

## The Protection of the right to health under the Constitution of the Democratic Republic of Congo

By *Dady Mumbanika Mbwisi\**

**Abstract:** *The present study discusses the protection of the right to health under the Constitution of the Democratic Republic of Congo. It argues that the DRC Constitution protects the right to health in a meaningful way. Indeed, not only does the Constitution protect the right to health in its broadest sense including health care and other underlying determinants of health, it also protects all the rights herein contained with the same status. In other words, all human rights protected by it are justiciable. Furthermore, the Constitution binds both the State and individuals to the Bill of Rights. According to the Constitution, ratified international instruments such as the International Covenant on Economic, Social and Cultural Rights and the African Charter on Human and People Rights are part of the domestic legal system of the DRC that the courts and tribunals must apply. This implies that in applying international treaties, the courts and tribunals may hold the DRC government responsible for violating one or more aspects of the right to health, which are not specifically provided for in the Constitution.*

However, the fact that the State is bound to unqualified obligations to provide immediate implementation of the right to health without taking account of the country's developmental level may be illusory. Moreover, the primary enabling law the Constitution refers to in order to give effect to the right to health has never been enacted. Also, there is no jurisprudence on the right to health including from the Supreme Court of Justice, which is the highest court of the land. This may be due to the lack of cases before the courts in which Congolese people sought to claim their right to health. Thus, without appropriate implementation measures, the right to health as protected under the DRC Constitution will remain illusive.

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## A. Introduction

The right to health is guaranteed and recognized by several international and regional human rights instruments.<sup>1</sup> In particular, within the framework of the United Nations Organization<sup>2</sup> and the African Union<sup>3</sup>, two main international organizations the DRC belongs to, the right to health is also guaranteed by some binding human rights treaties. Illustrative of this is the fact that under the International Convention on Economic, Social and Cultural Rights (ICESCR)<sup>4</sup> ratified by the DRC in 1976<sup>5</sup>, everyone is entitled to the enjoyment of the highest attainable standard of physical and mental health including access to medical services and medical attention.<sup>6</sup> States parties are under an obligation to adopt legislative and other appropriate measures in order to progressively give effect to this right within their available resources.<sup>7</sup> Moreover, under the African Charter on People and Human Rights (the African Charter)<sup>8</sup>, ratified by the DRC in 1987<sup>9</sup>, everyone is entitled to the enjoyment of the best attainable state of physical and mental health including medical attention, which States Parties have to realize through the adoption of legislative and other necessary measures.<sup>10</sup> The result of these provisions is that their implementation falls in the domestic jurisdiction of each member state. This is due to the fact that it is the responsibility of States to give effect to their international obligations on the domestic level.<sup>11</sup>

At the domestic level, the Constitution of the Democratic Republic of Congo (the DRC Constitution)<sup>12</sup> clearly provides that ‘the right to health and to food security is guaranteed. The law establishes fundamental principles and organization rules relating to public health and food security’.<sup>13</sup> Two main points may be drawn from this provision. First, the DRC

- 1 UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, UN Doc. E/C.12/2000/4 (hereinafter General Comment 14), Para 2.
- 2 United Nations Charter of June 26, 1945.
- 3 Constitutive Act of the African Union of May 26, 2001.
- 4 The International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI) (UN Doc. 993 UNTS 3) of 16 December 1966, entered into force 3 January 1976.
- 5 Ministry of Human Rights of the DRC: eighth, ninth and tenth periodic reports to the African Commission on Human and Peoples Rights, implementation of the African Charter on Human and Peoples Rights (2007), Para 30.
- 6 Art 12 of ICESCR.
- 7 Art 2 (1) of ICESCR.
- 8 The African Charter on Human and Peoples’ Rights (Adopted 27 June 1981, OUA Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986).
- 9 Ministry of Human Rights of the DRC, note 5, Para 30.
- 10 Arts 16 and 2 of the African Charter.
- 11 *Danwood Chirwa*, The right to health in international law: its implications for the obligations of state and non-state actors in ensuring access to essential medicine, SAJHR 19 (4) (2003), p. 542.
- 12 Constitution of the Democratic Republic of Congo as amended, 2006.
- 13 Art 47 of the DRC Constitution.

Constitution uses the concept of the ‘right to health’ which is inclusive of both health care and other underlying health determinants.<sup>14</sup> Second, unlike under Article 2 of the ICESCR, the state’s obligations with respect to the right to health under the DRC Constitution are not subject to the clause of ‘progressive realization’ and ‘available resources.’

Indeed, the right to health is a typical economic, social and cultural right, the contents and nature of which are controversial.<sup>15</sup> For instance, while under international law all economic, social and cultural rights entail both obligations of conduct and obligations of result<sup>16</sup>, some observers argue that unlike civil and political rights, economic, social and cultural rights as guaranteed under the DRC Constitution are mere aspirations that do not entail the obligation of result on the State.<sup>17</sup> One of the controversial but real reasons underpinning this observation is that unlike civil and political rights, economic, social and cultural rights entail financial implications<sup>18</sup> that require the undertaking of positive obligations.<sup>19</sup> Furthermore, while according to Article 2(1) of the ICESCR, States are required to progressively ensure the realization of economic and social rights within the availability of their resources, the Committee on Economic, Social and Cultural rights interprets the same article as entailing various obligations of immediate implementation as well.<sup>20</sup>

The above debates on the nature of economic, social and cultural rights have been solved by the DRC Constitution, at least on paper. Accordingly, the DRC Constitution does not contain any explicit provision qualifying all economic and social rights including the right to health herein guaranteed as mere aspirations nor does it subject their implementation to the clause of progressive realization and that of available resources. Thus, one may argue that all human rights protected by the DRC Constitution enjoy the same legal status. However, the fact that the State is bound to unqualified obligations to provide immediate implementation of the right to health without taking account of the country’s developmental level may be illusory. Part one of this paper discusses the nature and contents of the right to health in international law. Part two deals with the protection of the right to health under the DRC Constitution in light of the ICESCR. Lastly, part three examines the relevance of International Law for the DRC.

14 *Brigit Toebes*, The right to health as a human right in international law, Antwerp 1999, pp. 17-18.

15 UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant), 14 December 1990, UN Doc. E/1991/23 (hereinafter General Comment 3), Para 1.

16 *Ibid.*

17 *Jean Michel Kumbu, Bob Kabamba et Esambo Kangashe*, La Constitution de la République Démocratique du Congo, in: Babacar Cissé (éd.), Mandats, rôles et fonctions des pouvoirs constitués dans le nouveau système politique de la République Démocratique du Congo, Kinshasa 2007, p. 30.

18 *Ibid.*

19 *Mazyambo Makengo*, Introduction aux droits de l’homme: théorie générale, instruments, mécanismes de protection, in: Babacar Cissé (éd.), Fn. 17, p. 279.

20 General Comment 14, note 1, Para 30.

## B. The nature and contents of the right to health under international law

Under international law, the World Health Organization Constitutive Charter (WHO Charter)<sup>21</sup> remains the first international instrument to provide a definition for both the concept of “health” and “the right to health”. Accordingly, it refers to health as, ‘a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.’<sup>22</sup> Although this definition provides a broader understanding of societal determinants of health than the narrow typical language of disease and disability, it seems to be equating health with well-being.<sup>23</sup> This is because it presupposes that the State may ensure the complete or good health of individuals.<sup>24</sup> It must nevertheless be stressed that good health cannot be ensured by a State, nor can States provide protection against every possible cause of human ill health such as genetic factors, individual susceptibility to ill health and the adoption of unhealthy or risky lifestyles.<sup>25</sup>

In relation to the definition of the right to health, the WHO Charter stipulates 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.’<sup>26</sup> It therefore becomes clear that WHO Charter makes a distinction between health which is abstract and the enjoyment of the highest attainable standard of health which may be realistic.

Following the WHO definition of the right to health, subsequent human rights instruments interchangeably use expressions such as the right ‘to a standard of living adequate for the health and well-being’<sup>27</sup>, ‘the enjoyment of the highest attainable standard of physical and mental health’<sup>28</sup>, the right ‘to the best attainable state of physical and mental health,’<sup>29</sup> as well as the right ‘to health’<sup>30</sup> in their various stipulations of health as a human right.

Whatever the concept used to recognize health as a human right, the content of the right to health has been interpreted as embracing a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying

21 Constitutive Charter of the World Health Organization of July 22, 1946.

22 Ibid.

23 *Audrey Chapman*, Core obligations related to the right to health, in: Audrey Chapman and Sage Russell (eds.) *Core obligations: building a framework for economic, social, and cultural rights*, South Africa 2002, p.187.

24 *Chirwa*, note 11, p. 545.

25 General Comment 14, note 1, Para. 9.

26 WHO Charter.

27 Art 25 of the Universal Declaration of Human Rights, 10 December 1948, UN Doc. 217 A (III).

28 Art 12 of the ICESCR.

29 Art 16 of the African Charter.

30 Art 47 of the DRC Constitution.

determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment.<sup>31</sup>

As a sovereign State, the DRC has its domestic protection of human rights in general and that of the right to health in particular as will be shown below.

### **C. The protection of the right to health under the DRC Constitution**

#### *I. Overview of human rights under the DRC Constitution*

Health is a fundamental human right indispensable for the enjoyment of other human rights.<sup>32</sup> Therefore an adequate protection of the right to health in the DRC depends greatly on the way in which human rights in general are protected.

Under the DRC Constitution, human rights are protected by its Title II “Human Rights, Fundamental Freedoms and Duties of citizen and the State.”<sup>33</sup> In general, this Title II contains 57 Articles, of which 51 articles are dedicated to human rights and fundamental freedoms and, six Articles to duties of citizens. Accordingly, human rights are explicitly divided into three categories, namely, civil and political rights, economic, social and cultural rights, and collective rights.<sup>34</sup>

Chapter 2 of the DRC Constitution protects economic, social and cultural rights. They include among others, the right to private property, to work, to freedom of association, freedom of syndicalism, to strike, to marry as well as the rights of the child. It also contains the rights to education, to health, to housing as well as the rights of vulnerable groups.

Like the enjoyment of economic, social and cultural rights, that of collective rights is protected and guaranteed for both Congolese citizens and foreigners.<sup>35</sup>

In summary, the DRC Constitution has the merit to put all human rights herein contained on the same legal status. This assertion is reinforced by a combined reading of both Articles 60 and 150 of the DRC Constitution, which provides that respect of human rights and fundamental freedoms enshrined in the Constitution is compulsory for both the State and individuals and that the judiciary power must stand security for all fundamental rights and freedoms.

In the following section, the nature of the protection of the right to health under the DRC Constitution is analysed.

31 General Comment 14, note 1, Para. 4.

32 Ibid. Para 1.

33 Title II of the DRC Constitution.

34 See Chapters 1, 2 and 3 of Title II of the DRC Constitution.

35 Art 50 of the DRC Constitution.

## II. *The nature of the protection of the right to health under the DRC Constitution in the light of ICESCR*

As abovementioned, article 47 of the DRC Constitution guarantees the “right to health” of which the full enjoyment is subject to the enactment of an implementation law. It follows that in using the concept of the ‘right to health’, this article opts for a broad and holistic protection of the right to health. This is because the concept of the right to health includes,

*[T]imely and appropriate health care, underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health as well as the participation of the population in all health-related decision making at the community.<sup>36</sup>*

It is necessary to mention that in addition to their implicit protection in the concept of the ‘right to health,’ most underlying determinants of the right to health are protected as autonomous rights by the DRC Constitution.<sup>37</sup> These include the right to food, housing, and access to safe drinking water and electricity, as well as the right to a healthy and conducive environment.<sup>38</sup> Furthermore, according to the Constitution, conditions for building of factories, storage, handling, and toxic waste disposal from industrial or artisanal units installed on the national territory are to be regulated by law in order to protect public health.<sup>39</sup>

The State’s obligation to ‘guarantee the right to health’ is to be understood in its broad sense as including the obligations to respect, protect and fulfil.<sup>40</sup> This implies that the State is under an obligation to adopt adequate and complementary measures including legislative, judicial, and budgetary policies in order to make the right to health in all its aspects available, accessible, acceptable and of good quality.<sup>41</sup> An example of such complementary approach includes the state’s obligation to adopt a law on public health<sup>42</sup>, which will consist of protecting, promoting and restoring the people’s health through health-related activities in order to reduce the amount of diseases, premature deaths and reduce discomfort and disability in the population.<sup>43</sup>

However, inappropriate legal and non legal measures have been adopted to give effect to the right to health in the DRC. For instance, eight years elapsed since the coming into

36 General Comment 14, note 1, Para 11.

37 *Mbwisi Mumbanika*, The implications of the right to health for the Democratic Republic of Congo in relation to access to medical service and medical care, Master thesis, Cape Town 2013, p. 35.

38 Arts 47, 48 and 53 of the DRC Constitution.

39 *Ibid.* Art 54.

40 General Comment 14, note 1, Para 33.

41 *Ibid.* Para 12.

42 Art 47 of the DRC Constitution.

43 Art 1 of the Southern African Development Community Protocol on Health, 2004.

force of the DRC Constitution, the implementation law for the right to health, which article 47 refers to has never been enacted. Thus, laws that regulate the field of health in the DRC are disparate and unrelated. For instance, while the framework legislation on medicine, namely the 1933 Ordinance on the practice of pharmacy<sup>44</sup> and the 1952 Decree on the practice of medicine<sup>45</sup> is older than both the DRC Constitution and the ICESCR and needs to be adjusted to the later, some newly enacted laws which provide for the right to health such as the law on people living with HIV<sup>46</sup> and the law on the protection of the child<sup>47</sup> are not explicitly legally based on article 47 of the DRC Constitution and are not yet followed by the adoption of adequate specific implementation measures.

In addition, while existing policies on the right to health which mainly consist of the National Strategy of Strengthening Health System,<sup>48</sup> and the 2011-2015 Health Plan of Action,<sup>49</sup> aim to ameliorate the issues of the Congolese people in the context of fight against poverty<sup>50</sup> by tackling the issue of health care services of doubtful quality provided by private actors whose activities are not coordinated<sup>51</sup>, their implementation is subject to the adoption of the law<sup>52</sup>, which has never been passed. Yet, their goals still remain illusory.

Furthermore, under Article 60 of the DRC Constitution, both the state and individuals have to respect all human rights protected by the Constitution. According to the Constitution, the concept of 'State' includes national, provincial and local spheres of the government.<sup>53</sup> Consequently, each sphere of government within its jurisdiction is under an obligation to adopt measures that protect the right to health. It is also clear that individuals including private health care providers are compelled to respect the constitutional right to health.

It is necessary to compare Article 47 of the DRC Constitution with the ICESCR, which is the main international standard dealing with the protection of economic, social and cultural rights.

With respect to the ICESCR, the nature of the right to health is provided by its Article 12 stipulating the right to the enjoyment of 'the highest attainable standard of physical and mental health'. Its full realisation consists of reducing stillbirth-rates, infant mortality and providing for the healthy development of the child. It further requires improving all aspects of environmental and industrial hygiene, preventing, controlling and treating all diseases,

44 Ordonnance No 27 bis Hyg sur l'Exercice de la Pharmacie au Congo-Belge, 1933.

45 Décret Portant Art de Guérir au Congo -Belge, 1952.

46 Loi Portant Protection des Droits des Personnes Vivant avec le VIH/SIDA et des Personnes Affec-tées, 2008, art 11.

47 Loi Portant Protection de l'Enfant, 2009, art 21.

48 Ministère de la Santé Publique de la RDC, Stratégie de Renforcement du System de Santé, 2006.

49 Ministère de la Sante Publique de la RDC, Plan National de Développement Sanitaire 2011-2015, 2010.

50 Ibid. pp. 68-69.

51 Ibid. p. 81.

52 Ibid.

53 Arts 3 and 68 of the DRC Constitution.

including the provision of medical service and medical attention in the event of sickness. States parties are enjoined by Articles 2 (1) and 12 to adopt individually and through international assistance, to the maximum of their available resources, all means and legislative measures, with a view to achieving the full progressive realization of this right.

Taken together, the following points need to be made. Firstly, it follows that the nature of the right to health under the DRC Constitution as discussed above is broad enough to include all aspects guaranteed by the ICESCR. Moreover, unlike the ICESCR, which explicitly provide for the adoption of legislative and other necessary measures in order to give effect to the right to health, under the DRC Constitution these obligations are implied in the state's obligations to 'guarantee and to respect the right to health' through a combined reading of Articles 47 and 60 of the DRC Constitution.

Furthermore, unlike the ICESCR, the DRC Constitution does not subject the implementation of the right to health either to the qualification of progressive realization or to that of the availability of resources. Such unqualified state obligations are challenged as being unrealistic. To this end, Chirwa rightly observes that considering the many socio-economic problems and human, infrastructural and financial resource constraints that African states face, it is unrealistic to expect an immediate the implementation of socio-economic rights.<sup>54</sup> This is also true with the DRC, which is now seen as one of the poorest nations in the world despite its wealth in human and natural resources.<sup>55</sup>

Indeed, the underpinning idea of the submission of the implementation of the right to health to the clause of progressive realization and the availability of resources under the ICESCR is that the achievement of the right to health in all its aspects cannot be implemented overnight.<sup>56</sup> It is for this reason that the availability of resources is relevant for an adequate implementation of the right to health in the DRC.<sup>57</sup>

Finally, unlike the ICESCR, the DRC Constitution explicitly subjects individuals to the obligation to respect human rights herein contained including the right to health under its Article 60. This obligation may be seen as taking account of the emerging novel idea of the horizontal application of human rights<sup>58</sup>, according to which constitutional rights are not only those rights against the state, but also against other individuals.<sup>59</sup>

54 *Danwood Chirwa*, African regional human rights system: The promise of recent jurisprudence on social rights in: Malcolm Langford (ed.) *Social rights jurisprudence: Emerging trends in international and comparative law*, South Africa 2008, p. 327.

55 *Jacques Bahati*, Evaluating peace and stability in the Democratic Republic of Congo and the United States policy in the Great Lakes Region, Washington 2009, p. 5.

56 General Comment 3, note 15, Para. 9.

57 General Comment 14, note 1, Para. 64.

58 *Chirwa*, note 11, p. 564.

59 *Mattias Kumm and Victor Ferreres*, What is so special about constitutional rights in private litigation? A comparative analysis of the function of state action requirements and indirect horizontal effect, in: Andras Sajó and Renata Uitz (eds.), *The constitution in private relations: expanding constitutionalism*, Utrecht 2005, p. 242.



The DRC Constitution is also committed to give effect to all human rights including the right to health as guaranteed under its ratified international human rights instruments as discussed below.

### *III. Relevance of International law to the DRC and the Domestication of international treaties*

From the preamble to its body, the DRC Constitution places a high priority on ratified international human rights instruments.<sup>60</sup> This section examines how the DRC incorporates international human rights instruments into its legal system, the ways in which international treaties serve as source of law or as interpretative standards for the courts.<sup>61</sup>

With regards to the incorporation of international law at the domestic level, it has been argued that the relationship between international law and national law is not easy to establish.<sup>62</sup> This is because once a treaty has entered into effect for a State it does not necessarily mean that such a treaty is in force in that State.<sup>63</sup> Instead, it is an attribute of sovereignty for each State to decide on how a treaty should be given effect in domestic law.

As far as the DRC is concerned, it has adopted the monist approach. To this end, a combined reading of both articles 153 and 215 of the DRC Constitution suggests that courts and tribunals must apply ratified treaties and international agreements, which have precedence over domestic laws. It follows from these provisions that in the DRC, courts and tribunals can use ratified international treaties as both a source of domestic law or as an interpretative aid. This clearly means that in any litigation regarding the protection of the right to health in the DRC, courts and tribunals are entitled to directly apply all the ratified treaties including the ICESCR. This is because; international treaties constitute a powerful tool in the protection of the right to health given that they supplement the Constitution in filling any gaps in the Bill of Rights.

With a view to highlighting its commitment to directly apply ratified international human rights at the domestic level, the DRC's report to the Human Rights Council, stated that:

*[F]or a number of years now, Congolese courts have been basing their decisions on international human rights treaties. For example, in refusing to conduct criminal proceedings against a child aged 17, the Magistrate's court of Kinshasa/Assossa cit-*

60 Arts 48, 69, 153, 215 and 216 of the DRC Constitution.

61 UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 9: The domestic application of the Covenant, 3 December 1998, UN Doc. E/C.12/1998/24 (hereinafter General Comment 9), Para. 12.

62 *John Mubangizi*, The protection of human rights in South Africa, Lansdowne 2004, p. 32.

63 *Anthony Aust*, Modern Treaty Law and Practice, Cambridge 2007, p. 178.

*ed Articles 2 and 17 of the African Charter on the Rights and Welfare of the Child, which establishes 18 years as the minimum age of criminal liability.*<sup>64</sup>

The above quotation implies that ratified human rights treaties may be enforced directly by the Congolese courts<sup>65</sup> without any further particular formality.<sup>66</sup> As regards the protection of the right to health in particular, the monist approach requires that any gaps or omission in the Constitution relating to the nature of the State obligations or the content of the right to health will be filled in by a direct application of ratified international treaties.<sup>67</sup>

Some observers argue that international instruments in the DRC were to prevail over the laws of the Republic other than the Constitution.<sup>68</sup> Such a position may be questionable for the following reasons. Firstly, unlike some Constitutions of other countries such as the Republic of South Africa, which explicitly says that it is the supreme law of the land and proclaims its precedence over international law<sup>69</sup>, the DRC Constitution does not contain any explicit provision which states that it is the supreme law of the land or that it has precedence over ratified international treaties. Rather, it proclaims the precedence of international treaties over “the laws” (in plural) of the country, which may include the Constitution itself. It therefore remains the task of the Constitutional Court (currently the Supreme Court of Justice) vested with the power to interpret the Constitution to say whether precedence of ratified international treaties over domestic laws in the DRC includes the Constitution or not.

Secondly, as a rule in French legal system, the higher normative status of a treaty over the Constitution requires that the ratification of any treaty containing a clause contrary to the Constitution must occur only after the amendment of the latter.<sup>70</sup> This assertion is acknowledged by Article 216 of the DRC Constitution which provides:

*[I]f the Constitutional Court consulted by the President of the Republic, the Prime Minister, the President of the National Assembly and the President of the Senate or by one tenth of the Members of National Assembly or Senators, declares that a treaty or international agreement contains a clause, which is contrary to the Constitution,*

- 64 Human Rights Council, Working Group on the Universal Periodic Review, National Report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council Resolution 5/1 - Democratic Republic of Congo, 6th session, 3 September 2009, UN Doc. A/HRC/WG.6/6/COD/1, Para. 124 (b).
- 65 *André Mbata*, The conflict in the Democratic Republic of Congo and the protection of rights under the African Charter, AHR LJ 3 (2) (2003), pp. 236, 251 and 255.
- 66 *Mazyambo*, note 19, pp. 242-243.
- 67 *Danwood Chirwa*, Human rights under the Malawian Constitution, Cape Town 2011, p. 30.
- 68 *Mbata*, note 66, p. 255.
- 69 Constitution of the Republic of South Africa, 1996: Ss 2 and 231 (4).
- 70 *Andrew West, Yvon Desdevises, Alain Fenet, Dominique Gaurier, Marie-Clet Heussaff and Bruno Lévy*, The French legal system, London 1998, p. 44.

*the ratification or approval of such a treaty may be made only after the revision of the Constitution.*

It follows that, the underpinning idea of the constitutional revision is to make the Constitution consistent with the international treaty to be ratified. However, frequent application of this provision has potential to undermine the stability of the Constitution because it allows the constitutional revision whenever such kind of international treaty is to be ratified.

Therefore, the fact that international treaties have precedence over domestic laws coupled with the fact that the Constitution must first be amended before the ratification of a treaty containing a clause contrary to it, leads one to claim that the constitutional right to health is supposed to be given an interpretation, which would enable the DRC to comply with its international obligation.<sup>71</sup>

#### *IV. The justiciability of the right to health under the DRC Constitution*

The justiciability of the right to health implies the possibility of adjudication by the courts.<sup>72</sup> Accordingly, it has been suggested that as soon as any socio-economic right including the right to health has been given constitutional recognition and the provisions of the ICESCR incorporated into national law, such rights can be seen as justiciable and therefore are able to be invoked before the courts.<sup>73</sup>

The above conditions adequately apply to the DRC Constitution, which protects the right to health, acknowledges ratified international treaties including the ICESCR as source of domestic law and empowers courts and tribunals to ensure the guarantee of individual freedoms and fundamental rights herein enshrined. Put differently, one can claim that the right to health protected by the DRC Constitution can be invoked before the courts and tribunals. This is because the constitutional right to health enjoys the same legal status as all political and civil rights and because both the State and individuals are bound to respect it.

However, at the practical level, there is no court decision or jurisprudence on the constitutional or conventional right to health especially from the Supreme Court of Justice, which is the highest jurisdiction of the land. This may be due to among others, the lack of cases before the courts which aim to claim the right to health. In other words, Congolese people including lawyers, human rights activists and NGOs are either ignorant of the justiciability of the constitutional right to health or they may be seen as reluctant to claim this right before the courts. This assumption is based on the fact that for courts or judges to be seen as the ones being at the basis of lack of jurisprudence on the right to health in the DRC, there should be cases in which Congolese people sought to claim or rely on this right.<sup>74</sup>

71 General Comment 9, note 62, Para. 15.

72 Ibid. Para 10.

73 General Comment 3, note 15, Para 6.

74 General Comment 9, note 62, Para 3.

Ngonda Nkoy rightly observes that all human rights including the right to health guaranteed under the DRC Constitution are justiciable. Therefore, it remains the task of Congolese people as rights-holders not only to be aware of the justiciability of these rights but also, to claim them before the courts.<sup>75</sup>

#### D. Conclusion

Throughout this paper, it has been shown that the DRC Constitution protects the right to health in a more meaningful way. Indeed, not only does the Constitution protect the right to health in its broadest sense including health care and other underlying determinants of health, it also protects all the rights herein contained with the same status. Furthermore, the Constitution binds both the State and individuals including private health care providers to the Bill of Rights. Moreover, ratified international instruments including the ICESCR and the African Charter are part of the domestic legal system of the DRC that the Courts and Tribunals must apply. This implies that in applying international treaties, the courts and tribunals may hold the DRC government responsible for violating one or more aspects of the right to health, which are not specifically provided for in the Constitution.<sup>76</sup> Unfortunately, the lack of jurisprudence on the right to health in the DRC especially from the Supreme Court of Justice does not allow one to assess the extent to which Congolese courts use this competence or are aware of both the content of ratified treaties by the DRC and the justiciability of the right to health. Also, the implementation law for the right to health as argued by article 47 of the DRC Constitution has never been enacted.

Apart from the lack of appropriate implementation measures for the right to health, the criticism against the constitutional protection of the right to health remains similar to that generally made against the protection of this right under the African Charter. That is, the DRC Constitution binds the State with unqualified positive obligations to immediately give effect to the right to health, failing thereby to take account of the widespread poverty on the African continent or of acute resource constraints faced by African countries.<sup>77</sup> This is also true for the DRC, which expressly claims to be poor and heavily-indebted with one of the lowest rankings on the human development index in the world.<sup>78</sup> It must be stressed nevertheless that poverty or lack of resources cannot constitute a legal excuse for the DRC non compliance with its obligation to give full effect to the right to health. Rather, to be eligible to attribute its failure to implement the right to health to a lack of available resources, the DRC government has the burden to first demonstrate that every effort has been made to use all resources at its disposition with a view to satisfying its minimum obligations relating to

75 *Paul Gaspard Ngondankoy*, Cours de droit constitutionnel des droits de l'homme in : Bakama Bope (ed.) Cours intensifs sur les droits de l'homme et le droit international pénal, Kinshasa 2012, p. 87.

76 *Chirwa*, note 68, p. 28.

77 *Chirwa*, note 55, pp. 327 - 338.

78 National Report of the DRC to Human Rights Council, note 66, Para. 124 (b).

the said right including through the adoption of relatively low-cost targeted programmes.<sup>79</sup> This implies the adoption of adequate legal and non legal implementation measures for the right to health.

Therefore, any assessment of the DRC's compliance with its constitutional and international obligations to implement the right to health should take account of the fact that while the Constitution protects the right to health broadly, the DRC is one of the poorest countries. As a result, state's obligations in respect of the right to health should be interpreted as subject to the clause of progressive realization within the available resources, as provided by Article 2 (1) of the ICESCR or as urged by the African Commission on Human and Peoples' Rights.<sup>80</sup> This is because, while imposing an obligation to move as expeditiously and effectively as possible towards the goal of giving full effect to the right to health, the clause of progressive realization may be seen also as a necessary flexibility device which reflects the realities of the real world and difficulties involved for the DRC in giving fully effect to the right to health.<sup>81</sup>

79 General Comment 3, note 15, Para. 10, 11-12.

80 African Commission on Human and Peoples' Rights, Communication No. 241/2001, Purohit and Moore v The Gambia, 2001, Para. 84.

81 General Comment 3, note 15, Para 9.