

# The Gambia and The right to Traditional, complementary, and alternative health care: A Legal Commentary

## ABSTRACT

Health rights are important fundamental human rights. But unfortunately missing in the Gambian 1997 Constitution. Besides, the right to health does not only pertain to the mainstream sector but extends to the practice of medical pluralism. In promoting medical pluralism in a country such as the Gambia, rights to health should also extend to access to traditional and alternative remedies. The provision of the attainable highest standard in the profession should be the hallmark of the Nation.

Article 24 of the UN Declaration on the Rights of Indigenous Peoples states: Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals, and minerals.

The question is what is being done for the Indigenous Peoples in the Gambia to have access to their traditional and alternative medicines without any hindrances? In this legal commentary, I explore the constitutional provisions of the right to health in the Gambia and access to traditional, complementary, and alternative medicines.

**Keywords:** Right to Health, The Gambia, 1992 Constitution, 2020 draft Constitution, Healthcare

## INTRODUCTION

Going through the Gambian 1997[1] Constitution, I noticed that Section 62 gives room for the youth in their thirties to be eligible to contest as President of the land. It states that "*a person shall be qualified for election as President if (b) he or she has attained the minimum age of thirty years but not more than sixty-five years*".

The Gambian constitution restricts the maximum age to contest the Presidency. However, the restriction on age has been removed in Section 93 of the draft 2020 Constitution of the Gambia[1].

This position is contrary to the position in Article 62 (b) in the 1992 Constitution of Ghana which states that one qualifies to contest for president unless he has attained the age of forty years. The Ghanaian context does not place any restriction on the maximum age to contest for the presidency[2]. I am hopeful that the Gambia people stand a better chance to elect a young person in his or her thirties to become a national President one day on the African Continent.

### ***Rights to Health in 1997 Constitution, The Gambia***

I was disappointed to see that there is no provision for the right to health in the Constitution[1], a very important area. This is contrary to the right to health in Article 30 of the Ghanaian 1992 Constitution[2]. It states that a person who because of sickness or any other cause is unable to give his consent shall not be deprived by any other person of medical treatment, education, or any other social or economic benefit by reason only of religious or other beliefs[2].

Also, article 34(2) mandates the President to report to Parliament once a year to account to the people on steps taken to address the right to good health care [2]. Though this is a Directive Principle of State Policy and not enforceable.

### ***Rights to Health in 2020 Draft Constitution, The Gambia***

The *lacuna* created in the 1997 Constitution was cured in the draft 2020 Constitution that is yet to be adopted[3]. The draft Constitution provided a more specific and elaborated provision for fundamental and specific human rights.

Section 67 deals with the Rights of the sick[3]:

*“ A person who by reason of sickness or any other cause is unable to give his or her consent shall not be deprived by any other person of medical treatment, education or any other social or economic benefit by reason only of religious or other beliefs”.*

This position is in line with their Ghanaian provision on the rights of the sick. Section 62 also emphasizes economic and social rights. It states that[2].

1. *“Every person has the right to– a. the highest attainable standard of health, which includes the right to health care services, including reproductive health care;*

2. *A person shall not be denied emergency medical treatment”*

Section 33 emphasizes the implementation of fundamental human rights and freedoms and 35 provides the roadmap for enforcement of the fundamental human rights at the High Court[2].

### **Rights to Health: Other African Countries**

There are other African Countries with enforceable rights on health. This list is not comprehensive but includes examples of countries from each region.

For instance:

**South Africa** (1996) Constitution[4] states in Article 27 on Health care, food, water, and social security:

1. *“Everyone has the right to have access to a. health care services, including reproductive health care; b. sufficient food and water; and c. social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.*
2. *The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.*
3. *No one may be refused emergency medical treatment”.*

**Kenya** (Adopted by referendum in 2010) [5]

43. (1) *“Every person has the right— (a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care; (b) to accessible and adequate housing, and reasonable standards of sanitation; (c) to be free from hunger, and to have adequate food of acceptable quality; (d) to clean and safe water in adequate quantities; (e) to social security; and (f) to education.*

(2) *A person shall not be denied emergency medical treatment.*

(3) *The State shall provide appropriate social security to persons who are unable to support themselves and their dependants”.*

**Mozambique (1990) [6]**

Article 89. Health :

*“All citizens shall have the right to medical and health care, within the terms of the law, and shall have the duty to promote and protect public health”.*

**Senegal** (Adopted by referendum in 2001) [7]

Article 8

*“The Republic of Senegal guarantees all citizens their fundamental freedoms, economic and social rights as well as group rights. These freedoms and rights are Civil and political liberties, freedom of opinion, freedom of expression, press freedom, freedom of association, freedom to hold meetings, freedom of movement, freedom to protest, cultural freedoms,*

*religious freedoms, philosophical freedoms, union freedoms, freedom of enterprise, the right to education, the right to literacy, the right to property, the right to work, **the right to health**, the right to a healthy environment, and the right to a variety of information. These freedoms and rights shall be exercised under the conditions provided by law”.*

### **Constitution of Côte d'Ivoire (2000) [8]**

#### Article 7

*“The State shall ensure that all citizens have equal access to health, education, culture, information, professional training, and employment”.*

### **Methods**

**I examine** the constitutional provision of the right to health in the Gambian 1992 and the draft 2020 Constitutions and its violation of health rights. I further examine some selected African Countries Constitutions and their provisions on right to health. This was done in a non-systematic way of legal research.

**I conclude** with the importance of the adoption of the draft 2020 Constitution and the potential effect on the rights to health in the Gambian health system and discuss how their likely full recognition and enforcement, could help in reshaping the doctrine of the right to health.

### **Discussion**

It is instructive to know that these countries in Africa *supra* have health rights that can be enforceable in any court of competent jurisdiction. This cannot be said in the Gambian 1997 Constitution. However, the 2020 draft Constitution has a provision for enforceable rights to health. But until this new constitution is adopted, the faith of the sick patient in the right to health appears unachievable though there are several healthcare laws in the country.

These achievable health rights do not only pertain to the sick but to the general public desiring a specific right to health. Notwithstanding, there are pieces of healthcare laws in the Gambia that regulate healthcare industries and professionals.

But for the patient or the concerned citizens who would want to enforce his or her right to health; the right to access traditional and alternative remedies appears not to be guaranteed.

However, international human rights law is binding on the Gambia, there is a need for Gambians to realize this to improve their healthcare system. The question is

whether these fundamental human rights on health affect achieving the Universal healthcare goal. Obviously Yes!

The doctrine of Universal healthcare goal means affordable healthcare for all, free of all unnecessary impediments by whatever name, whether copays, deductibles, or user fees that could lead to medical bankruptcy. In shorthand, *financial barriers are a key predictor of poor access to and quality of health care that also constitute a leading cause of debt and impoverishment.*

To provide it in a detailed format: The goals of universal healthcare include equity in access to health services, which exists when any individual who needs healthcare services gets access to those services, without regard to employment status or ability to pay; extension of healthcare services good enough to improve the health of individuals receiving those services; and protection of individuals from impoverishment arising from illness, whether due to out-of-pocket payments or loss of income when a household member falls sick.

This doctrine [9] is enshrined in WHO instruments, including the Constitution of 1948, the Alma Ata Declaration of 1978, and Resolution 58.33 adopted by the World Health Assembly in 2005. WHO's 1948 Constitution stipulates that "[t]he 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."

The Alma Ata Declaration, known for its message of "healthcare for all," stipulates that health, defined to include "physical, mental, and social wellbeing," rather than the absence of disease or infirmity, is "a fundamental human right" whose attainment at "the highest possible level" "is a most important world-wide social goal[9]"

Finally, Resolution 58.33[9] defines universal coverage to mean "access to key promotive, preventive, curative, and rehabilitative health interventions for all at an affordable cost," consistent with the principles of equity in access and equity in financing.

Traditional and alternative remedies play an integral role in the prevention and promotion of health. Without the adoption of the 2020 Constitution of the Gambia, there are many impediments to achieving healthcare success in the country.

For instance, Chapter IV of the 1997 Gambian Constitution[1] is centered on the protection of fundamental rights and Freedoms. However, there is no provision for the right to health; so how does one protect the health of the citizens?

The provision is completely silent on health rights[1]. Section 17(1) states that the fundamental human rights and freedoms enshrined in this Chapter shall be respected and upheld by all organs of the Executive and its agencies, the Legislature, and, where applicable to them, by all natural and legal persons in the Gambia, and shall be enforceable by the Courts in accordance with this Constitution[1].

For instance, article 33(1) of the 1992 Constitution of Ghana states that where a person alleges that a provision of this Constitution on fundamental human rights and freedoms has been, or is being, or is likely to be contravened in relation to him, then, without prejudice to any other action that is lawfully available, that person may apply to the High Court for redress[2]. But in the case of the Gambia, as there is no Constitutional provision for health rights, how does one enforce it?

The nuances and ramifications of the right to health are sufficiently large and varied, just as are its rendition in constitutional and statutory provisions. It is sometimes difficult, at the legal level, to ascertain whether a legal right is intended by a provision or is a mere use of 'rights language'. This ambiguity is visible in several provisions in The Gambia's 1997 Constitution and legislation.

The only provision which indirectly talks about health is under Directive Principles of State Policy Chapter XX in Section 216 (4) which states that the State shall endeavor to facilitate equal access to clean and safe water, adequate health and medical services, habitable shelter, sufficient food and security to all persons[1].

Section 211, however, states that the principles of State policy in this chapter shall form part of the public policy of the Gambia for a just, free, and democratic State. These principles shall not confer legal rights or be enforceable in any court[1]. Meaning, one cannot enforce this policy if a government decides not to honor this and I think it is prejudiced against the people.

### *International Framework on the Right to Health*

The most important aspect of the right to health was established by UN General Comment 14 on the right to the highest attainable standard of health [10,12,13] which explained and interpreted Article 12 of the UN ICESCRs.

Attaining the highest standard[12 ] of health is paramount in all spheres of healthcare be it mainstream, traditional, or alternative medical practices. Hence, the folks in the provinces and those who rely on traditional remedies in the Gambia are supposed to be assured that practitioners have the requisite skills, education, and knowledge in the practice of these remedies in order not to harm the public. Hence, to achieve this, there is a need for effective legislation and regulatory framework. Though most of these international frameworks are not binding, General Comment 14[11,12 ] is a vital, authoritative, interpretative document for a more practical understanding of the right to health and its implementation.

This framework has been incorporated in the Gambia 2020 draft constitution[3]. Section 62 (1). *Every person has the right to– a. the highest attainable standard of health, which includes the right to health care services, including reproductive health care; and 2. A person shall not be denied emergency medical treatment*

The attainment of the highest standard of health extends to a person with disabilities [3]. Section 58 (1)f- *protection against abuse, all forms of violence and exploitation, and discrimination, in particular as regards access to health and social services and employment.*

I hold the view that justiciable rights to health can only be achieved in the 2020 draft constitution[3] and not the working constitution of the Gambia, 1997[1]. Countries are to abide by these rights to health and avoid their interferences and enjoyment. The issue of legislation, administration, budgets, promotions, and other procedures to realize the right to health are all promoted in health rights[ 12].

What intrigues me is that the right to health comment also extends to the indigenous people. They are to benefit from good medical access. These health services should be *culturally appropriate, taking into account traditional preventive care, healthpractices, and medicines*[ 12].

Also, this means that harmful practices of traditional and alternative healthcare should be discouraged by the State[ 12]. These can only be done with legislation to regulate these practitioners to safeguard those who subscribe to their services in the country.

Access to information also extends to the practice of traditional and alternative practices and not only mainstream practices. Section 48 of the draft Constitution also provides a specific right to information and this extends to both public and private entities[3].

Also, Section 65 of the 2020 draft Constitution makes provisions for Consumer protection rights. It states:

1. *Consumers have the right to– a. goods and services of reasonable quality; b. the information necessary for them to gain full benefit from goods and services; c. the protection of their health, safety, and economic interests; and d. compensation for loss or injury arising from defects in goods or services.*
2. *This section applies to goods and services offered by public entities and private persons.*

These extend to the practices and services rendered by traditional and alternative medicine practitioners.

Herein, I highlight the international framework on right to health and its role in Traditional MedicinesI[9 ]

- *The Universal Declaration of Human Rights (1948), Article 25;*
- *The Covenant on Economic, Social and Cultural Rights of 1966 Article 12, General Comment No. 14 of the Committee of the Economic, Social and Cultural Rights (August 11, 2000); other international legal instruments officially affirm the right to*

health, such the Convention on the Rights of Child 1989, the African Charter of Human Rights and the Peoples of 1981, the additional Protocol in the American Covenant on Human Rights dedicated to the economic, social and cultural rights of 1988, the European Social Charter of 1961 and its additional protocols, etc.

- *International initiatives in the field of health or development contain global obligations for health. The objectives of the Millennium Development Goals constitute an illustration of the global awareness that health is one of the conditions of social development and the reduction of poverty. Three of the eight objectives in this declaration pertain to health matters.*
- *Finally, the mandates of several intergovernmental agencies entrust stakeholders with the responsibility of realizing the right to health. It is the case for WHO, UNFPA, UNDP, the African Union, and the European Union.*

### **Human Rights Violations by Traditional and Complementary Practitioners**

It is instructive to say that as I advocate for the rights to health for such practitioners, the unconcerned nature of the government to formulate national legislation to regulate their activities could provide the platform for some of these practitioners to also violate the human rights of the patients[9].

Their activities could be dangerous to the public. These further go against the attainment of the highest standards of health for the public.

Additionally, others could also be engaging in illegal activities due to a lack of control or regulation by the state and avoid tax payments.

Others could also violate patients' privacy as stipulated in Section 43(1) of the draft 2020 Constitution [3] though such right to privacy is also limited in Section 43(2) b if adopted, jeopardize patients' physical integrity, and fail to provide patients with information on a treatment's side effects. Traditional practitioners could refuse to refer patients, who would benefit from effective therapies (for example, those with tuberculosis or HIV), to mainstream centers. Also, they could fail to provide relevant information on contagious diseases to health authorities and may cause serious health information systems crises [9].

### **Collaboration is key to achieving universal healthcare coverage**

I still believe that medicine is not competition. Achieving universal health coverage also depends on effective collaboration in healthcare. When healthcare players understand that patient health is the ultimate and not their selfish interest, then, every healthcare player will live up to their health obligations. A story was featured by aljazeera.com[14]on how traditional healers help doctors reach patients in Sierra

Leone; a country where most people visit healers, and some are stepping in to bridge the trust gap between the old and the new. A country that has 45,000 traditional healers, and about 1,000 trained doctors, nurses, and midwives [14].

Also, it has been reported that Sierra Leone has about 1.9 health professionals for every 10,000 people in the country [17], while an average distance of almost 18km to a health facility [17].

The healers played an important role in helping to fight the outbreak of Ebola. The Ebola outbreak further drew the authorities' attention to the reality that Sierra Leone's medical system could not afford to completely exclude traditional healers. Their strong roots in society were valuable assets. Some of the healers were brought in by authorities and medical professionals to spread awareness among their communities about how to combat the virus. The story further held that the collaboration extends beyond the EBOLA outbreak. Traditional healers understand the limitations of their art and the need for referral. The lesson drawn in Sierra Leone attests to the effectiveness of adopting medical pluralism [17].

Though Plural health systems tend not to function in straightforward ways. Sometimes providers coordinate with one another, and at other times they compete. Some are perceived as trusted and legitimate local institutions, while others may be viewed with great suspicion. And these things vary considerably from place to place [17].

### **Conclusion/Recommendation**

It is instructive to know that the implementation of the right to health in all its forms: both domestic legal and professional regulations could be seen if the draft constitution 2020 is adopted in the Gambia.

The current 1997 Constitution has so many *lacunae* and is not right to be health friendly. There are no provisions for the rights to healthcare in the Gambia. This creates injustices and discrimination when juxtapose with other fundamental rights in the 1997 Constitution.

Though health rights are absent, several pieces of legislation have been passed in the healthcare sector. However, no specific legislation has been passed to promote, regulate, and standardize the practice of traditional and alternative medicine practitioners.

This creates an unhealthy platform for the public to assess these services from practitioners with no uniformity or standardized practice and could harm the public thus depicting the goal of the international framework on rights to the highest standard of healthcare to the indigenous people.

As the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, and political belief, economic or social condition.

I can confidently say that the right to health is not guaranteed in the current Gambian constitution even though all the other health-related rights are recognized in statutory provisions. Rights to healthcare in the Gambia should be non-negotiable and neither should it be a privilege for the people.

I recommend the adoption of the draft 2020 Constitution to cure all these ambiguities in healthcare. Besides, the government can initiate statutory provisions to regulate and standardize the practice of traditional and alternative medicine practice to enable the public to have access to them at the highest standards in the profession. Finally, Traditional medicine is the oldest form of healthcare delivery that has stood the test of time [16].

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