

The Human Right to Health: In International, Regional and National Legal Instruments.

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Abstract

This Article discusses the contents, essential elements of human rights to health, right to health and other fundamental principles of human rights in international, regional and national legal instruments. The human right to health discussed in this Article is only from the legal point of view. Almost all international human rights treaties recognize the right to “highest attainable standard” of health. The human right to health perceived as significant aspect of economic development, environmental issues, and the rights of children-all currently important international concern. The human right to health importantly focuses the attachment of health status to the issue of dignity, non-discrimination, justice and participation. Almost all states of the world at least signed one international human right treaty that recognize health as human right but the problem is there is no flexible standard that consider the developing nations their level of wealth and development for progressive realization of this right.

Key Words: Health, Human Rights Law, Highest Attainable Standard, indivisibility and Progressive Realization.

1. Introduction

Health is not only essential for natural and normal development, but also necessary for the natural and normal functioning of individual.¹ Thus, irrespective of age, gender, and socio

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¹Kidus Meskel, Legal and policy framework for the realization of the right to health in Ethiopia: The case of person living with podoconiosis, Wolayta Zone Southern Ethiopia (LLM thesis, January 2011), in World Health

economic or ethnic background, an individual health is a basic and essential asset.² The centrality of health as an important aspect of the human condition is universally recognized. As the World Health Organization (WHO) has written without health, other rights have little meaning.³

“The right to health is a fundamental part of our human rights and of our understanding of a life in dignity. The right to the enjoyment of the highest attainable standard of physical and mental health, to give it its full name is not new. Internationally, it was first articulated in the 1946 constitution of the World Health Organization (WHO), whose preamble defines health as “a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity”. The preamble further states that “the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition”.⁴

The 1948 Universal Declaration of Human Rights also mentioned health as a part of the right to adequate standard of living.⁵ The right to health was again recognized as a human right in the 1966 International Covenant on Economic, Social and Cultural rights. The right to health is relevant to all states of the world: Every state has ratified at least one international human rights instrument recognizing the right to health.⁶ The states are required to ensure provisions of universal coverage of a base level of medical care benefits; do not prevent access to health information; takes steps to educate the public; and act to protect public health through various initiatives such as anti-smoking campaigns, etc.⁷

This short writing importantly assess the content, essential elements of human rights to health, right to health and other fundamental principles of human rights to ensure the right to health in international, regional and national legal instruments.

Organization (WHO) and Office of the United Nations High Commissioner for Human Rights (UNHCHR), The right to health (Fact Sheet No. 31), p 4

² Id, p 4

³ Steven D. Jamar, The international human right to health, the southern University law review, Vol. 22, 1994, p 3

⁴ World Health Organization (WHO) and Office of the United Nations High Commissioner for Human Rights (UNHCHR), The right to health (Fact Sheet No. 31, Geneva 2008), p 1

⁵ Article 25 of Universal Declaration of Human Rights (UDHR)

⁶ Id n (4), p 1

⁷ Steven D. Jamar, n (3), p 4

2. The Meaning and Contents of Human Rights to Health

Just as one needs to know what “speech” is while dealing the right to freedom of speech, one needs to know what “health” is when discussing the right to health.⁸ Just as “speech” has been expanded to include non-verbal expression and restricted to exclude from protection certain kinds of speech, “health” may well take on specialized meaning different from either its common or its public policy usage.⁹ Currently the meaning of the word “health” is interpreted as the absence of illness or a state of complete well being. The following definition or descriptions all identify health as more than the absence of disease:

Aristotle:

*“In the case of the body, excellence is health in the form of making use of the body without illness”.*¹⁰

World Health Organization:

*“Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity”.*¹¹

“In this concept the stress is on positive health and not on the absence disease. Health concerns not only the body, but also the mind, the freedom of the human being.”¹² With respect to the definition of Health provided in the constitution of World Health Organization there are a lot of controversies and critics against this definition. The definition seems utopian, lacks operational value, and nobody can conscientiously affirm to have a “complete state of physical,

⁸ Steven D. Jamar, p 6

⁹ Id

¹⁰ Steven D. Jamar, n (3), in Aristotle, on Rhetoric, Book 1 at 60 (George A. Kennedy trans., 1991), this passage comes from a portion of the book in which Aristotle is discussing excellence as a topic to be used for persuasive arguments. Aristotle’s approach is somewhat different from the other three definitions insofar as he focuses on functionality, on the use of the body, not just a passive condition of the body, p 6

¹¹ Steven D. Jamar, n (3), p 6, and World Health Organization (WHO) Constitution, in basic document of the World Health Organization (WHO) (37th ed. 1992)

¹² Steven D. Jamar, p 6

psychological and economic well being.”¹³ According to the wording of this definition, governments have a duty to ensure that complete physical, mental and social well being for all citizens of the country, which is an impossible goal.¹⁴ Nature itself imposes a series of limitations that make such a state of well being physically unattainable and, moreover, health depends on many factors unrelated to direct health interventions like an individual’s heredity, environment, and behavior play an important role in shaping his or her health prospects.¹⁵ Some other literatures also characterize the WHO approach as a “wish list” rather than a core human right because it does not lend itself to translation into clearly defined state responsibilities.¹⁶ The United Nations committee on economic, social and cultural rights (CESCR), which monitors the implementations of the international covenant on economic, social and cultural rights (hereafter, ICESCR), issued general comment No. 14 (hereafter, GC No. 14): The right to the highest attainable standard of health.¹⁷ The General Comment No. 14, represent the most authoritative statement on the meaning on the right to health.¹⁸ Under its GC No. 14, the Committee on ICESCR defined ‘health’ as a fundamental human right indispensable for the exercise of other rights.¹⁹

The above definitions may point policy-makers toward a worthy end, but they do not function as either a legal principle or rule capable of application to particular situations.²⁰ This understanding of health means that the right to health should, if possible, reflect the broader, affirmative notion of health as more than the absence of disease.²¹ As will be explored below, there is more content to the right to health than these teleological definitions.

The meaning of the term “right to health” is somehow debatable and it is a formidable challenge. But the challenge did not impede the recognition and development of a human right to health in

¹³ Audrey R. Chapman, Conceptualizing the right to health: A violation approach, *Tennessee Law Review*, (Vol 65, 1997), p 390

¹⁴ Audrey R. Chapman, p 392

¹⁵ F. Michael Willis, Economic development, Environmental protection, and the Right to health (*International environmental review*, Vol. 9 (1996), p 198

¹⁶ Steven D. Jamar, p 19

¹⁷ ICESCR General Comment 14, The right to highest attainable standard of health (Article 12) General Comment No. 14

¹⁸ Gostin Lawrence, The human right to health: A right to the highest attainable standard of health, *Hastings center report* 31(2), March-April 2001, p 29

¹⁹ ICESCR General Comment No. 14, Para 1

²⁰ Steven D. Jamar, p 11

²¹ Id

international, regional and domestic human rights law. However, such definitional problem is not the only problem of the right to health. It is the problem of many human right provisions, especially those of economic, social and cultural rights that have been guaranteed under ICESCR. Here, we have to know that the right to health does not mean the right to be healthy nor does it assert an unlimited right to be treated for every medical condition.²² The states are not obliged to protect their people against every cause of ill health or disability that can be caused by different contributing factors such as genetic disease, individual susceptibility and the exercise of free will by individuals who voluntarily take unnecessary risks, including the adoption of unhealthy ways of lifestyles.²³

A right to health, at minimum level, could mean right to conditions that protect health in the population, it might also include civil and political rights with respect to access to population based and personal health care services, at most, it include also provision of medical care for the diagnosis and treatment of disease and injury for those unable to pay.²⁴ J. Asher on the other hand has defined it in a way that "...the right to health should be understood as a right to the enjoyment a variety of facilities and conditions which the state is responsible for providing as being necessary for the attainment and maintenance of good health."²⁵ There is also another view of definition which alleges that right to health, in international human rights law, is a claim to a set of social arrangements- norms, institutions, laws and enabling environment-that can best secure the enjoyment of this right.²⁶

World Health Organization (Hereafter, WHO) articulated the first specific international health and human rights provision in the preamble to its constitution. It declares that:

²² ICESCR General Comment No. 14, Para 8, See also Judith Asher, *The right to health: A resource manual for NGOs* (2004), p 17

²³ Id

²⁴ Eleanor D. Kinney, *The international human right to health: What does this mean for our nation and world?* (Indian Law Review, Vol. 34 (2001), p 1458

²⁵ Judith Asher, n (22), p 17

²⁶ World Health Organization (WHO), *25 questions and answers on health and human rights* (Health and Human Right Publication Series, Issue No 1, July 2002), p 9

“... the enjoyment of the highest attainable standard of health (Right to Health) is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic, or social condition.”²⁷

The committee on ICESCR under its GC No 14 has elaborated Art. 12 of ICESCR and defined the right to health as not to be healthy, rather as a *right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health.*²⁸

It also says that: “... it is an inclusive right extending to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water, healthy occupational and environmental condition, and access to health related education and information...”²⁹ This shows the key aspects of the right to health. We usually associate the right to health with access to health care and the construction of hospitals, while these are not the only aspect of the right to health. It includes a wide range of factors that can help us lead a healthy life, as it has been listed above.³⁰

The right to health contains both freedoms and entitlements.³¹ The freedoms include the right to control one’s health and body, including sexual and reproductive freedom, and the right to be free from interference.³² The entitlements include: the right to a system of health protection providing equality of opportunity for everyone to enjoy highest attainable level of health, the right to prevention, treatment and control of disease.³³ The ICESCR explicates the right to health in terms of broad norms, state obligations, violations and implementation.

²⁷ The preamble of the World Health Organization (WHO) Constitution, Adopted by the international health conference (July 22, 1946)

²⁸ ICESCR General Comment No. 14, Para 8 & 9

²⁹ ICESCR General Comment No. 14, Para 11

³⁰ World Health Organization (WHO) and Office of the United Nations High Commissioner for Human Rights (UNHCHR), The right to health (Fact Sheet No. 31, Geneva 2008), p 3

³¹ ICESCR General Comment No. 14, Para 8

³² Id

³³ World Health Organization (WHO) and Office of the United Nations High Commissioner for Human Rights (UNHCHR), The right to health (Fact Sheet No. 31, Geneva 2008), p 3-4, & ICESCR General Comment No. 14, Para 8

3. The Right to Health under International Human Rights Instruments

Human rights are rights that every one possesses by virtue of being human, irrespective of race, religious or political beliefs, legal status, economic status, language, color, national origin, gender, ethnicity, etc.³⁴ Human rights are interdependent, indivisible and interrelated.³⁵ The human right to health has been recognized under different international and regional legal instruments, and international bodies.

3.1 The United Nation Charter: The right to health has been recognized ever since the birth of United Nations (UN) in 1945. The charter of UN urges state parties to respect rights to a higher standard of living and solutions to international health problem.

Article 55 of UN charter provides that with a view to the creation of condition of stability and wellbeing which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self determination of peoples, the United Nations shall promote:

- ✓ Higher standards of living, full employment, and conditions of economic and social progress and development;
- ✓ Solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
- ✓ Universal respect for and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language and religion.

The Charter only commits the United Nations to promote solutions to health problems; the inclusion of the reference to seeking solutions to “international health problems” in the basic document of the United Nations, indicates the fundamental, deeply rooted nature of this right.³⁶

3.2 The Universal Declaration of Human Rights: The 1948 Universal Declaration of Human Rights is not treaty but statement of policy and a call to action much like the declaration of independence. It affirmatively states a human right to health: “Everyone has the right to a standard of living adequate for the health and wellbeing of himself and his family, including

³⁴ Paul Dubinsky, et al., What is a human right? Universals and the challenge of cultural relativism (11 page international law review...107) (1999), p 5

³⁵ Vienna Declaration and programme of action (A/CONF.157/23), adopted by the world conference on Human Rights, Held in Vienna (14-25 June 1993)

³⁶ Steven D. Jamar, p 10

medical care and the right to security in the event of sickness, disability...³⁷ Health is treated as a way to measure the extent to which the right is being met. That is, the right to a certain minimal standard of living, not health directly.³⁸ The point is that the right is not necessarily to directly receive food, clothing, shelter and medical care, but that the right can be, and typically is achieved through access to a job which pays well enough to allow the earner to acquire those things for the person's family.³⁹ The other important point is in case there is lack of health it excuses one from earning a living and entitles to safety net of social service.⁴⁰ And the state can meet that claim through a social security system or workers' compensation system or some other insurance-type system, provide the substantive requirements of the right are met. As a declaration, the UDHR does not impose specific obligations on state parties.⁴¹ In the 1960s, the United Nations sponsored the development of two international covenants that articulate human rights recognized in the UN Universal Declaration of Human Rights (UDHR). These two covenants are International Covenant on Civil and Political Rights (ICCPR)⁴² and the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁴³

3.3 The International Covenant on Economic, Social and Cultural Rights (ICESCR): The ICESCR is the major U.N. treaty recognizing the international human right to health.⁴⁴ As per Article 12 of ICESCR:

1. The states party to the present covenant recognizes the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by states party to the present covenant to achieve the full realization of this right shall include those necessary for:

³⁷ Eleanor D. Kinney, The international human right to health: What does this mean for our nation and world? (Indian Law Review, Vol. 34) (2001).., United Nations Universal Declaration of Human Rights, General Assembly Resolution 217A (III), Art 13 (1), & United Nations. GAOR, 3d Sess., at 71, 74, U.N. Doc A/810 (1948).

³⁸ Steven D. Jamar, p 11

³⁹ Id

⁴⁰ Id

⁴¹ IP, Humphrey. The Universal Declaration of Human Rights: Its History, Impact and Judicial Character. Edited by BG Ramcharam, Human Rights: Thirty years after the Universal Declaration 1979.

⁴² International covenant on civil and political right, G.A. Res 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966).

⁴³ International covenant on economic, social and cultural rights, G.A. Res 2200I(XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316, 993 U.N.T.S. 3 (1966).

⁴⁴ Id

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- a. The provision for the reduction of the stillbirth-rate and of infant mortality and for the health development of the child;
 - b. The improvement of all aspects of environmental and industrial hygiene;
 - c. The prevention, treatment and control of epidemic, endemic, occupational and other disease;
 - d. The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

Coming to analysis of the provisions the standard in covenant on economic, social and cultural rights is the state parties required to recognize the right of everyone. There is a sense of greater role for discretion by the states in the rights under the covenant on Economic, Social and Cultural rights than under the covenant on civil and political rights. The use of the term “recognize” under Article 12 (1) confirm that the right to health is not promulgated or adopted or established by the state parties, but recognized, which entails that the state parties are not creating something, but simply recognizing the existence of that thing.⁴⁵ This will strengthen the consideration of a right to health as human right since it exists without the recognition by states. The right is not to physical perfection and not to flawless mental attitudes and processes; rather it is to the “highest attainable standard” of both physical and mental health (Art. 12 (1)).

The state parties agree to take steps for the progressive realization of full right to health to the maximum of its available resources. Under sub Article 2 of Art. 12, viewed from the obligation perspective, the idea is state cannot guarantee or provide healthy directly; it can only provide conditions conducive to the attainment of health. The steps listed under Art. 12 (2) are not limits on the right to health; nor do they list all of the conditions necessary for the enjoyment of it. But the steps listed do provide guidance insofar as the breadth of the duty of the state parties. To explain some of these duties (i.e., duties listed under Art. 12 (2)), in relation to the improvement of all aspects of environmental and industrial hygiene, the state party must, for example, prevent occupational accidents and disease; minimizes as far as reasonably practicable, the cause of health hazards that are inherent in the working environment (industrial hygiene); ensure adequate housing and safe and hygienic working conditions.⁴⁶ Concerning the prevention, treatment and

⁴⁵ Steven D. Jamar, p 12

⁴⁶ ICESCR General Comment No. 14, Para 15

control of endemic, epidemic, occupational and other diseases, states must, for example, create a system of emergency medical care for the management of accidents, epidemics, and similar health hazards.⁴⁷ States have to ensure the provision of appropriate regular screening programs; ensure diseases, illness, injuries and disabilities receives appropriate treatment, preferably at the community level.⁴⁸

3.4 International Covenant on Civil and Political Rights (ICCPR): The covenant on civil and political rights does not include a right to health, but it does include provisions which affect the right to health such as the right to life,⁴⁹ to freedom from torture,⁵⁰ to liberty and security of person,⁵¹ to humane treatment of prisoners,⁵² to freedom of thought, conscience and religion,⁵³ and to freedom “to seek, to receive and impart information.”⁵⁴ These rights help everyone attain health or enjoy the right to health, but the right to health not contained within or bound by these rights. And this clearly indicates as human rights by their nature are indivisible and interdependent. In the Vienna Declaration and Program of Action of 1993,⁵⁵ it is reaffirmed that all human rights are universal, interdependent, interrelated and indivisible. The UN Human Rights Committee suggested that the right to life in Article 6 of the ICCPR should not be given a narrow interpretation, but should be seen to affect other rights, such as the right to housing, food and medical care.⁵⁶ A condition which leads to health is one which provides freedom from anti-health such as torture, and freedom of conscience is related to mental health. Mann notes that nearly every article contained in human rights documents has the tendency to impact up on the enjoyment of the right to health.⁵⁷

3.5 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW): CEDAW recognizes “the right to protection of health and to safety in working

⁴⁷ ICESCR General Comment No. 14, Para 16

⁴⁸ ICESCR General Comment No. 14, Para 17

⁴⁹ Convention on Civil and Political Rights, Article 6, Dec. 16, 1966, 999 U.N.T.S. 171.

⁵⁰ Id, Art. 7

⁵¹ Id, Art. 9

⁵² Id, Art. 10

⁵³ Id, Art. 18

⁵⁴ Id, Art. 19

⁵⁵ Vienna Declaration and Program of Action, U.N. GAOR, World Conference on Human Rights, 78th Sess., 22d, plen. Mtg., part 1, cha III, U.N. Doc. A/CONF 157/23 (1993).

⁵⁶ ‘The Right to Life’ UN GAOR Human Rights Committee 37th session Supp No. 40

⁵⁷ JM, Mann, et al., ‘Health and Human Rights’, International Journal of Law, 1994.

conditions, including the safeguarding of the function of reproduction.”⁵⁸ The use of the word “protection” implies the taking of steps to create the conditions conducive to good health, or at least to avoid conditions antithetical to health. CEDAW adds specific content to the right of health in the guise of preventing discrimination against women in the “field of health care” by insuring not only equal access to health care services in general, but also specifically noting that family planning health care services are included in the term “health care services.”⁵⁹ Likewise, CEDAW obligates states to take all appropriate measures to eliminate discrimination in the field of health care in order to ensure, on the basis of equality between men and women, access to health care services, including to those related family planning.⁶⁰ States parties have a further obligation to ensure to women appropriate service in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and location.⁶¹ Article 14 of CEDAW addresses the particular problems of women in rural areas and again provides that women have the right to “access to adequate health care facilities, including information, counseling and services in family planning.”⁶² The same article also provides for sanitation and a water supply as a part of the right to “adequate living conditions.”⁶³

3.6 International Convention on the Rights of Child: Child Right Convention is the most extensive in terms of provisions for child health care.⁶⁴ Specifically, states parties must recognize “the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health” and that state parties shall “strive to ensure that no child is deprived of his/her right of access to such health care services.”⁶⁵ Care should include comprehensive preventive and health education services, “pre-natal and post-natal health care for mothers,” and family planning education and services.⁶⁶ Further states must take measures to abolish “traditional practices prejudicial to

⁵⁸ Convention on the Elimination of all forms of Discrimination Against Women, Article 11 (1), (f), Dec. 18 , 1979, 19 I.L.M. 33 (1980)

⁵⁹ Id, Article 12

⁶⁰ Id, Article 12 (1)

⁶¹ Id, Article 12 (2)

⁶² Id, Article 14 (2), (b)

⁶³ Id, Article 2 (h)

⁶⁴ Convention on the Rights of the Child (CRC), Nov. 20, 1989, 28 I.L.M. 1448 (1989) (entered into force on Sept. 2, 1990).

⁶⁵ Id, Article 24(1)

⁶⁶ Id, Article 24 (2)

the health of the children.”⁶⁷ The rights for the access to special care services for the disabled children, including health care and other services free of charge, to preclude financial barriers to these services.⁶⁸

3.7 The International Labor Organization (ILO) Occupational Safety and Health

Convention: The ILO occupational safety and health convention, (1981) (No 155), and its accompanying recommendation (No 164), provide for the adoption of a national occupational safety and health policy, as well as describing the actions taken by the governments and within enterprises to promote occupational safety and health, and improve the working environment. The convention is supplemented by the protocol of 2002 to the occupational safety and health convention (No 155) which calls for the establishment and periodic review of requirements and procedures for the recording and notification of occupational accidents and diseases, and for the publication of related annual statistics.

ILO convention No 155 covers all branches by which workers are employed, including the public service.⁶⁹ This convention define the word “health” relatively in the same way like the World Health Organization (WHO) definition of “health”, but not rigid as such like WHO definition since it does not employed “complete” definition. Convention No 155 defined “health” in relation to work under Article 3 (d) as “...not merely the absence of diseases or infirmity; it also includes the physical and mental elements affecting health which are directly related to safety and hygiene at work.” There is also another complementarity between this convention and Article 12 (2) (b) of ICESCR. When the committee on ICESCR under GC No 14, discusses the content of “the right healthy and work environments”, it refers Article 4 (2) of the ILO convention No.155 of 1981.⁷⁰ The ILO convention is of central importance because it introduces a national policy process in relation to occupational safety and health (after this, OSH). Under its Article 4 (1) it urges each member states, the formulation and implementation, and periodically reviews national policy on occupational safety and health, and the working environment. Calling for a national policy on OSH emphasizes that, governments must consider OSH as a matter of national concern and be

⁶⁷ Id, Article 24 (3)

⁶⁸ Id, Article 23

⁶⁹ Article 3 (a) of International Labor Organization (ILO) Occupational Safety and Health Convention No. 155, 1981

⁷⁰ ICESCR General Comment No. 14, Para 15

actively involved.⁷¹ The aim of the policy shall be to prevent accidents and injury to health arising out of, linked with or occurring in the course of the work, by minimizing, so far as is reasonably practicable, the cause of hazards inherent in the working environment.⁷² Article 11 of ILO convention No 155 sets out six functions which the national policy shall cover progressively, among them which includes:

- ✓ The establishment and application of procedures for the notification of occupational accidents and disease by employers;
- ✓ The holding of inquiries, where cases of occupational accidents and disease, or any other injuries to health arise in connection to work;
- ✓ The publication, annually, of information on occupational accidents, disease and other injuries to health;

Therefore, at national level, governments are required to identify arrangements on the measures to be taken to implement the policy; enforce relevant laws and regulations; and ensure the required coordination between various authorities and bodies on the manner by which the policy to be implemented, including, for example, through a central national body.⁷³ Article 16-18 of ILO convention place obligation on the employers to ensure, so far as is reasonably practicable, that the working environment is safe and without risk to health. These obligations includes, ensuring safe and healthy working place; ensuring chemical, physical and biological substances, and agents under their control are without risk to health when the appropriate measures of protection are taken; to provide adequate protective clothing and protective equipment to prevent risk of accidents or adverse effects on health; provides for measure to deal with emergencies and accidents, including adequate first-aid arrangements. Adequate arrangements should also be made for compensation of work related injuries and diseases, as well as for rehabilitation and to facilitate a prompt return to work.⁷⁴ Generally, International Labor Organization convention (No 155) has significant importance in the protection and promotion of workers safety and health which is one important part of human right to health.

⁷¹ International Labor Office, Building a preventive safety and health culture, A guide to the occupational safety and health convention No 155 (1981), its 2002 Protocol and the Promotional Framework for occupational safety and health convention No 187 (2006), Geneva, 2008, p 7

⁷² Article 4 (2) of ILO Occupational safety and health convention No. 155 (1981)

⁷³ Id n (71), p 8

⁷⁴ Benjamin O. ALLI., Fundamental principles of occupational safety and health, 2nd ed, International Labor Office, Geneva 2008, p 21

4 The right to Health under Regional Human Rights Instruments

In addition to the above discussed international human rights instruments there are also some regional instruments which recognize the right to health. From these, African charter on human and people's rights (Banjul Charter);⁷⁵ the American declaration of the rights and duties of man;⁷⁶ and the two European instruments: the European convention for the protection of human rights and fundamental freedoms,⁷⁷ and the European social charter.⁷⁸

Under the African regional human right system there are a number of conventions, treaties, and protocols that deals with the right to health. For example, the constitutive act of the African union⁷⁹ Article 3 (h), protocol to the African charter on the rights of women⁸⁰, African charter on the rights and welfare of the child⁸¹ are some of them. The African charter protects a broad range of socio-economic rights and also a number of collective rights relevant to socio-economic rights. This includes, right to work, right to education, right to self-determination, right to peace and etc. The African charter provides that every individual shall have the right to enjoy the best attainable state of physical and mental health.⁸² This mean, the right is not to physical perfection and not to flawless mental attitudes and processes; rather it is to the "best attainable standard" of both physical and mental health. The other important point is states are not required to guarantee or provide healthy directly to individuals, but only required to conditions conducive to the attainment of health. Under Article 16 (2) of African charter there is a more general obligation on state parties to "take necessary measures to protect the health of their people" and establishes a specific duty on states "to ensure that the states people receive medical attention when they are sick." The African commission on human and people's right (here after the commission)⁸³ has

⁷⁵ The African Charter on Human Peoples Rights (Banjul Charter) (June 27, 1981). Full text available at www.africa-union.org.

⁷⁶ American declaration of the rights and duties of man, March 30-May 2, 1948, O.A.S. res. XXX, adopted by the ninth international conference of American states, Bogota Colombia.

⁷⁷ European convention for the protection of human rights and fundamental freedoms, Nov. 4, 1950, entered into force September 3, 1953

⁷⁸ European social charter adopted by the committee of ministers of the council of Europe, July 6, 1961

⁷⁹ Constitutive act of the African Union, Adopted in Lome, Togo, July 11, 2000 and entered into force May 26, 2001

⁸⁰ Protocol to the African charter on the rights of women in Africa, Adopted in Maputo, Mozambique in July 2003 and entered into force November 2005

⁸¹ African charter on the rights and welfare of the child, Adopted in Finfinnee (Addis Ababa), Ethiopia in 1990 and entered into force November 29, 1999

⁸² Id n (75), Article 16 (1)

⁸³ The commission was established based on Article 30 and 40 of ACHPR with wide range of powers in respect of the rights in the charter and set up on July 29, 1987, Doc. OAU AFR/COM/HPR 2 (1)

given an interpretation concerning the economic, social and cultural rights that has been contained in the African charter in the case of *The Social and Economic Rights Action Center and The Center for Economic and Social Rights v. Nigeria (SERAC Case)*.⁸⁴ The complaints brought an action against Nigerian government for violations of array economic, social and cultural rights committed by state owned National Nigerian Petroleum Company (NNPC) and Shell Petroleum Development Corporation, by which the NNPC held a majority of shares. The complaint alleged that the companies exploited oil in Ogoni land, Nigeria without regard for the environment or health of the local communities. The resulting water, soil, and air contamination caused serious short and long term health problems, including skin infections, gastrointestinal and respiratory ailments, increased risk of cancer, and neurological and reproductive complications.⁸⁵ The complaint further alleged that the Nigerian government not only condoned these harmful operations but aided in their perpetration by placing the legal and military powers of the state at the disposal of the oil companies. The commissions accepted the complaint's allegation as fact and found that the Nigerian government violated the right to health and a third generation right to a clean environment by directly contaminating water, soil and air; damaging the safety and health of Ogoni people; and failing to protect them from the damage caused by the oil companies.⁸⁶ In reaching such conclusion, the commission underlined that the right to a clean and safe environment is enshrined under Article 24 of ACHPR. According to the commission, the right to a clean environment is seriously critical to the enjoyment of economic, social and cultural rights "in so far as the environment affects the quality of life and safety of the individual."⁸⁷ Regarding the right to enjoy the best attainable state of physical and mental health (under Article 16 of ACHPR), and the right to a generally satisfactory environment favorable to development (under Article 24 of ACHPR), the commission held that governments are prohibited from directly threatening the health and environment of their citizens. The commission found that the duty to respect these rights largely disclose non-interventionist approach from the state, such as refraining carrying out, sponsoring or tolerating any practice,

⁸⁴ See communication 155/96, Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria Government, Decided at 30th ordinary session, Oct 2001, 15th Annual Activity Report. AHRLR 60 (ACHPR 2001).

⁸⁵ Id n (84), Para 2

⁸⁶ Id, Para 70

⁸⁷ Id, Para 51

policy, or legal measures that violate the integrity of individual.⁸⁸ Like the U.N committee on ICESCR, the commission stated that the rights ‘generate at least four levels of duties, namely the duty to respect, protect, promote and fulfill’.⁸⁹ The decision of the commission suggests that the right to health in the African charter on human and people’s rights must be interpreted according to international human right instrument standards. Regarding remedies, the commission made extensive recommendations. It recommended that investigations be conducted, those responsible for violations should be prosecuted, and compensation should be paid to the victims.⁹⁰ The decision of the commission is important beginning for the protection and promotion of right to health in Africa. The decision has set a precedent for the justiciability of the right to health and can be viewed as a great triumph for social and economic rights in Africa.⁹¹

5 The right to Health in Ethiopia: The Legal and Policy framework

In Ethiopia there are different legislations, policies and code of practices that have been made to ensure respect, protection, promotion and fulfillment of the right to safety and health.

To begin from the country’s constitution, i.e. the Federal Democratic Republic of Ethiopia Constitution (hereafter, FDRE) is the supreme law of others: any law, customary practice or a decision of organ of state or public official which contravenes this constitution shall be of no effect.⁹² The right to health has been mentioned under the FDRE constitution of 1995. Every Ethiopian national has the right to equal access to publicly funded social service,⁹³ one of which is health related service. Health related service includes access to health care, safe drinking water and adequate sanitation, adequate nutrition and housing, healthy working and environmental conditions, health-related education and information, gender equality and others.⁹⁴ Publicly funded health service should be inclusive of all without discrimination on any ground: race, colour, sex, language, religion, political or other opinion, national or social origin, property, disability, birth or other status. According to the committee on economic, social and cultural

⁸⁸ Id, Para 52

⁸⁹ Id, Para 44

⁹⁰ Id, Para 71

⁹¹ D.M. Chirwa, A fresh commitment to implementing economic, social and cultural rights in Africa: The social and economic rights action center and the center for economic and social right v. Nigeria, 2002. P 55

⁹² Article 9 (1) Federal Democratic Republic of Ethiopia Constitution Proclamation No 1/1995 (entered into force August 21, 1995)

⁹³ Id, Article 40 (3)

⁹⁴ Id n (4), p 3

rights, “other status” may include health status (e.g., HIV/AIDS) or sexual orientation.⁹⁵ States have an obligation to prohibit and eliminate discrimination on all grounds and ensure equality to all in relation to access to health care and the underlying determinants of health. The international convention on the elimination of all forms of racial discrimination (Article 5) also stresses that states must prohibit and eliminate racial discrimination and guarantee the right of every one to public health and medical care. The Ethiopia state has the obligation to allocate ever increasing resources to provide to public health, education and other social service.⁹⁶ Also state shall, within available means, allocate resources to provide rehabilitation and assistance to the physically and mentally disabled, the aged, and to children who are left without parents or guardians.⁹⁷ Despite the fact that the FDRE constitution does not include the right to get emergency medical service which is an important aspect of the right to health, one may add the right to housing, social security, safe and potable water, food etc...from the open-ended use in the constitution (...other social service).⁹⁸

The FDRE constitution provides that all international agreements ratified by Ethiopia are integral part of the law of the land.⁹⁹ That means, after signature and ratification by House People’s representative these international treaties or conventions become an integral part of the law of the land. With respect to fundamental rights and freedoms specified in the third chapter of the FDRE constitution when interpretation is necessary, it should be in manner conforming to the Principles of Universal Declaration of Human Rights (UDHR), International Covenant on Human Rights, and International Instruments Adopted by Ethiopia.¹⁰⁰ Ethiopia has ratified or accessed most of the international or regional human rights instruments which give recognition to the right to health. The most important ones are the International Covenant on Economic, Social and Cultural Rights (ICESCR), International Covenant on Civil and Political Rights (ICCPR), the International Convention on the elimination of all forms racial discrimination (ICERD), the International Convention on elimination of all forms of Discrimination against Women

⁹⁵ Id n (4), p 7

⁹⁶ Id, Article 40 (4)

⁹⁷ Id, Article 40 (5)

⁹⁸Kidus Meskel, Legal and policy framework for the realization of the right to health in Ethiopia: The case of person living with podoconiosis, Wolayta Zone Southern Ethiopia (LLM thesis, January 2011), in Alemahu Sisay, The constitutional protection of economic and social rights in the Federal Republic of Ethiopia. *Journal of Ethiopia law* 22, No 2 (2008), p 55

⁹⁹ FDRE Constitution, Article 9 (4)

¹⁰⁰ FDRE Constitution, Article 13 (2)

(CEDAW), and the Convention on Child Rights (CRC). At a regional level, Ethiopia has ratified the African Charter on Human People's Rights (ACHPR).¹⁰¹ And all these international treaties and conventions are integral part of the law of the land. The FDRE Constitution is with several provisions pertaining to matters of safety, health and working environment in particular; Article 15 (The right to life), Article 18 (Prohibition against inhumane treatment), Article 25 (Right to equality), Article 35 (Right of women), Article 36 (Rights of children) have a substantial connection with the right to health. Under chapter ten of FDRE constitution which is about National Policy Principles and Objectives, government shall endeavour to protect and promote the health, welfare and living standards of the working population of the country.¹⁰² The FDRE constitution obliges state to design policies that would provide all Ethiopian access to public health. This is one of the social objectives under Article 90 of FDRE Constitution. The obligations of the state extends to the extent the resources of the country permit and it is expected to design policies that aim to provide all Ethiopian access to public health, clean water, food and social security.¹⁰³ Therefore, it is not doubtful that the FDRE constitution has given wider emphasis for the respect, protection, promotion and fulfillment of human right to health.

The Ethiopia health policy is the result of a critical examination of the nature, magnitude and root causes of the prevailing health problems of the country and awareness of new emerging health problems. It accords appropriate emphasis to the needs of less-privileged rural population which constitutes the over-whelming majority of the population and the major productive force of the nation. The Ethiopia health policy underlines the importance of achieving universal access to a basic package of quality primary health care services to all people decentralized, preventive, promotive and basic curative service. The government therefore accords health a prominent place in its order of priorities and is committed to the attainment of these goals utilizing all accessible internal and external resources. The government believes that health policy cannot be considered in isolation from policies addressing population dynamics, food availability, acceptable living conditions and other requisites essential for health improvement and shall therefore develop effective intersectorality for a comprehensive betterment of life. The Ethiopia health policy gives special attention: to family particularly women and children, those in the

¹⁰¹ The Ethiopian government had accessed ICESCR in 1993 and CRC in 1991 without reservation, ratified CEDAW in 1981 with reservation to Article 29 (1) and ACHPR in 1998.

¹⁰² FDRE Constitution, Article 89 (8)

¹⁰³ FDRE Constitution, Article 90 (1)

forefront of productivity, those hitherto most neglected regions and segments of the population including the majority of the rural population, pastoralists, the urban poor and national minorities. The major contributors to the burden of disease at all levels will be given the highest priority. These include HIV/AIDS, malaria, tuberculosis, leprosy, blindness, child and maternal mortality, and onchocerciasis. These priority health problems shall be implemented through the health sector development program (HSDP).¹⁰⁴

HSDP is the vehicle by which the National Health Policy articulated by the transitional government (TGE) in 1993 implemented. As such, the objectives and design of HSDP are entirely compatible with the policy which stresses the need to develop a comprehensive health service delivery system and the capacity for effective management in order to address the major problems of communicable disease, malnutrition, and the need for improved maternal and child health services. Health Sector Development Program (HSDP) was commenced in 1998 with the purpose of increasing the coverage and improving the quality of health services. The HSDP proposes long-term goals for the sector, and the means to attain the by way of a series phased, medium-term plans.

As provided in its preamble because of active participation of the society in the health sector has become necessary for the implementation of the country's health policy; and the issuance of public health is believed to be an important step for the promotion of the health of the society and for the creation healthy environment for the future generation thereby enabling it assume its responsibility in accordance of Article 55 of FDRE constitution the public health proclamation¹⁰⁵ was proclaimed. The public health proclamation defined health as not only the absence of disease but also the complete physical, mental and social well being of an individual.¹⁰⁶ Complete physical, mental and social well being does not mean physical perfection and not to flawless mental attitudes and processes. The other important point is states are not required to guarantee or provide healthy directly to individuals, but only required to conditions conducive to

¹⁰⁴ Kidus Meskel, Legal and policy framework for the realization of the right to health in Ethiopia: The case of person living with podoconiosis, Wolayta Zone Southern Ethiopia (LLM thesis, January 2011), in Ethiopia Health Sector Development Programs I-III, Ministry of Health, (Finfinnee (Addis Ababa): Ethiopia) (2002/2003 - 2009/2010).

¹⁰⁵ Ethiopia public health proclamation No 200/2000, Federal Negarit Gazeta, 6th Year, No 28, 9th March, 2000

¹⁰⁶ Id, Article 2 (5)

the attainment of health. For instance, under this proclamation inspectors are appointed by public health authority and granted with the following powers and duties:

- ✓ Enter and inspect any premise which he has sufficient reason to believe that there exists a situation endangering public health;¹⁰⁷
- ✓ To appropriate any article or material which is the result of any act committed contrary to law or used for the commission of the illegal act or has any connection with the commission of the illegal act;¹⁰⁸
- ✓ To cause the keeping separately of or the destruction of articles, materials or goods found in any premise or building where he/she has sufficient reason to believe that such goods are dangerous to health, or that they cause or can cause another danger;¹⁰⁹

These powers and duties granted for the inspectors under the supervision of public health authority clearly indicates as the government is properly incorporated its international obligations in national legislations to provide conditions conducive to the attainment of health of its citizens. The other important point under this proclamation is that the government takes legislative measures for best attainment of physical and mental health of its citizens by putting minimum set limit for food quality control,¹¹⁰ water quality control,¹¹¹ occupational health control and use machinery,¹¹² waste handling and disposal, communicable disease¹¹³ and others. Finally definition of health discussed under this proclamation is complementary to the definition of health discussed in ILO occupational safety and health convention, ACHPR, WHO and ICESCR.

6 Conclusion

The human right to health is fundamental right; without it other rights have less meaning and importance.¹¹⁴ The human right to health perceived as significant aspect of economic

¹⁰⁷ See Article 7 (1) of Ethiopia public health proclamation No 200/2000, Federal Negarit Gazeta, 6th Year, No 28, 9th March 2000

¹⁰⁸ Id, Article 7 (3)

¹⁰⁹ Id, Article 7 (8)

¹¹⁰ Id, Article 8

¹¹¹ Id, Article 10

¹¹² Id, Article 11

¹¹³ Id, Article 17

¹¹⁴ Steven D. Jamar, p 34

development, environmental issues, and the rights of children-all currently important international concern. The human right to health is type of second generation rights that highly require the involvement of state machinery for its full realization. But the problem particularly for the developing world signed an international and regional legal instrument that recognizes health right as human right, for instance, Ethiopia, is absence of flexible standard which recognizes their level of wealth and development that allow for the progressive realization of this right. That means mechanism for the realization and enforcement of the human right to health in different countries particularly the developing world should be assessed. In developing world including Ethiopia because they signed different international treaties or conventions on human right to health they should re-examine and address problems concerning medical man power, medical experimentation and facilities, and discrimination. Finally it is not doubtful that international human rights to health as recognized and incorporated in different international treaties and conventions impose greater obligations on signatories, for instance, Ethiopia with respect to health than their current effort and appreciation.

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