme and supervision of this essay. His philosophy brilliance, academic rigour and humanness stretch and inspire me.

Thank you to colleagues who shared insights that enriched my thinking about the essay topic. In particular, thank you to Yana van Leeve and Mpumi Zondi who consulted with me during the exploratory phase of this essay, as well as Johanna Kistner and Liebe Kellen.

Appreciation goes to Justice Edwin Cameron for his encouragement and support throughout the essay writing process.

Without my husband, Danie's, understanding and support of who I am and what is important to me, I would not have been able to engage in and complete the AEP academic venture. I am deeply grateful for his wisdom, care and patience.

I dedicate this work to my sons, Lucas and Daniël, who are a daily source joy, meaning and inspiration.

Soli Deo Gloria.

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1. Introduction

At the time of writing this research essay the 'refugee crisis' draws much attention in different parts of the world. Including war conditions, political instability, dire economic conditions and factionalism, peoples from Syria, Pakistan, Somalia, Nigeria and many more leave their homelands in search of safety and a better future. Perceivably more affluent countries, Western countries in particular, are sought out by migrants. The magnitude of the inflow of migrants in countries calls to account (willing and unwilling) host countries' ideology and practical implementation concerning human rights matters. These challenges span emotions evoked by, for instance, the photograph of the lifeless body of three year old Aylan Kurdi, from Syria, who drowned as his family tried to reach Europe by boat[1], or the outrage following sexual attacks on German women in December 2015 by immunity-claiming migrants[2]. Host countries are compelled to examine their stance on international relations with states from which migrants flee. They also need to make decisions about the distribution of resources, customarily reserved for their own citizens, to large numbers of foreigners. Questions such as 'how much of what is ours are we prepared to share?' and 'what is our responsibility towards uninvited others who make our country their home?' become apparent in the choices made by those in government and reflect in the sentiments of citizens.

[1] Helena Smith, "Shocking images of drowned Syrian boy show tragic plight of refugees", *The Guardian*, 2 September 2015. Available at: http://www.theguardian.com/world/2015/sep/02/shocking-image-of-drowned-syrian-boy-shows-tragic-plight-of-refugees

[2] Damine McGuinnes, "Germany shocked by Cologne New Year gang assaults on women", *BBC News*, 5 January 2016. Available at: http://www.bbc.com/news/world-europe-35231046

Similarly, South Africa has, and continues to, become the destination of citizens from a variety of other African countries. The narratives of many individuals and families migrating to South Africa highlight the horror of factional fighting in some African countries and gross human rights violations perpetrated in politically and economically unstable circumstances. Some of the affected individuals and families make their way to South Africa for refuge and in hope of a better future[3].

The South African Government has a policy of integration in regard to non-nationals[4] and the South African Constitution[5] encapsulates the spirit of respect for the dignity of each human being. However, persons from other African countries do not necessarily experience South Africa as a place where their dignity and basic human rights are acknowledged, despite the South African Government's policy of integration[6]. Brutal examples, as quoted in the media in 2000, are South African Police officers setting dogs on migrant men[7], and the stabbing (19 April 2015) of Emmanuel Sithole from Mozambique in Alexandra during a time of heightened xenophobic violence[8].

A particular aspect of asylum seeker and refugee experience in South Africa is the focus of this essay and that is their apparent difficulty in accessing basic health care.

[3] Roderick Mupedziswa, "'All That Glitters Is Not Gold': Johannesburg and Migrant Access to Social Services", In *Quality of Life and the Millennium Challenge,* eds. V. Møller and D. Huschka (Springer Science & Business Media 2009): pp.139-158, p.139.
[4] Ndumiso Ntshinga, "Statement by South Africa on recent attacks on foreign nationals in South Africa and prevention measures for the future", 30 April 2015. Available at: http://www.dfa.gov.za/docs/speeches/2015/ntsh0430.htm
[5] *Constitution of the Republic of South Africa*. Act 200 of 1993.
[6] Ntshinga, "Statement by South Africa on recent attacks on foreign nationals in South Africa and prevention measures for the future".
[7] Jonathan Crush, "The Dark Side of Democracy: Migration, Xenophobia and Human Rights in South Africa", *International Migration* 38/6 (2000): pp.103-133, p103.
[8] Beauregard Tromp and James Oatway, "The brutal death of Emmanuel Sithole", *Sunday Times*, 19 April 2015. Available at: http://www.timeslive.co.za/local/2015/04/19/the-brutal-death-of-emmanuel-sithole1

In South Africa this happens despite our permissive constitutional undertakings as well as the *Refugees Act* 130 of 1998 directive that a refugee "is entitled to the same health services … which inhabitants of the Republic receive from time to time"[9].

The situation appears to have many sides. On the one hand, there may be a self-protective sentiment, described by Jonathan Crush as "… a citizenry that feels under siege from the outside"[10]. On the other hand, some government department practices and/or internal regulations[11] appear to be in conflict with the South African Constitution and the *Refugees Act*. As a result, refugees and asylum seekers might claim services, for instance at a public hospital, but be denied such services due to a departmental instruction, for example, to pay fees because of their non-national status in order to receive treatment[12]. In these instances, the practice of gate-keeping becomes pertinent.

The focus of this essay is to explore the ethical implications of the role of gate-keeping in relation to refugee and asylum seeker need for basic health care in South Africa. The plight of undocumented migrants is perceivably as dire, if not more so, concerning access to basic health care. However, the scope of the essay is narrowed down to foreigners who are recognised by South African laws. Limiting the scope in this way is not intended to negate the needs of probably one of the most vulnerable groups in our society – those who have no standing in accessing any kind of service, who do not legally 'exist'.

[9] *Refugees Act* 130 of 1998. Chapter 5(g). Available at: http://www.saflii.org/za/legis/consol_act/ra199899.pdf
[10] Crush, "The Dark Side of Democracy: Migration, Xenophobia and Human Rights in South Africa", p.110.
[11] Jo Vearey and Marlise Richter, "Challenges to the successful implementation of policy to protect the right of access to health for all in South Africa", *Report on behalf of Migrant Health Forum* (3 June 2008): p.6. Available at: http://cormsa.org.za/wp-content/uploads/Research/Access/MigrantGautengDoH.pdf
[12] Ibid., p.6.

Moreover, it could rightfully be argued that South African citizens face the same kind of obstacles in accessing basic health care as do many refugees and asylum seekers. The struggle of many South African citizens who are still, from a living conditions perspective, arguably no better off than prior to 1994 is recognised and considered as important a field of study. However, considering the span of this essay, the focus will be limited to asylum seekers and refugees.

2. Essay question and its relevance

Even though moral unease exists about the impact of gate-keeping on the dignity of asylum seekers and refugees in South Africa, particularly by those who work in the Non-Governmental Organisation sector and are dedicated to promote human rights awareness, sufficient ethical enquiry in a more formal sense appears to be lacking. The importance of exploring the question of whether gate-keeping is a morally justifiable practice in South Africa in relation to refugee and asylum seeker rights to basic health care is to bring into focus both the potentially legitimate role as well as the possibly unjustifiable nature of some forms of gate-keeping. Whilst the ethical deliberation in this report is of an academic nature, the need to explore the issue is important because of the stories of many individuals who seem to be adversely affected as a result of arguably unjustifiable gate-keeping in the health care sector. Yvette Mbayo-Ndaya's story alludes to this.

> It is lunchtime in the bustling neighbourhood of Malvern in downtown Johannesburg. On a main street lined with shops a man stops in his tracks. He picks up several lollipops from a make-shift stall in front of one of the

> shops and gives the money to the vendor, a tired-looking woman who moves slowly, dragging her feet with every step.
>
> "I am sick," says Yvette Mbayo-Ndaya. I have high blood pressure. I have diabetes. I have kidney failure." … "I get my high blood and diabetes treatment from the Johannesburg hospital [Charlotte Maxeke]. But for the kidney they never give me medication. They say 'there is no medication for foreigners'[13].

The story of Yvette Mbayo-Ndaya, a migrant from the DRC[14], echoes the narratives of many foreign nationals who try to access health care services in South Africa. A variety of obstacles seem to be experienced. These include institutional directives that obstruct access to health care services, a blank refusal of services without any explanation given, a shouting down in the clinic reception area by the official calling a person a *makwerekwere* – derogatory term for an "African foreign national"[15] - needing to go back to where she came from, or perhaps an official demanding an 'unofficial' fee which presumably goes to their own pocket. Such stories illustrate disregard for the spirit of our Constitution that advocates respect of every person's basic human rights, the *Ubuntu* principles of acknowledging the dignity of persons, as well as the *Refugees Act* instructing access to basic health care. Ethical enquiry to prompt awareness, debate and, hopefully, a deeper understanding of the variables at play, seems to be called for.

[13] M & G Centre for Health Journalism, Bhekisisa, "SA is no haven for sick refugees", *Mail and Guardian*, May 13 to 19 2016.
[14] Ibid.
[15] David Mario Matsinhe, "Africa's Fear of Itself: the ideology of Makwerewere in South Africa", Third World Quarterly 32/2 (2011): pp. 295-313, p.302. Available at http://www.Academia.edu/804853/Africas_fear_of_itself_The _ideology_of_Makwerekwere_in_South Africa

The essay question, when contextually placed, requires exploration of four areas linked to an area of philosophical literature. The first area is the nature and ethics of gate-keeping. Secondly, the concept of human rights, originally stemming from Western moral philosophies, needs exploration. Thirdly, in an African context, *Ubuntu* is a framework according to which morality could be defined and will therefore be explored in relation to the essay question. The fourth area of inquiry concerns patriotic bias, looking at whether it can be ethically justified that South Africans are given preference with regards to access to health care services.

Drawing support from these areas of enquiry, it is concluded that gate-keeping can be a morally justifiable practice in South Africa in relation to the right of refugees and asylum seekers to basic health care. However, gate-keeping is a morally justifiable practice, if and only if, the ethics that determine the kind of gate-keeping practiced does not deny the dignity and basic human rights of people. Furthermore, it is asserted that legitimate patriotic bias is not sufficient, morally speaking, to justify reserving health care resources for South African compatriots when basic human rights concerns are at stake.

3. Gate-keeping

The practice of gatekeeping seems to be more entrenched in the way humans organise themselves than perhaps consciously recognised. Notice, for instance, the way young children behave on a school playground, giving access to some to join a group of friends and refusing association to others. Other examples include a private school for boys where entry is granted with fewer obstacles to those whose fathers

are part of the institution's history and support base, or Muslim, Jewish and Christian parents refusing marriage between their child and a person from another religion. These examples illustrate intuitive gate-keeping responses in social and cultural situations, where explicit or written rules do not necessarily apply, yet where its precepts are nevertheless practiced.

The kind of gate-keeping relevant to the essay topic, though, is the sort where it is implicit to, or consciously built into, societal, institutional/organisational, and role-related practice. Refugees and asylum seekers, as a category of people, seek access to health care services from a democratic state with a human rights constitution. When they indicate that their access to such services is obstructed, questions might be raised about the sort of, and rationale for, the gate-keeping practiced. Are they denied access to basic health care services because they do not have a right to such services, and/or are they refused services because of variables on an institutional/organisational level, for instance, scarcity of resources and that available resources are reserved for those who might be seen to be more eligible based on compatriot status, and/or are they confronted with officials who exercise mandated or self-claimed exclusionary powers?

In this essay it is argued that the story of Yvette Mbayo-Ndaya, and others who share her experiences, illustrate contradictions in the gate-keeping practices across the levels mentioned. On the one hand our human rights Constitution and the laws that follow therefrom require our government to more or less open the gates and meet the basic health care needs of South African citizens as well as refugees and asylum seekers. On the other hand, the institutions where access is sought might

close the gates to asylum seekers and refugees. Moreover, an institution's policy might permit access to basic health care, but the official on duty might claim discretionary powers and refuse access to some refugees and asylum seekers. Ethical questions about what is right, and right to who, under what circumstances and at what cost, abound in such discourse. The stance taken in this essay is that, as it concerns basic health care services and refugees and asylum seekers, gate-keeping practices ought to withstand the tests of respect for basic human rights and dignity of all persons. This will be argued for more specifically later. So far, however, the nature of the kind of gate-keeping relevant to the argument has not been examined. This is done in the discussion that follows.

As an immediate reaction, one might not think about gate-keeping in relation to our Constitution and that legislation is designed to fulfil gate-keeping functions. Therefore, when asked why we have a Constitution, a person might not necessarily explain its significance by directly referring to the notion of gate-keeping. Consider the following line of thinking: the South African Constitution is a document that promotes a human rights ethos in which human dignity is central. As the highest and overarching rule of law in South Africa, legislation and those who implement laws should reflect respect for human rights[16]. Following on, consider the underlying gate-keeping principle in what Pierre de Vos and Warren Freedman say about the Bill of Rights:

> When confronted with the question of whether law or conduct is in breach of the Bill of Rights, … a court must ask whether the person who has been infringed is entitled to the protection provided by the Bill of Rights and whether

[16] Pierre de Vos & Warren Freedman, "Introduction". *South African Constitutional Law*, eds. Pierre de Vos & Warren Freedman (Cape Town: Oxford University Press 2014): pp.3-33, p.26.

the person or organisation which wishes to approach the court has **standing** to bring the case. Whilst most of the rights in the Bill of Rights are granted to everyone, including non-citizens, some are specifically restricted[17].

It seems that the role attributed to the Constitution and laws that follow from such a stance is to exercise criteria-based discretion about who has rights and to build in the condition that some do not have certain rights in certain instances. This seems to indicate a gate-keeping role. It might be argued that the South African Constitution was not developed expressly to fulfil a gate-keeping function and this might be so. At the same time it appears that such a role is implied in that the Constitution grants rights or opens the gate and, in some instances, closes the gates. Perhaps by using a historical example the point might be illustrated more strongly. During the years of apartheid in South Africa, the laws of our country opened the gates and granted rights and opportunities to white South Africans. By the same token, laws kept rights and opportunities out of reach of all those who were not considered white South Africans. The gate-keeping function of the apartheid laws is clear. Coming back to the essay topic, I am suggesting that our Constitution and the ensuing laws serve an implicit gate-keeping function.

Following on and moving beyond the abstract sphere of our Constitution and laws, gate-keeping is evident on an institutional/organisational level. In the health care sector, certain institutions provide services specifically to certain groups of people. For example, people living with HIV, diabetes or terminally ill cancer patients who are

[17] Pierre de Vos, "Introduction to an application of the Bill of Rights". *South African Constitutional Law*, eds. Pierre de Vos & Warren Freedman (Cape Town: Oxford University Press): pp.319-345, pp.319-320.

in need of palliative care. In each of these instances criteria are set for those who might be granted access and those might not.

Our Constitution and the ensuing laws create a framework that guides the gate-keeping criteria of institutions, for instance about who should have access to basic health care services. There could thus be a justifiable expectation that policy makers of departments and institutions of the State ought to design gate-keeping practices that reflect what the Constitution stands for. Therefore, if our Constitution and the legislation relevant to asylum seekers and refugees grant basic health care rights to them, the State departments and institutions should provide these services.

However, moving from the abstract or aspirational, the narratives of persons like Yvette Mbayo-Ndaya illustrate that it might be naïve to think that all departments and institutions automatically implement the aspirations of our Constitution. One ought not to respond with premature judgement, though, about the kind of exclusionary gate-keeping practices evident at times. Dilemmas spanning political, economic and ethical spheres are plentiful in this arena. For now, however, it is asserted that our State departments and institutions ought to follow through with the gate-keeping role implied by the principles of our Constitution and relevant legislation. At the very least, our institutions ought to reflect recognition of human dignity through the kind of gate-keeping practices put in place, even when meeting the basic needs of all who are needy might be a very difficult or perhaps impossible undertaking.

Turning attention to the gate-keeping function as it plays out more specifically within institutions, the role of the individual who exercises the gate-keeping function

warrants consideration. Mamadi Corra and David Willer describe gate-keepers as those who "control access to 'benefits' valued by others who are their 'clients'" and highlight that the gate-keeper does not "own" that which she controls[18]. As such, "[i]t is not the nature of the benefit that determines whether an instance is gatekeeping, but its externality to the gate-keeper and the client-gate-keeper relation"[19].

Gate-keepers typically fulfil a two-fold role. They firstly decide who has access to certain services, benefits or information. Secondly, they exercise judgement in determining the extent to which others will be given access to certain services, benefits or information[20]. The power of the gate-keeper thus lies in deciding who has access to something as well as the extent of benefit afforded to those who are allowed in.

Building on this understanding of what gate-keeping is about, a kind of gate-keeping is described by John R. Boatright. The gate-keepers he refers to are third parties such as lawyers, accountants and bankers who "use their specialised knowledge and skills, as well as their reputation, on behalf of clients"[21]. Boatright's assertion is "that an intermediary has an obligation, at a minimum, to avoid being complicit in the wrongdoing of a client"[22]. The core issue that Boatright seems to address is that intermediaries (gate-keepers), in the third party sense, should take steps to ensure that measures are put in place to discourage unethical conduct by any of the role

[18] Mamadi Corra & David Willer, "The Gatekeeper", *Sociological Theory* 20/1 (2002): pp.180-207, p.160.
[19] Ibid., p.180.
[20] Roger Homan, "The Principle of Assumed Consent: The Ethics of Gatekeeping", *Journal of Philosophy of Education* 35/3 (2001): pp.329-343, p.332.
[21] John Boatright, "Reluctant Guardians: The Moral Responsibility of Gatekeepers", *Business Ethics Quarterly* 7/4 (2007): pp.613-632, p.613.
[22] Ibid., p.614.

players[23]. In some sense the NGO's who are raising the gate-keeping ethics concerning basic health care services by asylum seekers and refugees are fulfilling such a third party function, although they do not have formal power within the system in the way that Boatright refers to.

In addition to the implicit gate-keeping role of our Constitution and laws, the kind of gate-keeping more relevant to the essay discussion concerns the role played by those within institutions. They are not third party, but direct role players. Firstly, there is the management of health care services, those who write policies and decide how individual access to health care services should be directed. Secondly, there are the health care service providers, such as doctors and nurses who are expected to fulfil their role within the institution's policies. They are also bound by professional ethics that might conflict with the gate-keeping directives of the institution. Thirdly, there is the official who might not necessarily be a health care professional, but is mandated to follow through with the policy of the organisation. Such a person might, for instance, be the administrator at the reception desk who has some control over who gets a 'number' ticket and may wait in the queue to be called for a consultation.

Cutting across these three potential roles, the gate-keeping function can have legitimacy as is illustrated in a discussion by Edmund D Pellegrino. He talks about the weighing up of cost and fairness in a system to achieve a balance of interests[24]. Social justice concerns come to the fore in his discussion. He considers the ethics of gate-keeping from the point of view that decisions about who has access to what

[23] Ibid., p.629.
[24] Edmund Pellegrino, "Rationing Health Care: The Ethics of Medical Gatekeeping", *Journal of Contemporary Health Law & Policy* 2/1 (1986): pp.23-45, p.23. Available at: http://scholarship.law.edu/jchlp/vol2/iss1/6

kind of services are motivated by limited health care resources, as is typical of South African reality. He points out that gate-keeping by medical doctors might be motivated by rules determined by others, for example health care managers. Such managers might cap certain services in the light of the expenses involved[25].

In the context of the essay discussion, this would refer to the policy makers who need to reflect the principles of our human rights Constitution whilst taking into account the availability of resources. It might be argued that there are simply not enough basic health care resources available to dispense to South African citizens, let alone non-citizens. One could imagine the policy makers and management of health care services debating this ethical dilemma. Some might say that a shortage of basic health care resources in South Africa might justify closing the gates of services to some, even though their need for such services is accepted. Others might argue that gate-keeping of this sort is contradictory to our Constitutional aspirations. Although perhaps not explicitly named as such, the gate-keeping feature inherent to discourse of this nature is perceivable.

Narrowing down the focus to the health care service provider, gate-keeping decision making involves a mix of interests of self, the patient and service provider/society. The health care service provider (Pelligrino talks about the doctor here) needs to balance the use of resources so as not to disadvantage the patient or society at large. Criteria applied in this process are whether treatment will likely be “effective” and “beneficial”[26].

[25] Ibid., p.27.
[26] Ibid., p.26.

Diverting from Pellegrino's discussion, the idea of role-based morality comes to the fore here. A basic health care clinic in South Africa might be run on the theoretical understanding that access to basic health care services should be granted to South African citizens as well as asylum seekers and refugees. However, due to a shortage of resources, an internal directive might be followed where preference is given to South African citizens rather than non-citizens. The health care worker on duty might disregard such a gate-keeping directive on the grounds that any person who arrives with a basic health care need should be attended to, regardless of nationality. This is the professional duty of a health care worker. In this instance, her role as health care worker and incumbent obligations are prioritised. At face value, this seems morally right. However, it is not the whole story. This health care worker might be faced with 100 or 200 other 'deserving' patients during her daily shift. Should services, or the extent thereof, not be capped according to some gate-keeping rules, a percentage of her patients on that day will receive no service at all. The gate-keeping ethical dilemmas here are complex and overlap societal, institutional and role-invoked considerations.

The third role player talked about earlier is the official who acts as the administrative gate-keeping agent of the organisation. Such a person could be expected to carry out the directives of the policy makers, perhaps with a defined scope of discretionary decision making. Role-related dilemmas applicable to the role of such a person might be different from those of the health care service provider in the sense that the person will not be making diagnostic or treatment-related decisions. The official might nevertheless be confronted with gate-keeping dilemmas. For instance, the clinic policy grants certain services to all regardless of nationality. Yet, the official

might feel constrained by her knowledge of the shortage of medication in the store room and use her discretion as to who to dispense medication to. Conversely, she may put to the front of the queue an obviously ill asylum seeker on grounds of humanity, even if practice at the clinic is to give preference to South African citizens. And then there is the kind of gate-keeping that Pellegrino describes as “morally indefensible”, where the gate-keeper is motivated by self-interest and uses her role a gate-keeper to enrich herself[27]. This might involve requiring money or favours from asylum seekers or refugees in order to give them access to basic health care services.

Bearing in mind the foregoing discussion, it is important to highlight the potential benefit or virtue of gate-keeping. In setting the basis of discussion to follow, I am asserting that gate-keeping can be considered a legitimate and morally defensible practice. That is, if it is practiced with morally justifiable intent, serves a morally justifiable outcome and if the gate-keeping processes followed meet ethical practice standards. Gate-keeping seems particularly important in South African society where resources are considered limited and where distributive and re-distributive considerations have forward-looking as well as historical significance.

In closing the discussion of gate-keeping it can be said that it seems to be an intuitive social and cultural response in certain situations. Of interest to the essay topic, however, is intentional gate-keeping on a societal and institutional level. Gate-keeping practice is also attached to roles, such as that of policy makers, officials and health care service providers. Its function is to potentially support the protection of

[27] Ibid., p.44.

something. If applied in the interest of distributive and re-distributive justice on an institutional level and role related responsibilities, the practice of gate-keeping seems justifiable. The conscious and transparent practice thereof might ensure fairness and, in fact, give expression to what the South African Constitution stands for. However, gate-keeping cannot be morally justified when practiced in service of protecting exclusiveness at cost to the basic human needs of others or for compatriot or personal gain in a way that interferes with fairness in relation to individuals and collectives.

4. South Africa as a moral arena – distinctive outlooks

The discussion that follows is based on the premise that South African citizens in general, although presumably not exclusively, draw from two distinctive moral outlooks. The one perspective stems from a human rights paradigm, originating from Western contexts, in which the individual is centrally placed. In fact, it may be more accurate to say that the individual and her moral worth and dignity are centrally placed. A society structured according to this paradigm affords the individual freedom, autonomy, responsibility and certain claims in order to flourish, reflecting the philosophy of liberalism. The other outlook concerns the individual whose morality is defined in relation to others, where emphasis is placed on community. This outlook originates from African contexts, although not exclusively so, as Eastern cultures seem to be structured along similar beliefs. Morality finds expression in connection, without which the individual cannot flourish and construct a meaningful life. For the purposes of this essay, the focus rests on what both these perspectives might say about the ethics of gate-keeping in relation to asylum seekers and

refugees who seek basic health care. This exploration, in the main, falls onto deontological and virtue ethics ground within the field of applied ethics.

4.1 Human Rights

It could be said that present-day South Africa is a human rights society. After a reprehensible era of oppression and discrimination brought about by colonialism and apartheid, a democratic system was established. In this South African society, all persons are, or perhaps more realistically stated - ought to be - considered equal and free. This kind of mind-set echoes universal human rights discourse with a cosmopolitan quality.

The sort of cosmopolitanism pertinent here involves an attitude and action of a person who identifies with humanity beyond her own family, community and tribe, and who accepts responsibility to do what is right by other humans, regardless of whether others are compatriots. Such is the sentiment that Christine Sypnowich refers to as "cosmopolitanism of global justice"[28], proposing that each member of any society is entitled to access to the basic goods in order to create a minimally decent life. The basic goods relevant to this essay are basic health care services. In Rawlsian terms, the nature of what is considered basic goods would be what is considered fair to all without foreknowledge of, for instance, what one's innate abilities, social standing, race or gender might be[29]. In other words, if all are in the

[28] Christine Sypnowich, "Cosmopolitans, cosmopolitanism, and human flourishing", *The Political Philosophy of Cosmopolitanism* (Cambridge: University Press 2005): pp.55-74, p.56.
[29] Adam Swift, "Social Justice". *Political Philosophy: A Beginners' Guide for Students and Politicians* (2nd Edition Cambridge: Polity Press 2006): p.24.

same ("original"[30]) position, there would be agreement that access to basic health care would be essential for everyone, including those who might be the "worst off" in society[31]. It seems reasonable to say that asylum seekers and refugees who are the focus of this essay perceivably fit the description of the worst off or, at least, lean in that direction.

Upon acceptance of a human rights perspective, with the sort of cosmopolitan base mentioned above, all human beings should be viewed as morally equal and entitled to the same basic freedoms on South African soil, including non-nationals and all other persons across the globe. However, the manner in which gate-keeping is practiced in relation to many asylum seekers and refugees seeking basic health care services seems to show a lack of respect for human rights. This stark reality evokes unease and, at times, moral outrage, placing a question mark on whether a human rights perspective in South Africa is really entrenched all the way down.

The discussion that follows aims to develop an argument that a human rights perspective cannot be matched with the type of gate-keeping that denies human dignity. Therefore, if South Africa claims to have a democracy rooted in human rights, the systems put in place ought to reflect gate-keeping practices that respect human dignity. Furthermore, it will be argued that those who adopt a liberal human rights framework as their moral compass, are unlikely to condone or apply gate-keeping practices that deny dignity to another human. These claims will be made

[30] Ibid., p.24.
[31] Ibid., p.24.

with an acknowledgement of the associated ethical dilemma that it may not be possible to meet everyone's need and right to have basic health care.

Firstly, some background about the development and notion of human rights. Historical evidence of human rights discourse can be traced back as far as the ancient Greeks[32]. They acknowledged that rules made by man can prove to be "'unjust' when considered within a wider conception of justice"[33]. Confirmation exists of bills of rights that have been written up since the 1200's[34]. However, the philosophical frame of liberalism and human rights was originally proposed by John Locke[35]. Locke challenged autocracy and proposed what has become liberalism, where persons are considered equal, have a right to be treated with respect and dignity, afforded freedom and self-determination and a voice[36]. Following on from this, Immanuel Kant developed the idea that the individual is an autonomous moral agent. He emphasised the capacity of humans to reason and that the individual can choose right action by applying her mind. Correspondingly, other individuals are considered moral agents with the capacity to reason and choose[37].

In modern times, it was the global outcry about the atrocities committed during the Second World War that placed human rights discourse in the universal sphere. This undertaking led to the establishment of the United Nations in 1945, one of its

[32] Brenda Almond, "Rights". *A Companion to Ethics*, ed. Peter Singer (Oxford: Blackwell Publishers 1993): pp. 259-269, p.259.
[33] Ibid., p.259.
[34] James Nickel (2014). "Human Rights," *The Stanford Encyclopedia of Philosophy.* Edward N. Zalta (ed.). URL = http://plato.stanford.edu/archives/spr2014/entries/rights-human/, p.1.
[35] Almond, "Rights", p.260.
[36] Samuel Enoch Stumph & Donald C. Abel, *Elements of Philosophy – An Introduction*, 4th Edition (New York: McGraw-Hill 2002): p.482.
[37] Ibid., p.67.

functions being to work towards the realisation of human rights across the globe[38]. As pointed out by the late Arthur Chaskalson, the first President of the Constitutional Court of South Africa, universal commitment to the realisation of human rights is aspirational in nature[39]. Chaskalson draws attention to the fact that, despite the universal call for the respect of human rights, violations of rights across the globe continue[40]. Human rights violations also seem evident in South Africa, despite its being a signatory to the UN and pledging to protect human rights[41]. Even so, and in line with the tone of Chaskalson's further discussion[42] imagine a world without a call for human rights and universal efforts to promote recognition of each human being, by virtue of being human, as being worthy of respect. Such sentiments seem to point to a cosmopolitan mind-set, as mentioned earlier. Following this line of thinking, Pauline Kleingeld and Eric Brown talk of moral cosmopolitanism - about the concept of all humans being part of a community - where we have "a moral commitment to helping human beings"[43]. Moderately framed, such a view does not deny other affiliations[44] but seems to suggest that as far as human rights are concerned, nationality might be considered a morally arbitrary factor.

Against this background, one could then ask what it means exactly when we speak of human rights. Human rights could be understood as norms that, at a basic level,

[38] Paul Taylor, & Devon Curtis, "The United Nations", eds. John Baylis, Steve Smith & Patricia Owens, *The Globalization of World Politics*, 5th Edition (Oxford: Oxford University Press 2011): Chapter 19, p. 312.
[39] Arthur Chaskalson, "How Far Are We from Achieving the Goals of the United Nations' Declaration of Human Rights?", *Maryland Journal of International Law* 24 (2009): pp.75-84, p.75.
[40] Ibid., p.77.
[41] United Nations in South Africa. Available at: http://www.un.org.za/about/
[42] Chaskalson, "How Far Are We from Achieving the Goals of the United Nations' Declaration of Human Rights?", p.83.
[43] Pauline Kleingeld & Eric Brown, "Cosmopolitanism", *The Stanford Encyclopedia of Philosophy* (Fall 2014 Edition), Edward N. Zalta (ed.), URL = <http://plato.stanford.edu/archives/fall2014/entries/cosmopolitanism/>. p. 16
[44] Ibid., p.17.

tell us what all humans should be afforded to create a minimally decent life for themselves. Human rights also act as norms to protect persons from acts that would violate their humanity. The spirit in which such norms are portrayed essentially appears to acknowledge human moral worth, and equal moral worth, and that their freedom to choose and be should not be interfered with. Following on from this, a human rights perspective holds that human beings can lay claim to protection from abuses against their humanity. They may also lay claim to the basic goods to live a minimally decent life. Claims place an obligation on others and, in this way, human rights are a two way process[45] in which rights and duties exist as two sides of the same coin.

A further feature of human rights, as James Nickel points out, is that they are "plural"[46]. No one human right can cover the spectrum of protection and/or goods needed by any person. Having said that, there might be dispute about what should be included in a list of human rights. It might also transpire that context specific conditions call for prioritising certain rights over others[47]. Furthermore, the idea of human rights is that one cannot lose a right even if those rights might be curtailed under certain circumstances[48].

The rights in question are moral rights. A disregard of basic human rights can be considered a disregard of a person's humanity. This notion is in line with the concept that we are all part of a moral community[49] where our nationality, ethnicity, race or gender ought not to define what we should be afforded in the basic human rights

[45] Nickel, "Human Rights", p.1.
[46] Ibid., p.4.
[47] Ibid., p.5.
[48] Ibid., p.5.
[49] Kleingeld & Brown, "Cosmopolitanism", p.16.

sense. It could be considered morally wrong and unjust to deny a person the basic goods and protections from certain kinds of treatment such as torture. Some human rights are also legal rights, although I would argue that human rights are first of all moral rights by virtue of our humanity. The notion of human rights captures a way of acknowledging each other by virtue of our shared humanity, some of which translates into legal claims and protections.

Placing the human rights discourse in the South African context, Saul Dubow says that "South Africa offers a unique case study for historians of human rights. Its extended colonial history invites us to consider the development of several competing rights 'regimes' – liberal, Afrikaner, and African nationalist – whose political salience can be broadly correlated with distinct phases of political power"[50]. As it has been standing since 1996, South Africa has a Constitution that is based on a human rights philosophy, where the individual's moral worth is unquestionable and that discrimination cannot be practiced on the basis of morally arbitrary considerations. In this sense, the term "morally arbitrary" refers to chance factors, that are not created by will or choice.

South Africa's democracy, constitutionally and institutionally speaking, is built on the tenets of a liberal democratic society where the rights of individuals are recognised and respected and where discrimination is not condoned on the basis of morally arbitrary factors. The South African Constitution encapsulates the principles of a human rights culture in which the dignity of every human being is acknowledged. Section 10 specifically states that "[e]veryone has inherent dignity and the right to

[50] Saul Dubow, *South Africa's Struggle for Human Rights* (Auckland Park: Jacana Media 2012): p.11.

have their dignity respected and protected". Furthermore, pertaining to the focus of this essay, the Constitution states that every person has the right to "basic health care services …" (Section 27)[51]. Therefore, providing basic health care might be seen as an aspirational positive duty. Even though it might be argued that our Constitution confirms a legal claim to basic health care, in light of earlier discussion I would hold that our Constitution attaches legal weight to the right to basic health care because it is a moral right.

In the spirit of an acknowledgement of human rights, in this case moral and legal, refugees and asylum seekers ought to be treated with dignity and enjoy the same certain basic rights as South Africans. The *Refugees Act* 1930 of 1998 advocates putting into practice the spirit of treating each human being with dignity. In Chapter 5, section 27 it is stated that "[a] refugee – (g) is entitled to the same basic health services and basic primary education which the inhabitants of the Republic receive from time to time"[52]. For instance, the sentiment concerning the rights or the standing of asylum seekers to work and study in South Africa has been tested in the matter of The Minister of Home Affairs and Muriel Millie Watchenuka[53]. The Honourable Judge JA Nugent states that "[h]uman dignity has no nationality. It is inherent in all people – citizens and non-citizens alike – simply because they are human. And while that person happens to be in this country – for whatever reason – it must be respected, and is protected, by the Bill of Rights"[54]. At the same time, Judge JA Nugent signals that rights are not unlimited and that contextual factors play a role in this regard. In

[51] *Constitution of the Republic of South Africa*, Sections 10, 27 and 29.
[52] *Refugees Act* 130 of 1998. Chapter 5, Section 27.
[53] *Minister of Home Affairs and Others v. Watchenuka and Another*, (010/2003) [2003] ZASCA 142 (28 November 2003), South Africa: Supreme Court of Appeal, 28 November 2003. p.11. Available at: http://www.refworld.org/docid/47fdfb093a7.html.
[54] Ibid., p.11.

the context of this essay, the latter point may be drawn back to social justice considerations, limited resources in South Africa and the need to distribute resources fairly.

Despite the possible reality of limited resources, South Africa's Constitution resonates with international recognition of human rights. Therefore, the dignity of each human being is acknowledged, regardless of whether South Africa can indeed meet the basic needs of all. The South African government adheres to a policy of integration with regards to those who seek refuge in South Africa. Accordingly, asylum seekers and refugees in South Africa are given the right to basic health care. Both our Constitutional framework, as well as our Government's policy of integration, seem to imply a moral cosmopolitan way of thinking. Gate-keeping design, in its potentially justifiable form, could play an important role to address the dilemmas brought about by need overshadowing available resources. It could also provide a framework for the fair distribution of health care resources. Through even-handed distribution of resources, asylum seekers and refugees could receive basic services motivated by respect for their dignity as human beings. At the same time, through proper gate-keeping practices, it might be ensured that South African citizens are not disadvantaged.

So far, I am asserting that South Africa might claim to be a society shaped by human rights by virtue of its Constitution. Even though the Constitution is a legal document, it is also a morally aspirational document with a cosmopolitan undertone. I am also departing from a basis that a portion of South Africans hold liberal human rights values as their personal and role based moral compass. Within a society shaped by

human rights, all humans have certain claims so as to allow each person to live a minimally decent life. Health care is essential to any person's well-being at the most basic level. Therefore, considered from a human rights viewpoint, each person has a right to basic health care. To deny any person, regardless of nationality, this right would be to deny their dignity as well as the basic goods in order to live a minimally decent life. I am suggesting that this applies to institutional directives as well as the personal and role morality of those who work within institutions.

Furthermore, within a human rights perspective, any kind of discrimination that denies any person the very basic goods to live a minimally decent life will most likely not be considered just. Understood in this way, even those who have certain of their rights curtailed due to their choices, for example because they are in prison as a result of their criminal activity, cannot be denied access to, for instance, clean water, food and basic health care. Following this line of thinking, South African citizens may claim basic health care as a right, but not deny this right to anyone else. If it is accepted that basic health care is a moral right, and, in South Africa, it is also a legal right, gate-keeping practices on all levels ought to respect it.

Objections are anticipated. One objection might hold that a human rights framework is inappropriate in the South African context. It is not an African moral framework, it originates from the West and the majority of South Africans are not of Western origin. Therefore, a human rights framework cannot be used to evaluate South African practices. Such a view corresponds with debate regarding the universal acceptance or non-acceptance of human rights as embraced by the Universal

Declaration of Human Rights[55]. It might be said that it cannot be reasonably expected from all persons across the globe to accept a moral viewpoint rooted in a liberal human rights outlook that places the individual centrally. Other moral frameworks may, for example, place the collective centrally and not the individual and their rights[56]. Therefore a liberal human rights approach cannot be assumed relevant all the way down in South African society. Whilst South Africans perhaps negotiated and adopted a framework that would ensure a peaceful way forward after the apartheid period in South Africa, it needs to be contextualised as a political solution at a time. The objector might concede that Western moral influences should not necessarily be dismissed and that a number of South Africans may hold a human rights moral compass, but that it is unsuitable to put it forward as the framework according to which ethical judgements about gate-keeping are made.

Considering the objection, it seems important to take into account the view that a liberal human rights framework was accepted for political reasons in the South African context. Crush's statement seems relevant here: "The question … is whether ordinary South Africans have embraced the new 'official' human rights culture and, indeed, how the populace understands the concepts and essence of 'human rights' protection in the first place"[57]. This question may also be asked of the South African Government. As an example, their failure in 2015 to detain Sudan's President Omar al-Bashir, found guilty by the International Criminal Court of crimes against humanity[58], casts doubts about the extent of the Government commitment to uphold

[55] Pollis & Schwab, "Human Rights: A Western Construct with Limited Applicability", p.1.
[56] Ibid., p.12.
[57] Crush, "The Dark Side of Democracy: Migration, Xenophobia and Human Rights in South Africa", p.111.
[58] Amnesty International, "South Africa: Allowing Al-Bashir to evade justice shows total disregard for the law", 15 June 2015. Available at: https://www.amnesty.org/en/latest/news/2015/06/south-africa-allowing-al-bashir-to-evade-justice-shows-total-disregard-for-the-law/

accountability regarding protection of human rights. Our Government's subsequent withdrawal from the ICC seems to be further evidence of a lack of commitment to hold themselves and others accountable in the global arena as far as the protection of human rights goes. Taking these references into account, there appears to be a disconnection between what has been politically accepted and what is practiced.

However, despite these ambiguities and without naively saying that the majority vote means consensus and universal acceptance, a human rights perspective cannot reasonably be rejected now that it may not feel like a good fit with non-Western moral viewpoints. In fact, resistance to apartheid rule was based on the premise that the freedom and equality of the majority of South Africans was denied. This is human rights language. The Freedom Charter, considered a fundamental document preceding our existing Bill of Rights, speaks of respect for human rights[59]. So, to say that a human rights framework is not an appropriate reference to evaluate gate-keeping practices in the South African context does not hold convincingly.

However, concluding my response to the objection at this point might not be sufficient. So, consider the following: it is agreed, at least for the sake of argument, that the human rights perspective as upheld in this discussion is of Western origin. It focusses on the rights and freedoms of the individual and considers Western philosophers significant in defining liberalism and human rights. It is granted that a human rights perspective might not be universally acceptable, perhaps particularly in non-Western societies. By the same token, I would maintain that a human rights perspective (and the kind of gate-keeping it might consider morally justifiable) cannot

[59] Pierre De Vos & Warren Friedman, "Introduction", p.16.

be rejected outright just because it has Western origins. The bottom line to me seems to be that, in as far as basic human needs are at stake, any moral framework that denies any human being the basic goods to live a minimally decent life is open to interrogation. This idea will be further explored in the later section that focusses on patriotic bias.

For now, the objection seems to say that a human being needs basic health care, another human being on behalf of a system says that the person in need cannot have it. The reason given is because the person in need cannot lay claim to human rights, even if it means that the person will, as a result, not be able to have the necessary goods to live a minimally decent life. The consequences may be that the person perishes or is disadvantaged, but never mind, because a human rights approach is inappropriate in an African context. This is a crude statement of the objection. But, even if toned down, closing the basic health care gates on anyone evokes serious moral unease. The following statement by Phillip Cole in connection with basic health care articulates this unease: “If we cannot find a way of making an ethically principled distinction between citizens and migrants that can act as a moral basis for discrimination … then we may find that what many regard as an ethical project rests on deeply immoral foundations[60].

In principle such gate-keeping and denial of the basic means to live resonates with the stories of asylum seekers and refugees who seek a new life in South Africa. They tell about the disregard of their safety and dignity, and the refusal of basic goods needed to live a minimally decent life in their home countries. Studying the

[60] Philip Cole, “Human rights and the national interest: migrants, healthcare and social justice”, *Journal of Medical Ethics* 33 (2007): pp. 269-272, p.269.

histories of countries such as Somalia, Nigeria, DRC and Zimbabwe, provides sufficient evidence of this. This is not to propose that a human rights perspective trumps other viewpoints concerning refugees and asylum seekers in need of basic health care in whichever territories they find themselves. A human rights foundation does, however, make clear that all human beings are worthy of respect and that fellow human beings are morally wrong to deny them that which they need to live.

A home example can be used to support this point. During the years of the Nationalist Party reign, during which time the majority of South Africans were systemically and legally denied dignity, the international community spoke up. It condemned the denial of rights to oppressed South Africans. Presumably, these responses were informed by human rights inclinations, but strong support was also expressed from non-Western countries. There was recognition that the denial of basic freedoms and life goods was morally wrong.

Following on from this, it seems reasonable to say that it needs to be tested whether non-Western moral outlooks indeed deny that persons should not be afforded basic health care as an acknowledgement of their humanity and dignity. Evidence of instances where such denial might indeed be held as morally true, seem to me to be extremist doctrines. Such doctrines seem to contain elements of keeping intact role definitions that serve those in power. The continued practice of female genital mutilation[61] and denying girls education[62] are examples here. In fact, as will be explored in the next section, *Ubuntu* precepts (as an example of a non-Western

[61] World Health Organisation, "Female Genital Mutilation", Fact Sheet updated February 2016. Available at: http://www.who.int/mediacentre/factsheets/fs241/en/

[62] Unicef, "Girls' education and gender equality", 25 July 2015. Available at: https://www.unicef.org/education/bege_70640.html

moral outlook) might support the idea that to deny another human being basic health care could be considered unethical.

A second objection could be framed this way: It is accepted that all human beings are of equal moral worth and ought to have the basic goods and freedoms in order to lead a minimally decent life. A rights perspective is granted, within which the right to basic health care is recognised. The objector might continue that it would be morally wrong to maliciously cause harm to another person and to wilfully violate their rights. However, the objector might say, the instance of violating another person's right should be differentiated from infringing on another person's right. Judith Jarvis Thomson might be appealed to. She makes this distinction, illustrated by her thought experiment of someone waking up, finding herself connected to a famous violinist who needs the use of her kidneys to survive. As Thomson points out, surely the violinist has a right to life, but it would not be unjust for the person whose kidneys he is using, to disconnect herself from him. An infringement of the violinist's right to life seems justifiable in these circumstances[63].

Along the same lines, it could be argued that asylum seekers and refugees might have a right to basic health care, but those who they appeal to may not necessarily be unjust in failing to meet that need. Samantha Brennan calls instances of this nature "justified infringements of rights"[64]. She explains that rights are not absolute and "that some infringings are instead 'overridings' … the positive case of failing to accord a right when doing so is permitted on the basis of consequences at stake"[65].

[63] Judith Jarvis Thomson, "A Defense of Abortion", *Philosophy & Public Affairs* 1/1 (1971): pp.47-66, p.49.
[64] Samantha Brennan, "Thresholds for Rights." *The Southern Journal of Philosophy* 33.2 (1995): pp.143-168, p.144.
[65] Ibid., p.144.

The objector might say that the economic consequences for South Africa, as a developing country, in meeting the right of asylum seekers and refugees to basic health care, justify an infringement of that right. This argument resonates with the notion of patriotic bias discussed later in the essay.

This is a compelling objection. It requires consideration of how much is at stake[66] when the basic health care rights of asylum seekers and refugees are overridden. Such stakes also apply to the basic health care needs of South Africans, as discussed later in the essay when patriotic bias is considered. One way to answer the question is to imagine that gate-keeping practices deny basic health care services to refugees and asylum seekers. Picture the range of consequences: mothers giving birth unassisted and the potential risks involved to the baby and the mother, children dying of diarrhoea, and adults suffering heart disease as a result of untreated high blood pressure. Many more examples could be offered. These examples, I think, make clear the injustice of such infringement. The stakes seem to be too high should access to basic health care be denied, not only for the person who holds the right but also for those who might be faced with the moral accountability and practical consequences. Therefore, a distinction between having a right and the possible justifiability of infringing upon that right is granted. At the same time it is asserted that, in the case of basic health care, the stakes are too high not to meet the need as best as possible and infringement of the right is not morally justifiable.

[66] Ibid., p.146.

It is nevertheless recognised that South Africa is a developing country where social need is evident in almost every corner. Even though it might be morally true that we ought to provide in the basic health care needs of citizens and non-nationals it might be said that South Africa simply cannot afford to do so. On the basis of feasibility, our human rights obligation is, arguably, therefore mitigated. As stated by Nick Ferreira "[t]he protection of a particular right might therefore be feasible if it was the only thing that we cared about, but may be infeasible given that societies have numerous other priorities to address"[67]. Furthermore, the details of the non-feasible objection need to be scrutinised as the lack of resources argument might not stand without contextualising other kinds of State spending. If respect for human rights is observed in South Africa it needs to translate into political will to provide basic needs, justifiably at the cost of perceivably less important State spending. Only with evidence of such intention, the objection might hold more weight in that South Africa cannot immediately and completely provide for the basic health care needs of asylum seekers and refugees[68].

To close: Arguments in favour of, as well as objections concerning, a human rights position in the South African context in relation to gate-keeping practices relating to asylum seekers and refugees seeking basic health care in South Africa have been offered. It is concluded that, morally speaking, asylum seekers and refugees' basic health care needs ought to be met as far as possible. Gate-keeping policies and practices from the constitutional level to ground level ought to reflect such accommodation. Not to demonstrate such a mind-set seems morally wrong if the

[67] Nick Ferreira, "Feasibility Constraints and Human Rights: Does 'Ought' Imply 'Can'?", *South African Journal on Human Rights* 28 (2012): pp.483-505, p.490.
[68] Ibid., p.492.

dignity of the individual and their right to be afforded the basic goods to live a minimally decent life is taken seriously. This position is asserted notwithstanding the practical and perhaps even impossible nature of the task.

4.2 *Ubuntu*

In the foregoing section, it has been argued that gate-keeping practices, according to a human rights perspective, ought to respect basic health care as a human right for everyone. However, some might still insist that a liberal human rights (cosmopolitan inclined) perspective, with Western roots, ought to be rejected on the basis of irrelevance or inappropriateness in South Africa. As stated by Chuma Himonga "… one of the challenges to enforcing human rights in Africa is the lack of cultural legitimacy of the rights among the people intended to benefit from them"[69]. If it proves to be true that a liberal human rights perspective is inappropriate, what might African ways suggest about closing or opening the gates when refugees and asylum seekers present with health needs? In exploring this question, I am not trying to argue for possible similarities between an African moral outlook and a liberal human rights perspective. I am also not trying to argue that these outlooks might be compatible. What seems to be important to explore here is what African morality might propose justifiable health care services gate-keeping practices to be when strangers make themselves at home in South African territory.

To start, what is an African moral outlook? A likely African moral framework to refer to is *Ubuntu* because it is a recognised moral perspective in Sub-Saharan Africa. It is

[69] Chima Himonga, "The right to Health in an African Cultural Context: The Role of Ubuntu in the Realization of the right to Health with Special Reference to South Africa", *Journal of African Law*. 57/2 (2013): 165-195, p.173.

not assumed that *Ubuntu* is the only African way according to which morality might be understood[70]. Furthermore, appealing to *Ubuntu* is not to "pursu[e] ... the search to animate an otherwise outdated mode of being"[71] as it might be said that *Ubuntu* in its historical form does not predominate any longer. Munyaka and Motlhabi explain that *Ubuntu* historically encouraged friendliness, kindness and generosity towards strangers[72]. In essence, *Ubuntu* asserts that "[y]ou are welcome, we will help you and we respect you"[73]. However, the character of *Ubuntu* may have changed over time in the sense that it is perhaps now being selectively practiced in inner circles of families and communities, but not necessarily to all persons and in work places where individualist and capitalist mind-sets prevail. Munyaka and Motlhabi raise the question as to why the historical character of *Ubuntu* in terms of the treatment of strangers has changed. In response, they quote Steve Biko's description of the negative changes as the "process of bastardisation of *Ubuntu"* through South Africa's colonial and apartheid history as well the trend of capitalist development[74].

This may be so. However, whilst the character of *Ubuntu* might be changing, it does not seem to have been disregarded as a moral philosophy on the whole. Morally speaking, the individual and/or institutional moral agent needs to exercise choice and responsibility. Notwithstanding the destructive impact of colonialism and apartheid, it seems prudent not to conclude that a changing and/or perhaps less compelling

[70] Thaddeus Metz & Joseph B.R. Gaie. "The African ethic of Ubuntu/Batho: Implications for research on morality", *Journal of Moral Education*. 39/3 (2010):273-290, p.274. See also: Bernard Matolino & Wenceslaus Kwindingwi, "The end of Ubuntu", *South African Journal of Philosophy*, 32/2 (2013): pp.197-205, p.201.
[71] Matolino & Kwindingwi, "The end of Ubuntu", p.201.
[72] Mluleki Munyaka & Mokgethi Mothlabi, "Ubuntu and its Socio-moral Significance". In *African Ethics.* Ed. Munyaradzi Felix Murove. (Scottsville: University of KwaZulu-Natal Press 2009): pp.63-84.
p.75.
[73] Ibid., p.75.
[74] Ibid., pp.79-81.

Ubuntu way of thinking and life might leave moral agents without a moral compass and diminished accountability for their moral decisions.

Furthermore, whilst the point is taken that "it is not always clear what that African voice could be taken to represent"[75], the potency of the African way remains visible in everyday life and political speech in South Africa. The following quote from the recently released King IV Report on Corporate Governance South Africa 2016 attests to this:

> This idea of interdependency between organisations and society is supported by the African concept of *Ubuntu* or *Botho*, captured by the expressions … I am because you are; you are because we are. *Ubuntu* and *Botho* imply that there should be a common purpose to all human endeavours (including corporate endeavours) which is based on service to humanity. … As a logical consequence of this interdependency, one person benefits by serving another[76].

So, to be clear, it is not argued that *Ubuntu* is *the* moral compass of black African people. Neither is it suggested that it should be. At the same time, it is considered a significant African moral outlook and, in the likely absence of other more compelling and/or widely described African moral perspectives it is of interest what *Ubuntu* might say about gate-keeping practices.

[75] Matolino & Kwindingwi, "The end of Ubuntu", p.201.
[76] Institute of Directors South Africa, KING IV Report on Corporate Governance for South Africa (2016): p.24.

What, then, is *Ubuntu* about? *Ubuntu*, as a moral perspective, prioritises the idea of community and the collective. It places a premium on interdependence and solidarity and treating others with respect, dignity and compassion[77]. *Ubuntu* is a way of being, where personhood is shaped and defined through being in relationship and community with others. As pointed out by Edwin Etieyibo, *Ubuntu* is "a philosophy of lived experience … that one might say, is virtue-sensitive"[78]. Following this line of thinking Thaddeus Metz goes on to say that *Ubuntu* as a moral orientation based on the foundational principle that "[a] person is a person through other persons"[79]. Similarly, Augustine Shutte explains that a person's "self exists only in relationship with others" in *Ubuntu* understanding[80]. Moral maturity is a life-long striving and process that finds fulfilment in relation to others. This is different from an individualistic liberal self-actualisation concept, where a person strives to fulfil inherent potential through being autonomous and striving for freedom[81], which may or may not reflect this kind of connectedness with others.

Virtue, in *Ubuntu* terms, seems to mean that good acts flow from the person who is fundamentally "*umuntu* (a human being)"[82]. Humanness, therefore, as a moral concept, finds expression through human connectedness and orienting oneself in ways that are "friendly" or at least not harmful to others[83]. Whilst this may sound like

[77] Himonga, "The right to Health in an African Cultural Context: The Role of *Ubuntu* in the Realization of the right to Health with Special Reference to South Africa", pp.177, 178.
[78] Edwin Etieyibo, ""Autochthonous African" *Ubuntu vs* "Heterochthonous Western" *Ubuntu*". Hoernlé Research Seminar in Philosophy, University of the Witwatersrand, Johannesburg, 7 April 2016.
[79] Thaddeus Metz, "*Ubuntu* as a Moral Theory and Human Rights in South Africa", *African Human Rights Law Journal* 11/2 (2011): pp.532-559, p.536.
[80] Augustine Shutte, "Ubuntu *as the African Ethical Vision*", "Ubuntu as the African Ethical Vision". In *African Ethics.* Ed. Munyaradzi Felix Murove (Scottsville: University of KwaZulu-Natal Press 2009): pp.85-99, p.91.
[81] Augustine Shutte, *UBUNTU An Ethic for a New South Africa* (Pietermaritzburg: Cluster Publications 2001): p.13.
[82] Ibid., p.64.
[83] Metz, "*Ubuntu* as a Moral Theory and Human Rights in South Africa", p.539.

what most moral frameworks would advocate, *Ubuntu* places this notion within the perspective that it is not possible for a person to be a moral being independently of others. Munyaradzi Felix Murove says that "[s]uch interrelationality is what most scholars have observed as the feature that best sums up African ethics"[84]. Following on from this, the importance of connectedness and morality finding expression in relation to others has implications for someone whose worldview is based on *Ubuntu*. Through its "anti-egoistic"[85] characteristic an individual recognises another as inherently worthy of dignity and respect and that honouring same gives each person opportunity to express their morality[86]. Seen this way, individuals exist in community with each other and need each other to be fully human[87], which could be described as the interdependence characteristic of *Ubuntu*[88].

Focusing more specifically on health and health care, an *Ubuntu* perspective would be to consider the whole person. Being well, on the whole, is important and it would not be acceptable to objectify the person as a patient who presents with symptoms. As Shutte points out, being healthy in the broad sense of the meaning is necessary for a person to flourish[89]. Responding to illness is therefore not only a matter of treatment and overcoming the illness, but also concern that another's journey of flourishing as a human being is impeded. Such a state of affairs is of concern to the others and the community[90]. Hence, attending to health and wellness holistically is seen as a means to flourishing as a human being. Accordingly, an *Ubuntu* mind-set

[84] Munyaradzi Felix Murove, "Beyond the Savage Evidence Ethic", *African Ethics,* ed. Munyaradzi Felix Murove (Scottsville: University of KwaZulu-Natal Press 2009): pp.14-32, p.26.
[85] Metz, "*Ubuntu* as a Moral Theory and Human Rights in South Africa", p.539.
[86] Munyaka & Mothlabi, "*Ubuntu* and its Socio-moral Significance", p.69.
[87] Munyaka & Mothlabi, "*Ubuntu* and its Socio-moral Significance", p.71.
[88] Himonga, "The right to Health in an African Cultural Context: The Role of *Ubuntu* in the Realization of the right to Health with Special Reference to South Africa", p.177.
[89] Shutte, *UBUNTU An Ethic for a New South Africa,* p.13.
[90] Ibid., pp.129-133.

ought to reflect recognition of the personhood of the other, that the person who needs health care is important and valued[91]. The virtue-sensitive quality of *Ubuntu,* referred to earlier, is discernible here.

So far, drawing on the philosophical insights of *Ubuntu* scholars, it seems that *Ubuntu* is a paradigm in which the individual is recognised and prized, but that moral virtue is lived out and considered in terms of the individual's contribution to the dignity and well-being of others and community harmony. Morality independent of connectedness is not possible. Responding to the health care needs of others in a way that allows the other to flourish is a moral issue. Disregarding such needs would be contrary to the spirit of *Ubuntu*. These perceptions are advanced from the point of view of the moral agent who chooses their attitude and action.

Shifting position to the point of view of the one in need, what might such a person lay claim to? Munyaka and Mothlabi say that "[t]raditionally, one's rights, to use the language of rights, were not understood simply as statements about entitlement, but also about responsibility and obligation towards others. *Ubuntu* accords priority to both duties and rights; both are inalienable from all persons"[92]. If this is true, persons might feel justified in appealing for their health care needs to be met. Although their claim does not absolve them from any responsibility, *Ubuntu* gives them the expectation of having their basic health care needs met. Munyaka and Mothlabi assert that responding to such need "is not a matter of charity"[93], it is what ought to be done.

[91] Ibid., p.144.
[92] Munyaka & Mothlabi, "*Ubuntu* and its Socio-moral Significance", p.82.
[93] Ibid., p.82.

Echoing the same sentiment Bénézet Bujo[94] asserts that the African way would require that rights be considered in the context of the collective interest. A right needs to be justified in terms of its importance to both the individual and community. If I understand Bujo correctly, it would imply that a person's claim to basic health care would need to be evaluated against the respect and dignity afforded to them as an individual, seen within the context of what is in the interest of the community. In other words, would denying basic health care be disregarding their humanity? Of equal importance would be to evaluate a positive response to their need in the light of the community's interest: would denying them such rights be in the interest or to the detriment of community, harmony and solidarity. This is not a consequentialist viewpoint as the kind of deliberation is not, fundamentally, about the best outcome for the greatest number. It is about the understanding that responding to, or potential withholding of goods, would play a part in the lifelong striving to become more human through an attitude of care for others and wishing them to be well so that one can also be well. Bujo states that "[b]y respecting the rights of the individual, the community preserves its own identity, and the same is true of the individual himself"[95].

If these views are accepted, one might expect that *Ubuntu* as a moral outlook potentially speaks to a way of life on all levels of society. It informs the political sphere, conceptions of justice, the way societies and communities are structured, and how institutions are shaped. It also informs the expectations of communities, families and individuals. Considering the essay question, it is relevant to consider

[94] Bénézet Bujo, *Foundations of an African Ethic,* (New York: The Crossroad Publishing Company 2001): p.163.
[95] Ibid., p.163.

how *Ubuntu* precepts might inform the matter of health care on legislative and institutional levels and what sort of attitude and conduct it might require of a person providing the health care. Would it lean towards permissiveness and respond to the health care needs of all who might need it? Would a health care clinic operating according to *Ubuntu* management principles be considered friendly to all in need of health care, and would the official and health care service provider in attendance be considered ethical or unethical when they practice permissive or exclusionary gate-keeping practices?

Exploration now potentially moves into more contentious territory. The importance of community and interdependence, dignity afforded to all and the importance attached to well-being seen holistically and as a community concern sounds laudable. However, what ought one do when the precepts of *Ubuntu* conflict with each other? And, who/what is considered community?

Starting with the latter, Matolino and Kwindingwi make the point that "ubuntu works effectively in situations where communities are small and undifferentiated"[96]. They continue to say that "such communities are notorious for their dislike of outsiders, intolerance towards divergent ideas and place a high price and value on blood relations in recognising the other"[97]. Such a view may lean towards being anti-cosmopolitan, in that we do not essentially have duties beyond those close to us[98]. This might be one explanation for the kind of exclusionary gate-keeping practices concerning refugees and asylum seekers.

[96] Matolino & Kwindingwi, "The end of Ubuntu", *South African Journal of Philosophy* 32/2 (2013): pp.197-205, p.202.
[97] Ibid., p.202.
[98] Kleingeld & Brown, "Cosmopolitanism", p.17.

However, it does not sit comfortably as a justification for not attending to a person in need of health care assistance, because *Ubuntu* also prizes human dignity. If my understanding of *Ubuntu* is correct, responding to anyone in dire need would be required. Mpumi Zondi explains that the spirit of *Ubuntu* is carried within a person, wherever one goes, and that kindness is not restricted to one's kin. By the same token, she explains that *Ubuntu* does not mean that one should allow exploitation. Setting boundaries and holding others accountable for what is theirs to own is important[99]. One could put forward an example of a child drowning in a pond[100]. If someone passes by a child drowning in a pond it would not be morally justifiable not to help the child. Similarly, it could be argued that closing the gates on an asylum seeker or refugee in need of health care would be morally unjustifiable in *Ubuntu* terms. It is granted that not every asylum seeker and refugee claiming health care is like a child drowning in a pond. Moreover, the debate about what constitutes basic health care is granted[101]. All the same, the principle that requires recognition here is that *Ubuntu* is not restricted only to who is around you; it is also about who you are, all the way down. In this version one could argue that someone living according to *Ubuntu* precepts would be motivated to be friendly towards others, to acknowledge them and to be empathic towards their needs. It could be that small undifferentiated communities perhaps wish to keep their communities tight and not allow strangers in. At the same time, this might be true of a variety of homogeneous communities such as the Afrikaner community of Orania, Orthodox Jewish groups and the Amish. However, I would argue that a person does not leave their *Ubuntu* behind when they

[99]Mpumi Zondi, "*Ubuntu",* Consultation at Sophiatown Community Psychological Services. (Johannesburg 2016).
[100] Peter Singer, "Famine, Affluence, and Morality", *Philosophy & Public Affairs*. 1/3 (1972): pp.229-243, p.231.
[101] Himonga, "The right to Health in an African Cultural Context: The Role of *Ubuntu* in the Realization of the right to Health with Special Reference to South Africa", p.167.

are not with their own people or are living amongst others who do not share an *Ubuntu* philosophy. To conclude this point, de-humanising treatment of any person who is in need of health care seems contrary to the essence of *Ubuntu*. This would apply to a lack of evidence of *Ubuntu* on legislative, institutional and personal and/or professional role specific levels.

It seems to me that the more difficult ethical dilemma to discuss, related to the notion of community, is providing health care to so-called strangers at perceived cost to one's own people. Whilst it might be so that an *Ubuntu* approach would grant that all in need ought to be treated with respect and dignity, solidarity may call for protection of resources. It might be argued that solidarity is called for by South Africans because health care resources are limited and perhaps not even enough for citizens. So, it could be morally required from an *Ubuntu* inclined person to rescue the child from the pond once, twice and perhaps even many more times, but if the same situation repeats itself thousands of times, what could reasonable by expected? It could be argued that asylum seekers and refugees are presumably not all like the drowning child in the pond in terms of emergency medical need. Furthermore, they are in South Africa uninvited and typically intend staying and order to build a life for themselves here. South African citizens, therefore, have to share already limited resources with them. Considering that not enough health care resources appear to be available to meet the needs of South Africans, there may be a call for solidarity by means of structuring exclusionary health care services, restrictive institutional directives, through to the health care provider closing the gates in order to protect resources.

Metz offers insights in this regard. He does not address the question of gate-keeping in relation to asylum seekers and refugees per se, but talks about the morality of partiality and impartiality in terms of favouring those close to one[102]. The morally justifiable criteria for preferential treatment of some are restricted to matters of re-distributive justice[103]. Partiality and favouring some are therefore granted, and Metz states that "[a] civil servant's duty not to be strongly partial derives from the state's need to realise harmony"[104]. Even though an individual gate-keeper is implied here, I would argue that the principle appeals to all levels of gate-keeping, as discussed earlier. The African-morality viewpoint, if Metz's argument is accepted, would therefore not condone withholding of State resources, such as basic health care. Doing so would be contrary to promoting unity.

Somehow, whilst this line of thinking seems reasonable, it does not resolve the ethical dilemma. It seems to me that herein rests the most compelling objection to the argument. It could be argued that even though a withholding of State resources might be considered unethical, South Africa needs to promote unity amongst South Africans, perhaps signalling an anti-cosmopolitan attitude in service of self-protection[105]. Whilst strangers need to be treated with kindness and their needs acknowledged, when there is not enough to go around one is permitted to first take care of one's own. Is it morally required of South Africans to seek unity and harmony with asylum seekers? It could be said that *Ubuntu* is invoked by politicians and the privileged to ease tensions for political and capitalist reasons and it is not reasonable

[102] Thaddeus Metz, "African Moral Theory and Public Governance", *African Ethics,* ed. Munyaradzi Felix Murove (Scottsville: University of KwaZulu-Natal Press 2009), pp.335-356, p.344.
[103] Ibid., p.344.
[104] Ibid., p.344.
[105] Kleingeld & Brown, "Cosmopolitanism", p.17.

to expect South Africans to strive for unity with strangers who need to share in limited resources. Xenophobic attacks might signal such sentiments.

In reply to the objection, it seems to me that nothing in what *Ubuntu* stands for can justify a de-humanising system, denial of a person in need and mistreatment of another human being. This does not mean that when a person or group is under attack that pacifism and accommodating exploitation are called for. Asylum seekers and refugees are possibly perceived to be encroaching upon what rightfully belongs to South Africans and, in that sense, citizens might feel under attack. However, asserting this kind of thinking through to its conclusion may be difficult as refugees and asylum seekers are typically victims of unjust circumstances. They do not appear to come to South African out of a position of strength, eager for 'combat'. They are typically struggling for survival, to varying degrees akin to a child drowning in a pond. With reference to discussion earlier in the essay, they also have been given legal standing in the South African system, i.e. in this case their human right to have access to basic health care is considered a legal right. This is not the case for those who do not have any legal standing such as undocumented migrants. Furthermore, they are not what could be considered medical tourists to South Africa. These would be tourists seeking medical treatment at perhaps more affordable rates and without having long waiting times for medical interventions[106]. I would argue that the conditions under which asylum seekers and refugees seek access to health care services in South Africa calls for humane treatment.

[106] Harriet Hutson Gray & Susan Cartier Poland, "Medical tourism: crossing borders to access health care", *Kennedy Institute of Ethics Journal* 18.2 (2008): pp.193-201, p.193.

Reflecting on the foregoing discussion, it might seem that the objection has not been dealt with firmly enough. This might be so because of the complexity of the ethical dilemmas, considered from an *Ubuntu* moral outlook. To conclude in a more defined manner: my inclination is to acknowledge that there might be disagreement in defining community, whether the notion of community pertains to those closest or whether community is thought of in the cosmopolitan sense of the word. Questions arise about who one ought to seek solidarity with and how collective interest is defined. According to the *Ubuntu* way, should one strive to be in unity with all those who make up the human community? Or is it morally acceptable to give preference to the interests of close others, knowing that by doing so others do not have the means to live a minimally decent life? Notwithstanding these possibly slippery slope areas, I would hold that *Ubuntu* principles might prioritise dignity and humanness in response to anyone in need, leaning towards a cosmopolitan attitude rather than a strictly own-community stance. As Zondi[107] says, and reflecting the virtue-sensitive quality highlighted by Etieyibo[108], *Ubuntu* is within you and you practice it where-ever you go. One's *umuntu* is not restricted to close others. Therefore, I would argue that reasonable gate-keeping practices are called for in relation to asylum seekers and refugees basic health care needs, if considered from an *Ubuntu* outlook.

The discussion of South Africa as a moral arena is concluded with the assertion that both the dominant moral paradigms most South Africans seem to hold, place respect for each other as humans centrally. Meeting the basic needs of others as a way of respecting human flourishing and an expression of doing what is morally right would

[107] Zondi, "*Ubuntu"*.
[108] Etieyibo, ""Autochthonous African" *Ubuntu vs* "Heterochthonous Western" *Ubuntu*".

require just gate-keeping practices. This would be true for all levels of consideration, from our constitutional aspirations, institutional policies as well as the personal and role-incumbent ethics of those who represent institutions or health professions.

5. Patriotic Bias

Taking stock of my reasoning so far, a morally persuasive case can probably be made for gate-keeping. In fact, properly applied, gate-keeping consistently thought-through and followed-through from legislative to ground level might serve an important function in the fair distribution of resources. Furthermore, neither of the two major moral frameworks that many South Africans might default to in dealing with ethical matters seems to condone closing the gates on someone in need of basic health care. This would be to deny the person's dignity. A human rights perspective recognises that every human being, in the moral cosmopolitan sense of the word, is entitled to the basic goods to construct a minimally decent life, including basic health care. This notion is taken up on a South African constitutional and legislative level with an expectation that implementation will follow suit all the way down. Similarly, *Ubuntu* seems to be a moral outlook that deeply recognises the dignity of persons. Non-responsiveness to a person in need might be considered a slight on the morality of the person who is appealed to for assistance as well as a slight on the dignity of the person in need. Furthermore, not attending to health and wellness would most likely not be considered in the interest of the collective. Taking such a stance does not negate the dilemmas potentially brought about by calls for solidarity and acting in the interest of community. Despite the dilemmas, I am inclined to say that an *Ubuntu* outlook has cosmopolitan undertones where it concerns any person in need,

including their health care needs. Not acknowledging and trying to respond to a person in need seems contrary to striving to become more human oneself.

If this line of reasoning seems plausible, what does one then make of the often unfriendly gate-keeping practices concerning refugees and asylum seekers who are in need of basic health care? This happens notwithstanding the basic health care access afforded by our Constitution and ensuing legislation, a human rights framework as well as the precepts of *Ubuntu*.

Context plays a role here. South Africa is a developing country with limited resources. We have a political history of oppression. Conceivably many citizens entered into an era of hope after the first democratic elections in 1994. However, for many South Africans their hopes have perhaps not manifested into a significantly better resourced everyday life. In addition, thousands of foreign nationals are making South Africa their home, placing more pressure on already thinly stretched resources. The moral worth of asylum seekers and refugees may not be in question and their need to have access to basic health care is morally granted. At the same time, South Africans understandably strive to secure a better future for themselves. Ethically speaking, how much could they be expected to share with, and sacrifice for, foreigners in such pursuit? What could they justifiably do to secure a better future for themselves?

One answer might be to act on a perhaps unexpressed, or in some instances, overt call for solidarity and identifying with one's own – ensuring that those to whom one has special obligations are secure. Therefore, and despite our Constitution and the

current legislation, there may be a sense of justification in closing the gates on strangers despite moral ideals indicating a sense of duty towards any human being, regardless of nationality or affiliation. Another possibility might be a sense that many South Africans paid a heavy price during years of oppression. They were denied equality and, as a result, did not have access to adequate schooling, health care, housing and opportunities to build a better future for themselves and their children. With this in mind, it might be considered unreasonable to expect those who have been disadvantaged through oppressive political circumstances to share resources with those who were not part of this process of struggle and liberation. Generally speaking, South Africans are still healing and perceivably trying to establish minimally decent life circumstances. Asylum seekers and refugees might be seen as interfering with such a process. It may well be experienced as unfair to be disadvantaged again, this time by the claims of others in need who are not compatriots in the historical process. An inclination to close the gates on non-South African citizens may therefore feel justified.

These pro-patriotic notions are explored in the discussion that follows. The ethics of patriotism and, more specifically, patriotic bias are brought into focus. The discussion is structured along the following lines: considering what patriotism is, arguing that patriotic bias might be morally justifiable, and considering the ethical implications of upholding patriotic bias when faced with another human being's need for basic health care. It is concluded that despite morally defensible arguments proposed in favour of patriotic bias, meeting the basic human needs of human beings ought to take precedence over patriotic sentiments despite contextual considerations.

Patriotism is about love for one's country, and as Eamonn Callan puts it "… constancy in love …"[109]. This kind of 'love' seems to be characterised by an awareness of time: the history of a country, how it has come to the point it is at currently, and an envisaged future of a particular kind. It is about identification, association and attachment, and pride[110]. Alisdair Macintyre says that, should it be considered a virtue, "… patriotism is one of a class of loyalty-exhibiting virtues …"[111].

South African patriotic sentiments were evident when the Springboks won the Rugby World Cup in 1995. This happened about one year after our country's first democratic elections and our president at the time, Mr Nelson Mandela, publically congratulated the team captain. Even though rugby may have been perceived as the sport of the previous oppressors, the patriotic feeling that many South Africans felt on that day was momentous. The death of Mr Nelson Mandela in 2013 is another example of patriotic sentiment evoked when a nation faces the loss of a loved, or at least widely respected, leader. The event of his death appeared to have evoked collective sadness amongst South Africans, despite political tensions evident at the time.

However, in addition to these more emotive shows of patriotism is a person's dedication to their country and their dedication to contributing to its flourishing. Should one's country flourish, the chances that it will provide for one's own needs are better[112]. Understood this way, love for and commitment to one's country seems

[109] Eamonn Callan, "The Better Angels of Our Nature: Patriotism and dirty Hands", *The Journal of Political Philosophy* 18/3 (2010): pp. 249-270, p.250.
[110] Daniel Druckham, "Nationalism, Patriotism, and Group Loyalty: A Social Psycholical Perspective", *Mershon International Studies Review* 38/1 (1994): pp.43-68, p.46.
[111] Alisdair Macintyre, "Is Patriotism A Virtue?", *Lindley Lecture*. University of Kansas (1984): pp.1-21, p.4.
[112] Stephen Macedo, "Just patriotism?", *Philosophy and Social Criticism* 1-11 (2011): p.3.

possible in response to Stephen Macedo's question "[h]ow can you have a 'special relationship' with 70 or 300 million or a billion people?"[113]. Following on from this, "[m]oderate [n]ationalism" places a premium on the interests of one's own nation[114]. Positively stated from a Kantian view, Pauline Kleingeld points out that recognising the moral worth of all humans does not mean that "one has a moral duty or political duty to treat every person on the planet the *same* …"[115]. This line of thinking might be described as a "[c]ompatriots first argument" or "national partiality argument"[116] . If a choice needs to be made between giving something to a "compatriot" or a "non-compatriot", and both their needs cannot be met, one ought to choose one's compatriot[117]. The moral stance underpinning the compatriots-first view is that "[p]utting our nearest and dearest first does not conflict with cosmopolitanism, but in any feasible world, most extensively achieves cosmopolitan ends"[118]. A gate-keeper might, therefore, hold the view that to be partial towards nationals and to ensure that their needs are met in the first instance, gives everyone a better chance of creating a better society.

The views of Will Kymlicka and Christine Streahle are relevant here. They point out that, historically, human kind shows this possibly to be true: humans tend to share with those who they are partial to. When they do share with others beyond those whom they are partial to, in this case asylum seekers and refugees, they need to have a sense of "common identity" with them and to feel that the sharing will be

[113] Ibid., p.3.
[114] Kleingeld, "Kantian Patriotism", p.369.
[115] Ibid., p.324.
[116] Kai Nielsen, "Toward a Liberal Socialist Cosmopolitan Nationalism", *International Journal of Philosophical Studies* 11/4 (2003): pp.437-463, p.442.
[117] Ibid., p.442.
[118] Ibid., p.444.

"reciprocated" in the future[119]. Further to reciprocity, moral motivation for patriotism might be underpinned by what Igor Primoratz calls "… gratitude, … fairness, and … the common good"[120]. A person might feel grateful for what their country has given them to construct a decent life for themselves. Such gratitude may evoke a sense of obligation to the country[121]. They may also perceive the need for fairness – as they benefit from what the country offers, so should compatriots. What is available should be equitably distributed to citizens and, at the same time, each person should fulfil their duty towards compatriots. Such duty and distribution of benefits are seen in the light of acting in the common good of compatriots[122]. Construed this way, Primoratz' statement that "[p]atriotism, then, is love of one's country, identification with it, and special concern for its well-being and that of compatriots"[123] seems apt.

However, is such a mind-set morally justifiable? One could argue that it is. It seems right that the duties of care brought about by special relationships (such as one's fellow citizens) take priority over responsibilities over those with whom one does not share a special relationship. This does not imply that others are considered morally less worthy or that others do not have justifiable needs and rights. Such a view is proposed by David Axelsen[124] for example, who states that "our obligations towards compatriots greatly outweigh (and in some cases eclipse) duties towards foreigners" and that only being part of the human race is not a strong enough motivation to have to share resources. David Miller argues along similar lines - in favour of those

[119] Will Kymlicka & Christine Straehle, "Cosmopolitanism, Nation-States, and Minority Nationalism: A Critical Review of Recent Literature", *European Journal of Philosophy* 7/1 (1999): pp.65-88, p.69.
[120] Igor Primoratz, "Patriotism and Morality: Mapping the Terrain", *Journal of Moral Philosophy* 5 (2008): pp.204-226, p.217.
[121] Ibid., p.218.
[122] Ibid., p.219.
[123] Ibid., p.217.
[124] David V. Axelsen, "The State Made me Do It: How Anti-cosmopolitanism is Created by the State", *The Journal of Political Philosophy* 21/4 (2013): pp.451-472, p.451.

belonging to the same nation showing some partiality to their own nationals, even if such partiality expresses bias[125]. It therefore seems reasonable to defend the interests of significant others and those with whom one identifies, starting at home – family and close others - and following through to fellow countrymen.

To stretch the point, one could say that even if it might be considered morally right that everyone is worthy of equal treatment, in the marginal utility sense of the word[126], it is perhaps too demanding an obligation. One might agree that every child is entitled to good basic schooling, but one might not contribute to the schooling of other children should this mean that it will interfere with saving up for one's own child's future education. A parallel example may be where persons abhor interpersonal violence and are proponents of pacifism. However, when their children are held at knife point and some form of attack from the parents might save them, pacifism might be too demanding a requirement for ordinary moral agents. With these examples in mind, justification for patriotic bias might be put forward, based on the argument that we are morally right in giving precedence to obligations towards those we share close/closer associations with. This would be true for those in our inner circle as well as our fellow countrymen. This is asserted even though the moral worth of every other human being, as well as their right to the basic goods to live a minimally decent life, is granted.

Linked to this is the second argument in favour of patriotic bias. The majority of South Africans have been disadvantaged by colonialism and the apartheid regime.

[125] David Miller, "Reasonable Partiality towards Compatriots", *Ethical Theory and Moral Practice* 8/1 (2005): pp.63-81, p.70.
[126] Singer, "Famine, Affluence, and Morality", p.234.

For many years most South Africans were denied equality with a de-humanising effect. After enduring much hardship and trying to deal with the individual and collective effect of oppression, South Africans are now considered living in a free society with equal voting rights and opportunities. Against this background, it could be said that South Africans ought to be afforded the opportunity to establish themselves first. The damage and limitations caused by oppression, in a redistributive justice sense of the word, need to be acknowledged and respected. Within the South African context, such acknowledgement translates, for instance, into affirmative action work place policies[127] and re-distribution of dispossessed land through the land claims process[128]. Amidst South Africa's focus on political redress, attending to the needs of non-nationals who did not share in South African history, struggle and liberation is perceivably not a fair requirement. This line of argument resonates with Rachelle Bascara's[129] view. She says the following:

> Compatriot partiality can be justified amidst cosmopolitan demands of justice if one is from a developing nation, because special consideration towards oppressed groups in general is warranted and because an oppressed group's project of self-emancipation is instantiated in the partial compatriot.

Furthermore, the notion of responsibility might be brought in to support the argument. David Miller's description of different kinds of responsibilities is relevant

[127] *Employment Equity Act*, No 55 of 1998. Chapter III. Available at: http://www.labour.gov.za/DOL/downloads/legislation/acts/employment-equity/eegazette2015.pdf
[128] *Restitution of Land Rights Act*, No 22 of 1994, "Entitlement to restitution": p.6. http://www.justice.gov.za/lcc/docs/1994-022.pdf
[129] Rachelle Bascara, "Compatriot partiality and cosmopolitan justice: Can we justify compatriot partiality within the cosmopolitan framework?", *Etikk i Praksis-Nordic Journal Of Applied Ethics.* 2 (2016): pp.27-39, p.35.

here[130]. South Africans did not cause the unfavourable circumstances in the countries that asylum seekers and refugees are migrating from. South Africans are trying to recover from their own oppressive history and cannot be held morally responsible for the causes[131] of the conflicts in other countries. Even though asylum seekers and refugees have painful narratives, they do not share the South African experience and are not compatriots. Neither are South Africans responsible for the fact that asylum seekers and refugees are migrating, as an "outcome" of their situations[132]. It is not by any doing of South Africans that asylum seekers and refugees make their way here to seek a better future. Therefore they could be considered uninvited and intruding on territory where historical redress should be allowed to take its course without interference. Furthermore, South Africans do not seem to gain any kind of "benefit" from the position of the asylum seekers and refugees, and in that sense, cannot be looked at for any kind of redress[133]. When South Africans are required to share resources with asylum seekers and refugees they might feel exploited as no reciprocity can be expected from a person who flees their own country. Seen in this way asylum seekers and refugees lay claim and take what belongs to South Africans. Against such a mind-set it might be seen as the duty of compatriots, and that it would be virtuous in the patriotic sense[134], to exclude strangers (asylum seekers and refugees) from access to basic health care services. Doing so would be seen to be "*restoring* justice"[135] to those who shared in the suffering of oppression. This is not to say that one does not want strangers to have

[130] David Miller, *National Responsibility and Global Justice"* (Oxford: Oxford University Press 2007): p.100.
[131] Ibid., p.100.
[132] Ibid., p.101.
[133] Ibid., p.103.
[134] Robert Audi, "Nationalism, Patriotism, and Cosmopolitanism in an Age of Globalization", *The Journal of Ethics* 13/4 (2009): pp.365-381, p.368.
[135] Bascara, "Compatriot partiality and cosmopolitan justice: Can we justify compatriot partiality within the cosmopolitan framework?", p.35.

access to basic health care, but just not in the context of current South African circumstances, where resources ought to go to nationals.

Considering the above arguments in favour of patriotic bias, what might be considered morally justifiable gate-keeping in relation to the claim of asylum seekers and refugees to basic health care services? To start, one might argue that our Constitution and the legislation that follows therefrom, such as the *Refugees Act*, are idealistic and too permissive. Considering South Africa's history and the redress that needs to happen for South Africans, opening the gates to non-nationals might create a gulf between aspirational morality and what could reasonably be asked of moral agents. An appeal could therefore be made to bring within reach the moral requirements concerning the right of refugees and asylum seekers to basic health care based on patriotic bias justifications. Alternatively, our constitutional aspirations should perhaps be upheld, but the legislature needs to pay closer heed to the ethical dilemmas inherent in the laws that follow from our human rights Constitution. Addressing these concerns directly might prevent, at least to some extent, a situation where institutions possibly find themselves in a difficult situation concerning human rights aspirations and not having the resources to meet them.

Should the legislature take such a stance, institutional directives might be to apply discretionary gate-keeping when asylum seekers and refugees require basic health care. It would make sense to anticipate the ethical dilemmas facing policy makers and those who are in charge of health care services and provide guidance in responding to these dilemmas. At the basis of such dilemmas is the perceivable tension between wanting to respond to any person in need (who is morally equal to

any South African and has a right to health care) and patriotic bias (to preserve limited resources for compatriots). With clarity and transparency on an institutional level about these ethical dilemmas, health care service providers and the associated administrative officials could be expected to provide basic health care services primarily to South African citizens. By acknowledging the dilemmas, and supporting those who deal with asylum seekers and refugees who seek health care services, more restrictive gate-keeping might be practiced in a transparent and respectful manner.

Taking a step back and reflecting on the foregoing discussion in favour of patriotic bias, one might feel justified, at least partially so, to advocate for restrictive gate-keeping concerning health care services and non-compatriots. The first argument put forward speaks in defence of tipping the scale to caring for those with whom one has a special relationship. In this case, the relationship concerns fellow South Africans. The second argument highlights that most South Africans have been subjected to oppression as a result of colonialism and an unjust political regime. South Africa is a young democracy within which citizens are perceivably in a process of trying to create minimally decent lives for themselves and where re-distributive processes are under way. Resources are limited, including health care, and to expect South Africans to share what is available with non-compatriots is too demanding a moral requirement.

These points granted, it nonetheless seems that patriotic bias arguments, at a cost of meeting the basic needs of others, might only hold in an insulated world. This

would apply to a patria with impenetrable symbolic or actual walls[136], where one could pretend that globalisation and migration, and the effects thereof, do not exist or are irrelevant. In such a country, one might find denial or naivety about being part of a human community beyond one's own country. In such a country patriotic bias may sit comfortably within moral territory.

However, South Africa is not such a country. Migrants from other African countries, in particular, are real and stand in the same queue for basic health care services as many South African citizens. Callan's statement seems relevant in that there is "… the ambivalence with which we should regard the moral status of patriotism"[137]. In the negative sense, patriotism is an expression of a nationalist outlook[138] and might be associated with a dislike of those who are not considered compatriots. It might go as far as considering oneself superior to non-compatriots, putting in doubt the notion that all human beings are of equal moral value. Intolerance and attempts to prevent non-compatriots from integrating into a particular society and sharing in the resources belonging to compatriots may consequently be prompted. Pauline Kleingeld describes this as a perception of "[p]atriotism as a [d]uty"[139]. Such a mind-set is characterised by division between us and others who we need to protect ourselves from and an objectification of other human beings as adversaries. Extreme gate-keeping doctrines might hold that non-compatriots should not be accommodated. It might also be visible in the degrading forms in which asylum

[136] At the time of writing this essay, Donald Trump was elected as the president of the USA. His statements concerning 'building a wall' between America and Mexico have been widely criticised.
[137] Callan, "The Better Angels of Our Nature: Patriotism and dirty Hands", p.250.
[138] Druckham, "Nationalism, Patriotism, and Group Loyalty: A Social Psycholical Perspective", p.47.
[139] Pauline Kleingeld, "Kantian Patriotism", *Philosophy & Public Affairs* 29/4 (2000): pp.314-341, p.322.

seekers and refugees are addressed and treated. In its extreme form "xenophobia ethnic hatred" may be directed at non-compatriots[140].

Extremist positions aside, it seems that there is some space in the human community for partiality and measures of inequality. It does not necessarily cause serious moral distress if some people are better off than others, have more resources and are able to live their lives with more comforts and opportunities than others. The same tolerance appears to hold if we share more of what we have with those with whom we have a special connection. In fact, legislation other than the *Refugees Act* places duty of care in the context of close relationships. For instance, the *Children's Act* [141] requires parents not to behave towards their children in certain ways. The duty of parents to care and protect is clear[142] – a requirement in the first instance contextualised within a special relationship.

It might also be granted that, symbolically speaking, building some sort of wall to ensure that those who enter South Africa and seek refuge and a chance to live a minimally decent life here, are dealt with according to certain criteria that are fair in the light of the collective interest of South Africans. Our Constitution advocates respect of all South Africans and the legislature provides a framework for the protection of the rights of citizens. With this in mind, I am not suggesting that whoever enters South Africa by whatever means and with whatever motives should be embraced into South African society.

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[140] Montserrat Guibernau, "Nationalism versus Cosmopolitanism: a Comparative Approach", *Journal of Catalan Intellectual History* 5 (2013):pp.13-34. Available at: http://revistes.iec.cat/index.php/JOCIH/article/viewArticle/72875/72628. p.17.

[141] *Children's Act 38 of 2005*. Available at www.justice.gov.za/legislation/acts/2005-038%20childrensact.pdf

[142] Ibid., Chapter 2(7).

All these considerations taken into account, and herein lies the crux of my moral protest about the first patriotic bias justification, it surely cannot be morally justifiable to deny the basic needs of any other person in terms of any kind of plausible moral framework. Basic health care is a need shared by all persons of all descriptions across the globe. This fundamental need exists regardless of where the person happens to find themselves at a particular point in time. Applying liberal human rights thinking health care would be considered a right. Thinking from an *Ubuntu* perspective, the well-being of another is a matter of dignity and treating others with dignity is a moral matter. Therefore, not being responsive to a person's health care needs is to deny another human being dignity and the essential goods to live a minimally decent life. Considered from a virtue ethics point of view: what kind of a person or society can justifiably stand by and watch men, women and children living with the consequences (and dying) because of a refusal of basic health care. Seen in its stark reality, it cannot and ought not to matter what nationality a human being is when a health care need is expressed. Being human is what matters here, and that fact overrides other considerations in this context.

Taken at face value, one might put this reasoning forward to settle the matter and dismiss patriotic bias in relation to the essay question. This would be to say that all humans are morally equal, nationality is not the deciding factor, and that health care is a basic human need and cannot be denied to any human being. Such denial would be to renounce a person's dignity and basic human rights. However, deeper probing into the moral dilemma is necessary. If two people stand in line for basic health care services and one of them has a special relationship with the health care provider, would it be morally wrong of the health care provider to favour the one she

is partial to[143]? The instance of an individual facing this dilemma can be generalised to a societal level.

The answer to the question would be *yes* the health care provider as a representative of our national health care system would be morally wrong to favour those to whom she is partial. South African society recognises that every person is of equal moral worth by virtue of liberal human rights values, *Ubuntu* principles as well as the sentiments of our Constitution. Therefore, practicing inequality in relation to basic human needs is not justifiable. Basic human needs are distinguished from other needs in that if such needs are not met, fellow human beings are denied the basic goods to survive and live minimally decent lives. It cannot, therefore, be morally acceptable to say that one person is more eligible for basic health care on the basis of their nationality. Perhaps for other things, but not for health care and means necessary for human survival and a minimally decent life.

This view is in line with Stephen Nathanson's deliberation of just partiality and just war, in that none of the special relationships that one might have justifies disregard of collective human morality[144]. Miller's view is relevant here in that where it concerns others' human rights, bias towards nationals does not apply[145]. In these instances, "… the duty to respect the conditions that are universally necessary for human beings to lead minimally decent lives …"[146] deserve priority. Kai Nielsen

[143] Bascara, "Compatriot partiality and cosmopolitan justice: Can we justify compatriot partiality within the cosmopolitan framework?", p.31.
[144] Stephen Nathanson, "Patriotism, War, and the Limits of Permissible Partiality", *Journal of Ethics* 13 (2009): pp.401-422, p.413.
[145] Miller, *National Responsibility and Global Justice,* p.72.
[146] Ibid., p.73.

similarly talks about the "primary goods" needed by everyone[147] regardless of other considerations. The right to basic health care corresponds with such a view.

It is therefore concluded that, as far as any basic human needs are concerned, considerations in favour of identification with one's own and solidarity ought to be overridden by affording the person in need of basic health care dignity and a chance to flourish.

Issue is also taken about the second patriotic bias viewpoint offered and it is rejected as a reason to close the gates on refugee and asylum seeker access to basic health care services. The essence of the rejection is that, even if I am suffering or recovering from suffering and my resources need to be carefully managed, this cannot justifiably be the reason to refuse others' their basic needs and rights. Psychologically speaking, one's own suffering might perhaps serve as a reason to limit generosity as one's resources and energies might be focussed on oneself but morally speaking, not justifiably so at the cost of the fundamental needs of any other human being.

In advancing this view, the fact that the majority of South Africans were disadvantaged by colonialism and apartheid is undisputed. Taking its most superficial and generous version it could be said that these systems impeded the collaborative development of South Africa. However, I think, truthfully stated, the debilitating and brutalising effects of these oppressive systems are starkly evident in almost every corner of South Africa. South Africans' need to recover and build

[147] Nielsen, "Toward a Liberal Socialist Cosmopolitan Nationalism", p.453.

decent lives for themselves is warranted and respected. Neither is our developing country status denied, signalling the need to be prudent about the manner in which resources are distributed.

Even so, this reality does not justify not giving asylum seekers and refugees access to basic health care services in South Africa. Along a parallel track to the experiences of the majority of South Africans are the stories of the many asylum seekers and refugees who wish to settle in South Africa. Whose needs are, morally speaking, more deserving? The question is not loaded with pressure to equalise experiences of suffering and desires to overcome oppressive histories. However, a reminder that the refugees and asylum seekers from other African countries come from oppressive situations is significant. On the whole, these asylum seekers and refugees are not medical tourists or simply opportunistic intruders. Furthermore, be mindful that African countries supported the cause of South Africa's oppressed and provided aid in different ways during the years of struggle against apartheid[148]. The call to provide for the basic health care needs of asylum seekers and refugees is related to similarly oppressed human beings from other developing countries, a number of whom supported South Africans to become liberated. Bascara's argument - that developing countries with an oppressive history are entitled to exclusively direct their resources to their own are justified in not assisting other countries who might also be in need[149] - therefore, cannot be used to vindicate closing the health care gates on refugees and asylum seekers.

[148] *Priya Pitamber,* "How the family of African states helped end apartheid" (19 March 2015). Available at: https://www.brandsouthafrica.com/people-culture/arts-culture/south-africa-s-neighbours-helped-to-end-apartheid

[149] Bascara, "Compatriot partiality and cosmopolitan justice: Can we justify compatriot partiality within the cosmopolitan framework?", p.35.

Social justice and, more specifically, re-distributive justice principles, are relevant here. Re-distributive justice concerns the notion that redress should be made where goods and opportunities have been taken from people unfairly[150]. As mentioned earlier, such redress in South African society includes affirmative action and land claims. These practices are relevant amongst South Africans, not in relation to refugees and asylum seekers. So, to make the point clear, some discriminatory practices are legitimised in the South African context to equalise matters. This is to ensure that justice is done by South Africans who have been disadvantaged by political oppression. However, basic human needs are excluded from this equation. Furthermore, redistributive considerations do not involve refugees and asylum seekers.

In this light, citizens' claims to distribute what belongs, and is available, to South Africans compatriots might be interpreted as a striving to recover and build a better future. Bascara[151] speaks to this sentiment when she says that "[i]t is only when the oppressed themselves are able to actively exercise their agency that full emancipation can be realized". However, it cannot be morally warranted for South African compatriots to close the gates when another human being, who does not share in their particular history, has health care needs whilst being on South African territory. It cannot be morally just to use nationality and own suffering as a reason to not meet the basic needs of another human being. The position that I am stating here is that where basic human needs/rights are at stake, they overshadow the need to focus on one's own history of suffering. A patriotic bias argument on the basis of

[150] Adam Swift, "Social Justice", *Political Philosophy: A Beginners' Guide for Students and Politicians* (2nd Edition Polity Press: Cambridge 2006): p.33.
[151] Bascara, "Compatriot partiality and cosmopolitan justice: Can we justify compatriot partiality within the cosmopolitan framework?", p.35.

compatriots sharing a painful history and exclusively deserving all that South Africa has to offer, does not, therefore, appear morally sufficient.

In concluding this section, patriotic bias arguments that speak to the heart and to reason, are noted. The ethical dilemmas concerning partiality to one's closest and responding to others in need are undeniable. Similarly, the need for justice to be done to compatriots who have suffered oppression is undisputed. However, patriotic bias motivations do not persuasively hold in relation to the basic needs of any human being to survive and construct a minimally decent life. There is too much at stake. Support for this position can be found in both human rights and *Ubuntu* morality: respecting the dignity of persons and responding to their basic needs are fundamental and override patriotic considerations.

6. Conclusion

Is gate-keeping a morally justifiable practice in South Africa in relation to the right of refugees and asylum seekers to health care services? Yvette Mbayo-Ndaya and many others leave their home countries somewhere in Africa and seek a better future in South Africa. Although it can be guessed that some do so for opportunistic reasons, many of the stories told about their circumstances illustrate the dynamic of forced migration. Staying in their home countries in all likelihood constitutes risk to them. They arrive in South Africa and manage to secure asylum seeker and refugee status.

In this essay it has been argued that gate-keeping might be an ethically justifiable practice. When consciously and intentionally applied, it could be put to work to ensure fairness towards those who have standing and may lay claim to certain things. With regards to health care services, fairness is called for regarding distribution of resources as South Africa is a developing country in a time frame of recovery after years of oppression. Health care resources are limited and therefore need to be mindfully dispensed. Gate-keeping as a practice provides a framework or tool that helps to guide decisions about how to distribute health care resources. This would apply to the morally aspirational intentions found in the abstract sphere, to the way basic health care services and policies are designed and implemented, through to the health care service providers and relevant officials who deal with asylum seekers and refugees.

Furthermore, an argument has been put forward that a human rights moral outlook campaigns for the meeting of basic health care needs of any human being, including asylum seekers and refugees. Our Constitution and the legislation following therefrom guide our health care gate-keeping principles. Permissive gate-keeping is implied with regards to basic health care, based on the premise that to deny health care is to deny a person's dignity. This applies to all human beings, not only South African citizens. Whilst the Constitution and our legislation define legal rights, the moral base of respect for human rights is clear.

Whilst a liberal human rights perspective appears to unambiguously support meeting the basic health care needs of any person regardless of nationality, it might be less obvious from an *Ubuntu* moral outlook. Tensions and dilemmas concerning respect

for human dignity and calls for solidarity and acting in the collective interest are perceivable. Who is part of community and should be considered with regards to collective interest, especially in a recovering South Africa that is on a developmental path with limited resources? Notwithstanding these tensions, it seems that turning a blind eye to another's suffering or fundamental needs would communicate an anti-*Ubuntu* spirit. Doing so would be a slight on the morality and dignity of both the person appealed to as well as the one in need.

All considered, the words of Yvette Mbayo-Ndaya '… there is no medication for foreigners'"[152] are reason for moral unease. Perhaps with greater awareness and deliberation of gate-keeping ethical dilemmas a way forward might be found that respects the human dignity of asylum seekers and refugees. As sung by The Fairest and Best in their tribute to refugees "… humanity is staring at you … it could be you … there is not excuse to turn away …"[153].

[152] M & G Centre for Health Journalism, "SA is no haven for sick refugees".
[153] The Fairest and Best, "It could be you" (2016). Available at: http://www.thefairestandbest.com/it-could-be-you-the-single

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