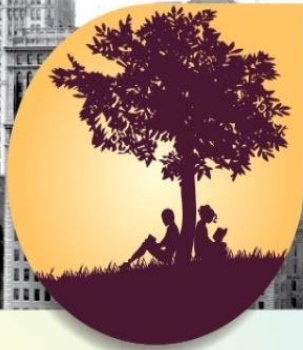


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## Right to Health: Critical Analysis of Kenyan Legal Framework

By: *Limlim Thomas Elim*\*

### *Abstract*

*This paper traces the legal concept of health and its association to the right to health by analysing the Kenyan legal framework to health. It has analysed from global sphere all the way to domestic one. It has critically examined 10 international authorities, 3 regional instruments and 5 municipal ones. The basis of this analysis is the constitution which acknowledges both international law and domestic law. It has taken a journey through the historical happenstance in the course of development of the law particularly the international human right. The paper has established that right to health is essentially holistic from its conceptualization but in practice, it is been misinterpreted narrowly hence denying the citizenry the optimal enjoyment of this right. From the analysis, it is the position of this paper that right to health ought to be implemented on the basis of human-animal-ecosystem approach. Consequently, the paper has proposed legal reforms for the appropriate actualization of the right as per the constitutional and international law intendment.*

### **1. Introduction**

Right to health is a common knowledge concept that is as old as the existence of mankind. It is therefore a universal right and all the major religions in the world namely Christianity, Islam and Buddhism acknowledge it. Within the context of Christian faith, right from the biblical Garden of Eden where the genesis of man is believed to have started, the right to health and its enjoyment is conspicuous in the life of Adam. It is on this premise that this paper will delve into the critical analysis of Kenyan legal framework that guides the implementation of enjoyment of this right and find out whether it aligns to the legal doctrine or not. First, the paper will lay the global perspective using the international authorities. Second, it will look at the regional. Third, it will examine the municipal domain. Fourth, it

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will draw conclusion and finally, make recommendation on reforms. The common thread will be both legal manifestation as well as the institutional.

## **2. Global Perspective**

A number of international legal apparatus provide for the right to health. These includes the United Nations Charter (UN Charter),<sup>1</sup> The Universal Declaration of Human Rights of 1948.

(UDHR),<sup>2</sup> The International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>3</sup> and its Optional Protocol adopted in on December 10<sup>th</sup> 2008.<sup>4</sup> It also includes CESCR General Comment No. 14, the right to the highest attainable standards of Health,<sup>5</sup> the World Health Organization Constitution<sup>6</sup> and other instruments which include UN Agenda 2030<sup>7</sup> for Sustainable Development Goals which aims at transforming the world, Global Health Security Agenda 2024 Framework.<sup>8</sup>

### **2.1 Health in the Context of the UN Charter 1945**

Out of the 111 Articles of the charter, a minimum of 17 articles have made reference to health explicitly or implicitly or both. Three Articles namely 13(1)(b), 57, and 62(1) have expressly mention health while the preamble and articles 1(3)(4), 17(a)(d)(e), 74, 76,83,88,91,92, 98 and 103 have implied. Articles 55,56,58 and 60 have both overt and covert imputations. The repetition of the words economic and social in several parts of the

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<sup>1</sup> Charter of the United Nations and Statute of the International Court of Justice 1945 54.

<sup>2</sup> ‘Universal Declaration of Human Rights, 1948’ (*Humanium*) <<https://www.humanium.org/en/universal-declaration/>> accessed 12 June 2022.

<sup>3</sup> ‘International Covenant on Economic, Social and Cultural Rights | Treaties Database’ <<http://www.kenyalaw.org/treaties/treaties/873/International-Covenant-on-Economic-Social-and-Cultural>> accessed 12 June 2022.

<sup>4</sup> ‘Optional Protocol To The International Covenant On Economic, Social And Cultural Rights’.

<sup>5</sup> ‘General Comment No. 14: The Right to the Highest Attainable’.

<sup>6</sup> World Health Organization, *Basic Documents* (49th ed, World Health Organization 2020) <<https://apps.who.int/iris/handle/10665/339554>> accessed 17 March 2022.

<sup>7</sup> DPI UN, ‘A/RES/70/1 Transforming Our World: The 2030 Agenda for Sustainable Development’.

<sup>8</sup> ‘The Global Health Security Agenda (GHSA): 2020-2024’ 3.

document is so conspicuous. A myriad of observation comes to the fore upon examination of this charter. Firstly, the cardinal observation is on the background of development of this charter in this particular epoch and its relationship to health as a legal phenomenon. It was contemporaneous with the advent of the end of World War 2(1939-1945). Second, term of the members of the Economic and Social Council is 3 years compared with that of non-permanent members of the Security Council which is actually 2 years. Third, the number of the members of the council is greater than that of the Security Council. Fourth, the election of the members to the council is immediately as opposed to the security council and the other councils of the organization. This is also evident in the phraseology of trusteeship system where health is one of the justifications of performing the functions in trust-territories. Fifth, in terms of the organs, the General Assembly has the ultimate responsibility which gives the higher prominence compared to other functions. Finally, the nomenclature of the council. These five aspects point to the criticality of health as a concept and the imperativeness of social determinants in shaping the meaning of health and the right to health in its altruistic perception. It is imperative to note that health has not been defined in the charter. Therefore, from this charter and the fact that it is above all the other treaties, it is succinct that right to health is all encompassing and ought to be interpreted as such and its implementation need to be holistic.

## **2.2 Universal Declaration of Human Rights of 10<sup>th</sup> December 1948 (UDHR)**

Hot in the heels of the Charter was this document acknowledging the charter and owing its fidelity to it. It makes make both implied and express reference to the health in at least 8 articles and its preamble. From the outset, it provides for the promotion of social progress and better standards of life in larger freedom. Article 25 directly mentions health and goes further to provide its components while articles 3, 22, 23(1),27, 28, 29(2) and 30 have implicit connotation to health. It is this non-binding document that has given rise to the two legal covenants and their protocols. Once more economic and social aspects are prominent leitmotif in this document.

### **2.2.1 The International Covenant on Economic, Social and Cultural Rights of 16th December 1966**

It came into force in on 3<sup>rd</sup> January 1976. It alludes to the UN Charter and UDHR as well as the International Covenant on Civil and Political Rights. It has a minimum of 18 articles out of the total 31 articles making overt, covert or both emphasis on health in addition to its preliminary. Two articles namely 7 (b) and 12 expressly mention health. Articles 1(1), 2(1),3, 6(2), 8,15,16,17,18,19,20,21,22 and 23 have implied reference to health. Articles 10 and 11 have both express and implied reference to health. Again, health is not defined but it is within the ambit of economic, social and cultural rights.

Overall, a number of pertinent observations come to the fore in as far as this treaty is concerned. One, the treaty is open to signature by any state member of UN, member of any of its specialized agencies, by any state party to the International Court of Justice as per the provision of its article 26. This is significant in light of the limitation provided for UN membership which requires approval of UN Security Council. Two, amendment to this treaty is not as stringent as that of UN Charter as per article 29(2) hence flexibility which allows for adaptability. Adaptability is a cardinal principle in health spheres. Three, article 11 and 12 of the covenant are very comprehensive compared to other articles in the covenant hence lends credence to the uniqueness of the right to health and its interpretation. Four, for close to a half a century, the covenant operated without an optional protocol in comparison to its counterpart on civil and political rights which had two optional protocols within a span of two decades (in 1966 and 1987) into its operation. The covenant got its first optional protocol in 2008 establishing a Committee on Economic, Social and Cultural Rights as a compliant mechanism. It is interesting to note that this protocol acknowledges and reaffirms the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms. It has 22 articles which is also significant to note. Article 10 of the protocol is interesting in the sense that it provides an expeditious (a maximum of 6 month between conflicting state parties) way of resolving economic, social and cultural issues. Health is within the socio-economic domain.

The CESCR provides communication such as General Comment No. 14 which has provided clearest appreciation of history of the ICESCR under paragraphs 4 and 8 in as far as Article 12 of the covenant is concerned. Paragraph 9 provides the dual elements of the highest attainable standard of Health namely individual's biological and socio-economic preconditions as well as the state's available resources. Thus, right to health has to encompass necessary conditions; variety of facilities; variety of goods; and variety of services. Hence, it is an inclusive right as provided for under paragraph 11 and implied in paragraph 10.

### **2.2.2 Other International Authorities**

These are authorities such as Article 5(e)(iv) of the International Convention on the Elimination of All Forms of Racial Discrimination of 1965<sup>9</sup>, articles 11.1 (f) and 12 of Convention on Elimination of All forms of Discrimination Against Women of 1979<sup>10</sup>, and Convention on the Rights of the Child 1989<sup>11</sup> and Principle 1 of Stockholm Declaration of 1972.<sup>12</sup> Recently, there is Global Health Security Agenda 2024 Framework<sup>13</sup> which as considered health as an aspect of security. In all these, health is an overwhelming theme and its rightly given a broader view.

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<sup>9</sup> 'OHCHR | International Convention on the Elimination of All Forms of Racial Discrimination: 50 Years of Fighting Racism' (OHCHR) <<https://www.ohchr.org/en/treaty-bodies/cerd/international-convention-elimination-all-forms-racial-discrimination-50-years-fighting-racism>> accessed 12 June 2022.

<sup>10</sup> DPI UN, 'Convention on the Elimination of All Forms of Discrimination against Women New York, 18 December 1979' (OHCHR) <<https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women>> accessed 12 June 2022.

<sup>11</sup> 'Convention on the Rights of the Child' (OHCHR) <<https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child>> accessed 12 June 2022.

<sup>12</sup> United Nations, 'United Nations Conference on the Human Environment, Stockholm 1972' (United Nations) <<https://www.un.org/en/conferences/environment/stockholm1972>> accessed 12 June 2022.

<sup>13</sup> 'The Global Health Security Agenda (GHSa): 2020-2024' (n 8).

### **2.3 The WHO Constitution of 22nd June 1946**

It is important to note that this body was formed by 61 states 1 year after the UN Charter.<sup>14</sup> It has 82 Articles while the charter has 111 articles. It has defined health unlike the charter. It is more comprehensive on the concept of health for all people in article 1. It has mentioned environmental hygiene in article 2. Its preamble acknowledges the ideals of the charter as the benchmark of the 7 principles of the document. It has formed agreement with 12 other intergovernmental organizations handling different disciplines as well as a framework of engagement with non-state actors in article 2(b)(i)(j). What does this imply? It means that right to health must be conjunctively be seen from consortium of environmental, economic and social underpinnings.

### **2.4 Resolution**

The UN Agenda 2030 for Sustainable development Goals provides for the transformation of the World. The preamble enunciates people, planet and posterity as fundamental aspirations in the 17 Goals that are integrated and indivisible and balance the triple dimensions of Sustainable Development Goals namely economic, social and environment as provided in paragraph 2 of the declaration. The vision, shared principles and commitment in paragraph 7,9,10,11,12 and 19 reaffirm the centrality of purposes of the UN Charter, UDHR, International Human Right Treaties and other earlier resolutions. Paragraphs 14,17,18, 26,27 and 18 expressly cites global health threats and calls for an integrated approach. This is reflected in the 17 SDGs which calls for win-win cooperation. Further, the resolution mentions climate change in paragraph 31, human health and environment in paragraph 34 and paragraph 35 implies both.

It is notable that out of the 17 SDGs, a minimum of 7 provide overtly or covertly for health. SDG 3 is explicit and detailed on health while 2,6,8,11,13

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<sup>14</sup> World Health Organization (n 6). The Constitution was adopted by the International Health Conference held in New York from 19 June to 22 July 1946, signed on 22 July 1946 by the representatives of 61 States (Off. Rec. Wld Hlth Org., 2, 100), and entered into force on 7 April 1948. Amendments adopted by the Twenty-sixth, Twenty-ninth, Thirtyninth and Fifty-first World Health Assemblies (resolutions WHA26.37, WHA29.38, WHA39.6 and WHA51.23) came into force on 3 February 1977, 20 January 1984, 11 July 1994 and 15 September 2005 respectively and are incorporated in the present text.

and 15 are implicit. The underpinning theme is health is part and parcel of sustainable development and hence its broad meaning in my view ought to suffice. It is notable that Kenya played a critical role.<sup>15</sup> Is this reflected in the practice? Non-affirmative answer prevails.

In a nutshell, the global perspective is that right to health is inherently attached to social determinants and social determinant go along with transdisciplinary approach to conceptualization of health. All the instruments poignantly point to this fact. The question then is whether this is reflected in practice or not. Based on the institutionalization, it is clear that implementation of right to health is characterised by isolationist worldview and has been narrowed to human health for instance World Health Organization is concern with promotion of human health yet environmental health and animal health heavily influence human health. The latter two are handled by different institutions. Without realization of these later two aspects, then right to health is a mirage at least and a misconception at best in the current prevailing circumstance at the global level. The good news is that, there is a demonstratable evidence that integrated implementation of right to health is concretizing as evidence by the Tripartite Partnership involving FAO, WHO and WOA<sup>16</sup> in advancing the concept of one health approach.<sup>17</sup>

### **3. Regional View**

#### **3.1 The European Convention on Human Rights**

The preamble acknowledges the UDHR adopted on 10<sup>th</sup> December 1948. Out of the 59 articles, a minimum of 9 articles make reference to health and

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<sup>15</sup> ‘Secretary-General’s Remarks to Press Conference on the Outcome Document of the Post-2015 Development Agenda’.

<sup>16</sup> ‘Home’ (WOAH - World Organisation for Animal Health)  
<<https://www.woah.org/en/home/>> accessed 13 June 2022.

<sup>17</sup> ‘Tripartite Partnership of FAO, WHO, and OIE Highlights the Importance of Strengthened Work at the Human–Animal–Ecosystem Interface’  
<[https://www.fao.org/ag/againfo/home/en/news\\_archive/AGA\\_in\\_action/2013\\_Tripartite\\_partnership\\_at\\_the\\_human-animal-ecosystem\\_interface.html](https://www.fao.org/ag/againfo/home/en/news_archive/AGA_in_action/2013_Tripartite_partnership_at_the_human-animal-ecosystem_interface.html)> accessed 13 June 2022.



right to health (4 articles mention it directly while 5 are implied).<sup>18</sup> Protocol No.1 and 4 under articles 2 and 2(3)(4) provides for health interventions indirectly and directly respectively. It is importantly to highlight that this document was adopted by the union 5 years after the UN Charter and 2 years after UDHR.

### **3.2 American Convention on Human Rights 1969**

The Convention came to force on 18<sup>th</sup> July 1978.<sup>19</sup> Its preamble acknowledges the Charter of Organization of American States, The American Declaration of the Rights and Duties of Man and the UDHR as well as reaffirming and refining other international instruments that have worldwide and regional scope in terms of economic social and cultural rights. It has a minimum of 13 articles out of total 82 covering health matters. Articles 5,12(3),15,16(1)(2) and 22(3)(4) are express provisions while articles 1(1),2,3,4,21(1)(2),25(1), 26 and 27(2) have implied connotations. Notably, environment has not been explicitly mentioned in the document. The application of this instruments was a matter of an historic advisory opinion in 2017 before Inter-American Court of Human Rights. The court observed that Article 26 of the convention which provides for progressive realization of economic, social and cultural rights includes an autonomous right to a healthy environment and it's related to right to life and personal integrity which is the very essence of existence of humankind.<sup>20</sup>

### **3.3 The African (Banjul) Charter on Human and People's Rights<sup>21</sup>**

The charter has both explicit and implicit provisions for health. There are a minimum of 12 articles out of the total 68 that cover health directly or

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<sup>18</sup> EU, 'European Convention on Human Rights' <European Convention on Human Rights>.

<sup>19</sup> 'American Convention on Human Rights' (ICNL) <<https://www.icnl.org/resources/library/american-convention-on-human-rights>> accessed 12 June 2022.

<sup>20</sup> *Advisory Opinion on the Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity—Interpretation and Scope of Articles 4(1) and 5(1) of the American Convention on Human Rights) OC 23/17 8.*

<sup>21</sup> African Union, 'African (Banjul) Charter on Human and Peoples' Rights | Treaties Database' <<http://www.kenyalaw.org/treaties/treaties/11/African-Banjul-Charter-on-Human-and-Peoples-Rights>> accessed 12 June 2022.

indirectly as well as the preamble. The preamble covers health in the following ways. First, it provides for dignity as one of the essential objectives for achievement of the aspirations of the African peoples. Second, it stipulates due regards to the UN Charter and UDHR. Third, it acknowledges economic social and cultural rights reinforced by acknowledgement of universality principle.

There are 4 articles (11,12,16 and18) that have expressly provided for health while 8 articles (4,5,14,20,22,24,26 and 27) have implied. Article 11 explicitly provides for the limitation of right to assembly based on the ground of health. The right to freedom of movement under article 12.2 is limited by the interest of public health. Under the enunciation of article 16, the right to the best attainable state of physical and mental health as well as compelling of state parties to protect the health of the people and ensure they receive medical attention when they fall sick. Finally, the proclamation of article 18.1 ensures the physical health and morals of the family as a natural unit and basis of the society.

There are 8 articles that have covertly provide for health. First, article 4 stipulates the entitlement to respect for life and the integrity of his person while article 5 enunciates the entitlement to respect of dignity inherent in a human being. Second, the proclamation of article 14 on limitation of property right on the basis of public or community interest in accordance with the appropriate laws. This thread is palpable under article 27.2 where proclamation of collective security, morality and common interest duty of an individual is mandated. Third, economic and social development is compulsory provided under the article 20.1 as an ingredient of self-determination while the support to all people in the struggle against economic or cultural foreign dominion is assured in 20.3. The same theme is reflected in article 22.1. Fourth, the right to a general satisfactory environment favourable to people's development is provided under article 24. Fifth, the duty to guarantee of the independent court and establishment and improvement of the national institutions to protect and promote freedoms guaranteed by the charter under article 26 is cardinal.

Summarily, the fundamental observation here is the economic, social, cultural and environmental aspects are provided in the realization of health. Two, the historical context of this document alludes to health as a problem from foundation of this charter. Conspicuously present is the holistic implication of the perception of health and the medical aspect being a subset. The regional perspective provides the following observation. One, health concept is non-existence if it is devoid of the social determinants as evidenced by the nomenclature. Two, the international legal instruments are essential and inherent ingredients in elaboration of health concept.

Third, progressively, there is an emerging expressive inclusion of environment as an influencer of health. Fourth, the nomenclature of economic, social and cultural is palpable through all the regional legal authorities. Mark you, health is part and parcel of these terms. This leads us to the critical question-whether the state parties to this instrument live as per the dictates of the authorities? Institutionally, there is no health regional body instead, the international bodies such as WHO have regional offices and hence the isolationist approach from the global perspective is cascaded down to the regional level. Overall, the framing in naming denotes association and interconnectedness of different systems hence multi-disciplinarity is noticeable. Therefore, it is the submission of this paper that regional concept of right to health ought to manifest in the form of human-animal-ecosystem approach to health as opposed to the current dominant isolationist approach.

## **4. Municipal Perspective**

### **4.1 National Constitution of Kenya 2010**

The Constitution of Kenya<sup>22</sup> has health as a cardinal function in three ways. First, in the preamble, health is implied by invoking respect for environment for posterity. It also recognizes social justice as well as commitment to nurturing and protecting the wellbeing of family, individual communities and nation. Second, a minimum of nine<sup>23</sup> out of the total 18 chapters have

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<sup>22</sup> 'Kenya Law: The Constitution of Kenya' <<http://kenyalaw.org/kl/index.php?id=398>> accessed 12 June 2022.

<sup>23</sup> Ibid. Chapters 2,4,5,7,8, 9, 10,11, and 17.

health implied, express or both. Third, a minimum of fifty- seven<sup>24</sup> articles out of 260 have health as a theme and at least one schedule<sup>25</sup> of the Constitution. Closer analysis of articles further reveals that a whopping 43 articles have an implicit expression of health while 6 (articles 181,43,145,144,150 and 204) are explicit about health while 8 (20,21,26,27,46,56 and 191) have both implied and express regards to it. The numerous articles that are implicit in reference to health is an area to explore and discover the hidden message. The word health in itself apparently appears mostly together with public order, economic and social development, national security, environment and morality. Why are these observations critical? This provides a presentation perspective as well as the framing overview which requires an in-depth examination.

Besides presentation, there is a second facet that is developed in the articles. This is what can be called effect triggers. First, it is curious to note that the Independent Kenya Human Right and Equality Commission is the only commission that the constitution allows to replicate to two or more commissions. This is in light of the fact that health falls within economic and social rights which the constitution mandates the commission to monitor, investigate and report. Why?

Second, health has permeated and acquired prominence in leadership cycles particularly in the state offices. It is a common ground for all the officers to be removed from office as a result of physical or mental incapacity. Its prominence is even of higher threshold when it comes to the office of the President and Deputy President. The tribunal for removal on this basis has 3 unique attributes namely, three of its 5 members ought to be medical practitioners; the report of the tribunal is final and cannot be appealed before a court and the report is adopted by the national assembly by simple majority and no provision for the senate. This is non-political when it is compared with removal vide impeachment. No wonder, in my observation, the health

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<sup>24</sup> Articles of the constitution of Kenya that have health prominence: 10, 19,20,21,22,23,24,25,26,27,28,29,30,31,32,35,41,42,43,46,50,53,54,55,56,57,58,59,60,66,68,69,70,72,91,95,131,132,144,156,157,158,159,160,168,175,176,181,185 ,186,187,189,191, and 204.

<sup>25</sup> Fourth Schedule part 2 paragraph 2.

of the president as of right is considered from a holistic perspective and that office being representative of the nation and its standard, it goes without saying the right to health given to the president ought to be the golden standard for right to health for the entire citizenry. Is that the case? The simple answer is a negative. Equalization fund in the constitution also has overtones of health particularly on regards to health facilities and provision of water. Other effects include the impeachment of the presidency on the grounds of non-observances of ratified international conventions and treaties; and declaration of a state of emergency. These kind of effect raises legal inquisitiveness which touches at minimum legal concept and practices. Finally, the fourth Schedule as per the provisions of Articles 185(2); 186 (1) as well as 187 (2) provides county health<sup>26</sup> in an inclusive approach that exhibit human-animal-ecosystem interface.

Within the province of institutionalization, the constitution has provided for the two levels of Government and the Independent Commission as avenues of ensuring enjoyment of right to health. This is a clear demonstration of the inter-connectedness and it ought to be ingrained in the regulatory framework.

## **4.2 Enabling Laws**

### **4.2.1 The Health Act No. 21 of 2017**

This 112-sectioned and 4-scheduled Act<sup>27</sup> is the primary legislation on matters right to health and in its preamble, it proclaims establishment of a unified health system at both levels of government. It is important to note that when it comes to definition of term disease and health, the law adopts a broad meaning and when it comes to health care services; health facility and health systems, it adopts a narrow interpretation by centralizing it to human as opposed to human-animal-ecosystem approach. Summarily, there are a minimum of eleven sections that prescribe right to health including right to

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<sup>26</sup> Ibid.

<sup>27</sup> 'No. 21 of 2017'

<<http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2021%20of%202017>> accessed 12 June 2022.

health care providers<sup>28</sup> and at least 13 provisions establishing and conferring power to the institutions.

A number of critical observations emerged from a closer look at the statute. First, though health and disease have been defined broadly, implementation of right to health has been given narrow interpretation<sup>29</sup> in as far as health facilities; services and systems<sup>30</sup> are concerned as evidenced in section 2 of the act and hence recreating a legal mismatch. Second, promotion and prevention in terms of arrangement of achieving the enjoyment of standards of right to health always come first compared to curative, palliative and rehabilitative services.<sup>31</sup> Animal health and health of the environment as well as economic health are part and parcel of promotion and prevention and thus, it is a disservice to lock them out by application of narrow reasoning. At the moment, much of the health services are geared on curative, palliative and rehabilitative<sup>32</sup> which are in my view secondary. Third, the law has expressly provided for public and environmental health<sup>33</sup> as well as collaboration of the fields.<sup>34</sup> However, this flies off in the face of granting primacy<sup>35</sup> to the Cabinet Secretary of health who is inadvertently and presumably constrained by narrow interpretation dictated by state practice. Finally, the institutions stipulated by the act are limited to narrow construction of health at both levels of government for instance Cabinet Secretary<sup>36</sup>, Director General<sup>37</sup> and the minimum five directorates<sup>38</sup> of health at National domain.

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<sup>28</sup> Ibid Section 12.

<sup>29</sup> Ibid n.22 Sections 22 and 23.

<sup>30</sup> Ibid n. 22 First Schedule (Classification of health facilities).

<sup>31</sup> Ibid n.22 Section 5.

<sup>32</sup> Ibid no.25 The first schedule of the Health Act provides classification of Health facilities. These are basically and impliedly for curative, palliative and rehabilitative purposes.

<sup>33</sup> Ibid n.22 Sections 68 and 12 (1)(b).

<sup>34</sup> Ibid n.22 Section 108.

<sup>35</sup> Ibid n. 22 Section 106.

<sup>36</sup> Ibid n. 22 Section 15.

<sup>37</sup> Ibid n.22 Sections 16-17.

<sup>38</sup> Ibid n. 22 Section 18.

At devolved units, County Executive Committee (CEC) member and County Director<sup>39</sup> in charge of health are provided for. The same thread is palpable in Health Sector Intergovernmental Consultative Forum<sup>40</sup> as well in National Health Research Committee<sup>41</sup> and Kenya Medical Research Institute.<sup>42</sup> These institutions are clearly non-inclusive to warrant the constitutional dictates<sup>43</sup> of enjoyment of right to health in as far as they are devoid of health interest obedient to human-animal-ecosystem character.

#### **4.2.2 The Public Health Act (Cap 242)**

This 169-sectioned law<sup>44</sup> composed of fifteen parts stipulate in its preamble that it is an act of Parliament for securing and maintaining health. This act bestows health authority to the municipality and Cabinet Secretary for health. It introduces meat inspector, stock and veterinary officer in its definition provided in section 2. Curiously missing is environmental related definition. However, it is the most comprehensive law and seemingly meets the constitution dictates in as far as right to health is concerned save for the institutional part. The element of human-animal-ecosystem approach is largely succinct. The Central Board of Health<sup>45</sup> which is the cardinal institution is non-inclusive since it is within the domain of narrow interpretation in terms of its composition. Second, from part II-XII, it is mainly related with prevention of diseases when they have reached the humans. This in my view is self-defeatist. Why not focus at the primary level of protection before it reaches mankind? This is where environment and animal ecosystem are key component of right to health

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<sup>39</sup> Ibid n.22 Section 19.

<sup>40</sup> Ibid n.22 Section 26.

<sup>41</sup> Ibid n. 22 Sections 93-94.

<sup>42</sup> Ibid n.22 Section 97.

<sup>43</sup> Articles 42 and 43 principally.

<sup>44</sup> 'CAP. 242'

<http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20242>  
accessed 12 June 2022.

<sup>45</sup> Ibid Section 3.

### **4.2.3 Environmental Management and Coordination Act (EMCA) No.8 of 1999**

The 148-sectioned and 3-scheduled law<sup>46</sup> proclaims in its preamble that environment is foundational constitution of national economic, social, cultural and spiritual advancement. It must be born in mind that right to health is part of socio-economic rights. It overtly prescribes entitlement to a clean and healthy environment for recreation, education, health, spiritual and cultural purposes.<sup>47</sup> It also calls for proper management and rational utilization of environmental resources.<sup>48</sup> Within the province of institutionalization, the Cabinet Secretary for environment,<sup>49</sup> National Environment Management Authority<sup>50</sup> headed by the Director General<sup>51</sup> are provided for at the National level. This is a further demonstration of isolationism approach in play.

### **4.2.4 Others laws relevant to Right to Health**

These include 3-sectioned Meat Control Act Cap 356 which confers exercise of control over meat for human consumption as well as the premises such as slaughter houses and provides for export and import control of meat and meat product. It prescribes for collaboration between the minister responsible for veterinary services and the one responsible for health. Clearly, here health has been delinked from veterinary services instead of health incorporating veterinary services. Moreover, there is Veterinary Surgeons and Veterinary Paraprofessionals Act No.29 of 2011 providing for matters relating to animal health services. In this Act under the 3<sup>rd</sup> Schedule which provides for the oath, it stipulates commitment to promotion of public health.

## **5. Conclusion and Reforms**

Briefly put, there is an interesting pattern developed in framing of legal instruments from the global spheres up to the domestic sphere. The

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<sup>46</sup> 'No. 8 of 1999'

<<http://kenyalaw.org:8181/exist/kenyalex/actview.xml?actid=No.%208%20of%201999>> accessed 12 June 2022.

<sup>47</sup>ibid Section 3 of EMCA No.8 of 1999.

<sup>48</sup>Ibid n.41 Section 9 (2)(a) of EMCA No.8 of 1999.

<sup>49</sup> Ibid n.41 Section 5 of EMCA.

<sup>50</sup> Ibid n. 41 Section 7 of EMCA.

<sup>51</sup> Ibid n.41 Section 10 of EMCA.



Constitution and all the enabling laws have conferred the courts particularly the Magistracy and the Environment and Land Court the power to enforce right to health as evidenced in Public Health Act and EMCA. Clearly, health has been legally given interconnected prominence with other disciplines hence integration of diverse aspects. The legal guidance to enjoyment of right to health must therefore be consistent with human-animal-ecosystem approach which in practice appears to not being the case.

The constitution has provided a holistic right to health but the enabling laws have not as demonstrated by the conspicuous isolationist approach. The legal definition of health and disease captures the spirit of right to health but implementation is devoid of the letter and the spirit of the same. There is a categorization of right to health in terms of health, public health and environmental health and the order of arrangement seems to confer the order of prominence and importance. This should not be the case. Finally, there is a prominent dichotomy in enjoyment of right to health in the sense that standards of right to health enjoyed by the President as a representative of the people and nation seems to be diametrically different from that of the citizenry. This defeats the logics of representation of the people and of that office being a standard bearer of the nation.

There is need for reform to entrench human-animal -ecosystem approach into law in order to realize the constitutional right to health. First, an independent commission in charge of matters relating to enforcement of right to health holistically need to be established as per article 59(4). The commission so formed be inclusive of all the facets of health and establish monitoring and evaluation mechanisms are consistent with the broader interpretation of health and right to health. This will grant the nation the benefit of having the right status of its health system. Second, the presidential standard in terms of right to health should be made reference for enjoyment of right to health since the office represent the nation and the people. Third, all the enabling laws should be amended or repeal to align them to the constitutional dictates in as per as conceptualization of right to health is concerned. Fourth, abolish the categorization of health into health, public, and environmental and instead make them the subset of health with equal prominence in as far as enjoyment of right to health is concerned.

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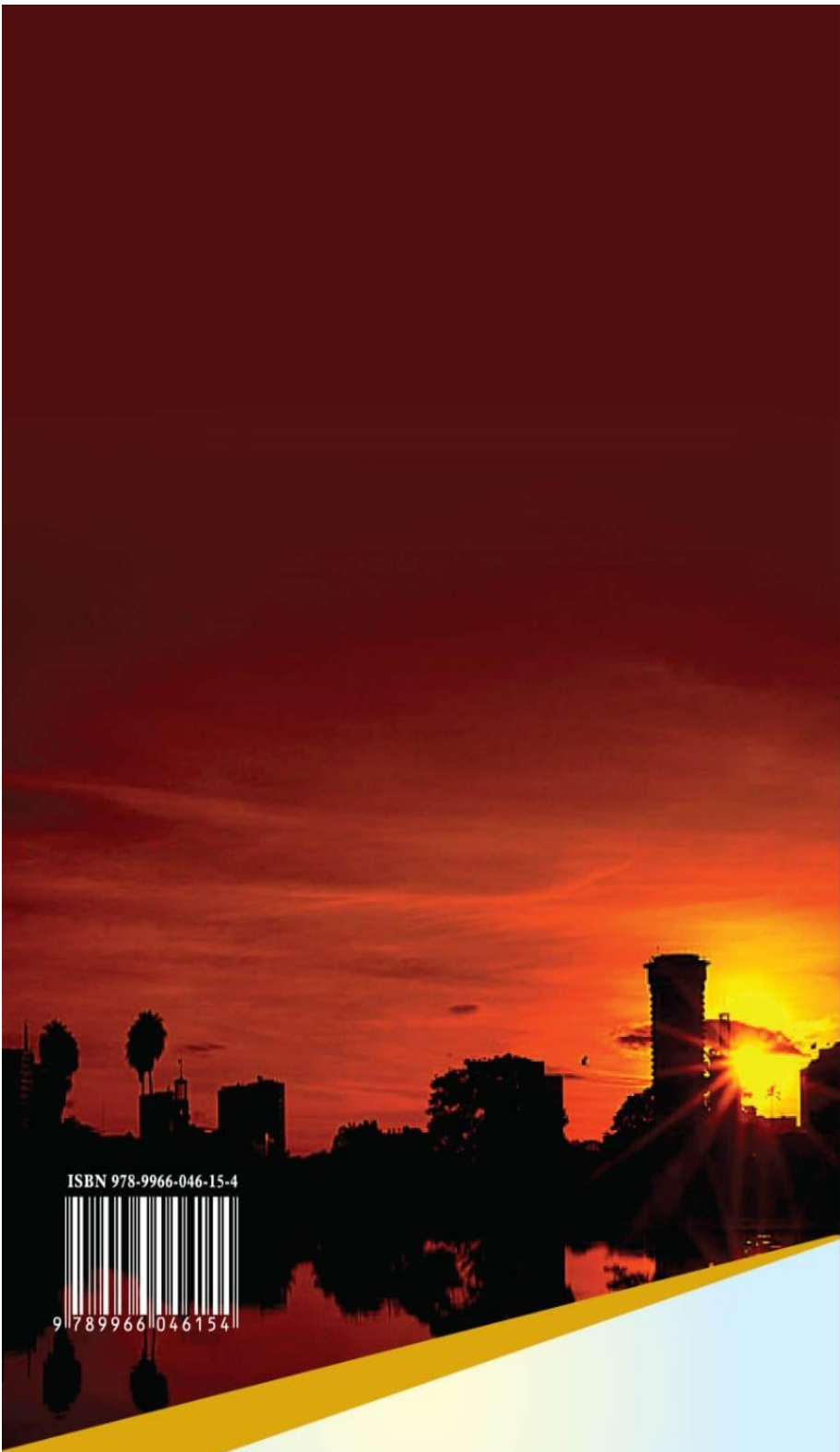
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ISBN 978-9966-046-15-4



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