

**The Right to Health
in the Constitutions of
Member States of the
World Health Organization
South-East Asia Region**



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The Right to Health in the Constitutions of Member States of the World Health Organization South-East Asia Region

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1. Objectives

This brief survey examines references to the right to health in the constitutions of the 11 Member States in the World Health Organization (WHO) South-East Asia Region (SEAR).

The right to the highest attainable standard of health (referred to as the “right to health”) was first depicted in 1946 in the Constitution of the WHO, and has since been included in several international treaties and declarations. The most authoritative interpretation of the right to health is outlined in Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which has been ratified by 9 of the 11 SEAR Member States¹. When a state subscribes to a treaty through ratification, accession or succession it has a legal obligation to take a number of steps to ensure that everyone under its jurisdiction can enjoy the rights set out in the treaty. Obligations to fulfill the right to health may also arise from national legislation.

The purpose of the survey is to assess whether the right to health is an inclusive concept in the legal systems of SEAR Member States. Thus, where the right to health is a constitutionally protected right, it may be assumed that the rights-based approach to health also has some domestic legitimacy. However, where the right to health is absent from the constitution, the rights-based approach may appear somewhat foreign in the public health context.

This survey focuses on constitutional provisions on the “right to health”. States may, of course, make explicit reference to rights without sharing the value-system of the international human rights community. The right to health in a constitution that focuses on the duties of the citizens is not the same as the right to health in a traditional liberal constitution where the focus is on the rights of the citizen. Whereas in many national contexts, the ethos or spirit of constitutions may vary on political grounds, modern constitutional traditions share the same historical origin, its constitutions employing the rights language, and the concept of a rights-bearer.

National constitutions are the supreme laws of countries. Hence, in the case of any contradiction or inconsistency between any other national laws and provisions of the constitution, the stipulation in the constitution prevails. Thus, the mention of the right to health in national constitutions provides one way to mark the government’s obligation to respect, protect and fulfill human rights. Therefore, the inclusion of the right to health in national constitutions is central to the recognition of health-related human rights.²

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- 1 ICESCR (1966) has been ratified by Bangladesh, DPR Korea, India, Indonesia, Maldives, Nepal, Sri Lanka, Thailand and Timor-Leste. Bhutan has signed, but not yet ratified the ICESCR. Myanmar is not a member.
 - 2 Mulumba M, Kabanda D, Nassuna V. *Constitutional provisions for the right to health in east and southern Africa*. Centre for Health, Human Rights and Development, CEHURD, in the Regional Network for Equity in Health in East and Southern Africa. EQUINET Discussion Paper 81, April 2010, <http://www.equinetafrica.org/bibl/docs/Diss81%20ESAconstitution.pdf> : p.1 (accessed 20 February 2011).

2. Limitations

This survey studied only constitutional norms that had categorical mention of the right to health. It is not an examination of these norms in the context of the countries' legal systems as a whole. For instance, there is no right to health in the Indian constitution, but the Supreme Court of India has interpreted the constitution's article on the protection of life and personal liberty so as to include access to health care into the article's scope.³ In Indonesia, the national health law⁴ includes detailed provisions on right to health and health-related rights. The same may be true of other jurisdictions.

This survey being a descriptive one, does not consider the actual relevance of constitutional norms to the national legal system. While an important concern, this is often a legally and politically complex issue and beyond the scope of this short survey. In some countries, constitutional rights are merely figurative; in other countries they constitute enforceable entitlements that may act as a basis for litigation. The right to health might not be depicted *de jure* in some constitutions, but access to health could still be considered *de facto* as a right. For instance, in the Sri Lankan constitution health care is included only as an obligation of the provincial councils, and not as a right, but health care as well as education are free in principle and contribute to consistently improving indicators in these areas.

Furthermore, this survey does not also take into consideration constitutional provisions that are closely linked to the right to health, even though these may be necessary for the realization of the right to health, such as provisions on minimum essential food and nutrition, access to basic shelter, water and sanitation, access to health-related information, and the right to a clean and safe environment. While it is accepted that the right to health is an inclusive right, which extends to not only the right to health care, but to all of these underlying determinants of health, this survey refers categorically to the mention of "right to health" and "right to health care" in the constitutions. A deeper assessment of the extent to which the "right to health" is incorporated into the constitutions of WHO SEAR Member States, would require a more comprehensive study that considers constitutional provisions for the underlying determinants of health. Some rights, clearly related to underlying determinants of health, are nevertheless reflected in the annex part of this study, but it should be noted that the main focus in this survey has been on provisions relating to "right to health" only.

Also, the *travaux préparatoires* or the legislative histories of the constitutions were not available for the survey. A more thorough legal study would require extensive interviews, historical research and data collection in the surveyed countries.

3. Findings

The right to health is not an unfamiliar concept in the Member States of the South-East Asia Region. This right is enshrined in the constitutions of DPR Korea, Indonesia, Maldives, Nepal (interim constitution), Thailand and Timor-Leste. All these constitutions employ the local equivalent of the English language word "*right*" in describing people's entitlement to health care and in some cases also to underlying determinants of health. The constitution

3 Swarup J and Singhvi LM. *Constitution of India*. New Delhi: Modern Law Publications, 2006: p. 1100.

4 Health Law No 36, 2009

of Timor-Leste is the only constitution where the words “right to health” are included. The constitutions of Bhutan, Bangladesh, India, Myanmar and Sri Lanka do not recognize the *right* to health as a fundamental right but, nevertheless, compel the state to provide health services or in some cases, more indirectly to improve public health. It should be noted that although the right to health has not been included as a positive right in some constitutions of the Region, other national legislation guaranteeing this right might be in place, or access to health could be treated *de facto* as a right.

The distinction between the “right to health” or the “right to health care”, and the obligation of the state to provide health care may not appear significant as far as the observable outcomes on the ground are concerned, but from the human rights perspective the difference is important. The rights-based approach to health signals a paradigm shift to using human rights as a pervasive human value enshrined in global convention, and not merely constitutional declarations on state policy, as a direction for health development.⁵ The assumption is that once people are made aware of human rights as a pervasive value of a democratic society, and assume their role as rights holders, they will take actions to hold the states accountable to improve health service delivery.⁶ The right to health may be incorporated in the constitution as a constitutional right (positive right), which can be enforced in a court of law. In contrast, when it is incorporated as a directive principle of the government, the right cannot be enforced by the courts and constitutes rather a socioeconomic objective to guide the government’s actions.⁷

The operationalization of health rights is a dynamic and progressive process. International human rights law and constitutional obligations can provide a framework from which national health policies and laws can be formulated. Many countries revise or produce new constitutions, but other national legislation and policies can also be changed to suit changing needs. National health programmes and policies, born from national and international laws, can generate positive health outcomes and the individual realization of health rights. Constitutional law, being the highest form of domestic law, thus has significant potential to impact individual health circumstances.⁸

Provisions on the right to health have been included in the constitutions of countries of the Region by relatively recent amendments. The right to health was incorporated in the Thai constitution in 1991, and health-related rights were further expanded in the new constitution of 2007; the right to health was taken into the Indonesian constitution by an amendment in 2000⁹; the Timor-Leste constitution was enacted in 2002. Right to health care and to relevant underlying determinants of health were also included in the new Maldivian constitution, which was enacted in 2008, and in the Nepalese Interim Constitution, which

5 World Health Organization. *25 Questions & Answers on Health & Human Rights*. Health & Human Rights Publications Series No.1. Geneva, July 2002: p. 16.

6 Sofia Gruskin & Daniel Tarantola. Health and Human Rights. In: Gruskin et al. (eds.) *Perspectives on Health and Human Right*. New York: Routledge, 2005: p. 49.

7 Mulumba M, Kabanda D, Nassuna V. *Constitutional provisions for the right to health in east and southern Africa*. Centre for Health, Human Rights and Development, CEHURD, in the Regional Network for Equity in Health in East and Southern Africa. EQUINET Discussion Paper 81, April 2010, <http://www.equinetfrica.org/bibl/docs/Diss81%20ESAconstitution.pdf> : p. 3 (accessed 20 February 2011)

8 Peruhoff, SK. *Health, Essential Medicines, Human Rights & National Constitutions*. Geneva: World Health Organization, 2008: p. XV.

9 and the amendment of Health Law No. 36 in 2009 further depicts health-related rights in more detail.

came into force in 2007.¹⁰ These developments could be considered to indicate that the right to health is gaining recognition in the SEA Region. A human rights-based approach aims to build the capacity of rights-bearers to claim their rights and of duty-bearers to fulfill their obligations. Taking steps to adopt appropriate legislative measures is an integral part of the State (duty-bearer) obligation to fulfill rights. Furthermore, when the right to health is included as a positive right in a constitution, the (legal) basis for right-holders to claim health-related rights is improved. Thus, any measures taken to include the right to health in the constitutions of the Member States of the SEA Region are positive steps towards realization of the right to health.

4. Right to health in the constitutions of Member States of the SEA Region

The following table presents an overview of the status of the right to health in constitutions of the Member States of the Region. The exact nature of the rights and obligations varies from one constitution to another. The wordings of health-related constitutional provisions can be found in the annex of this survey.

Country	Right to health or right to health care as a constitutional right (positive right, the word “right” is depicted)	Health care only as a constitutional obligation of the state (directive principle for the state, the word “right” is not depicted)
Bangladesh		x ¹¹
Bhutan		x
DPR Korea	x	
India		x ¹²
Indonesia	x	
Maldives	x ¹³	
Myanmar		x ¹⁴
Nepal	x	
Sri Lanka		x ¹⁵
Thailand	x	
Timor-Leste	x	

10 It was not possible to trace the history of the right to health in the constitution of the Democratic People’s Republic of Korea.

11 Referring only to “improvement of public health” as a “primary duty of the government”.

12 Referring only to state duty, regarding “improvement of public health as among its primary duties”.

13 The Maldives constitution includes a “positive right” to health care and some underlying determinants of health, and obliges the government to provide these rights progressively. However, there are no provisions for protection of “right to health”.

14 Including only the obligation of the Union to “earnestly strive to improve education and health of people” and to “enact the necessary law to enable people to participate in matters of their education and health”.

15 As an obligation of Provincial Councils.

5. Annex: Constitutional provisions on right to health

The following section presents a compilation of constitutional provisions on the “right to health” in the constitutions of Member States of the Region.

It should be noted that in some cases it was difficult to verify whether the constitutions were the most recent versions in terms of conclusion of amendments. It should also be noted that for some countries official English translations were not available (unofficial translations are noted brackets). All text from the constitutions has been copied word for word.¹⁶

5.1 Bangladesh

The Constitution of the People’s Republic of Bangladesh, as of 17 May 2004 (source: Commonwealth Legal Information Institute, <http://www.commonlii.org/bd/legis/const/2004/index.html>, unofficial translation).

Article 18. Public health and morality

- (1) The State shall regard the raising of the level of nutrition and the improvement of public health as moving its primary duties, and in particular shall adopt effective measures to prevent the consumption, except for medical purposes or for such other purposes as may be prescribed by law, of alcoholic and other intoxicating drinks and drugs which are injurious to health.
- (2) The State shall adopt effective measures to prevent prostitution and gambling.

5.2 Bhutan

The Constitution of the Kingdom of Bhutan, as of 18 July 2008 (source: <http://www.constitution.bt/html/constitution/constitution.htm>).

Article 5. Environment

The Royal Government Shall:

2. d. Ensure a safe and healthy environment.

Article 9. Principles of State Policy

- (21) The State shall provide free access to basic public health services in both modern and traditional medicines.
- (22) The State shall endeavor to provide security in the event of sickness and disability or lack of adequate means of livelihood for reasons beyond one’s control.

¹⁶ All websites referenced in the annex were accessed on 20.2.2011

5.3 DPR Korea

Socialist Constitution of the Democratic People's Republic of Korea, as of 5 September 1998 (source: http://www1.korea-np.co.jp/pk/061st_issue/98091708.htm, unofficial translation).

Article 56.

The State shall consolidate and develop the system of universal free medical service, and consolidates the section doctor system and the system of preventive medicine to protect people's life and improve working people's health.

Article 72.

Citizens are entitled to free medical care, and all persons who are no longer able to work because of old age, illness or a physical disability, the old and children who have no means of support are all entitled to material assistance. This right is ensured by free medical care, an expanding network of hospitals, sanatoria and other medical institutions, State social insurance and other social security systems.

5.4 India

Constitution of India, as of 2006 (source: Ministry of Law and Justice, <http://indiacode.nic.in/coiweb/welcome.html>).

Art 39. Certain principles of policy to be followed by the State

- (e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;
- (f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

Art. 47. Duty of the State to raise the level of nutrition and the standard of living and to improve public health

The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purpose of intoxicating drinks and of drugs which are injurious to health.

5.5 Indonesia

Constitution of the Republic of Indonesia, certified translation of the 1945 Constitution, including amendments until the 4th amendment (2002) (source: Asia Human Rights Commission, <http://indonesia.ahrchk.net/news/mainfile.php/Constitution/34/?alt=english>)

It should be noted that Health Law No 36 includes detailed provisions for health-related constitutional rights and obligations. For instance Article 4 of the Health Law clearly states that “every person shall have the right to health”.

Chapter XA. Fundamental Human Rights

Article 28H

- (1) Each person has a right to a life of well-being in body and mind, to a place to dwell, to enjoy a good and healthy environment, and to receive medical care.
- (2) Each person has the right to facilities and special treatment to get the same opportunities and advantages in order to reach equality and justice.
- (3) Each person is entitled to social security enabling him to develop his entire self unimpaired as a dignified human being.

Section XIV National Economy and Social Welfare

Article 34

- (3) The state has the responsibility to provide proper medical and public service facilities.

5.6 Maldives

Constitution of the Republic of Maldives, as of 2008 (source: Ministry of Legal Reform, Information and Arts, <http://www.presidencymaldives.gov.mv/Documents/ConstitutionOfMaldives.pdf>)

It should be noted that although the following provisions on economic and social rights can be considered to constitute a “positive right” to health, the constitution lacks specific reference to protecting the right to health. The constitution provides health-related rights for citizens, and makes it an obligation of the State to ensure progressive realization of these rights.

Chapter II Fundamental Rights and Freedoms

Article 23. Economic and Social Rights

Every citizen the following rights pursuant to this Constitution, and the State undertakes to achieve the progressive realisation of these rights by reasonable measures within its ability and resources:

- (a) adequate and nutritious food and clean water;
- (b) clothing and housing;
- (c) good standards of health care, physical and mental;
- (d) a healthy and ecologically balanced environment;
- (e) equal access to means of communication, the State media, transportation facilities, and the natural resources of the country;

- (f) the establishment of a sewage system of a reasonably adequate standard on every inhabited island;
- (g) the establishment of an electricity system of a reasonably adequate standard on every inhabited island that is commensurate to that island.

5.7 Myanmar

Constitution of the Republic of the Union of Myanmar, as of 29 May 2008 (source: Ministry of Information, http://www.burmalibrary.org/docs5/Myanmar_Constitution-2008-en.pdf)

Article 28.

The Union shall:

- (a) earnestly strive to improve education and health of the people;
- (b) enact the necessary law to enable National people to participate in matters of their education and health;
- (c) implement free, compulsory primary education system;
- (d) implement a modern education system that will promote all-around correct thinking and a good moral character contributing towards the building of the Nation.

5.8 Nepal

Interim Constitution of Nepal (source: UNDP Nepal, <http://www.undp.org.np/constitutionbuilding-archive/specialinterest/translator/file/IC%20Final%20version.pdf>, unofficial translation)

Nepal is governed under an interim Constitution, which came into force on 15 January 2007. The Legislature Parliament passed the 8th Amendment Bill of the Interim Constitution of Nepal at an emergency meeting on 29 May 2010 extending the Constituent Assembly (CA) term by one year. This means that the deadline for Nepal to promulgate a new constitution has been extended for one year.¹⁷ The interim constitution recognizes several health-related rights.

Part 3 Fundamental Rights

Article 16. Right regarding Environment and Health:

- (1) Every person has the right to live in a clean environment.
- (2) Every citizen shall have the right to basic health services free of cost from the State as provided for in the law.

¹⁷ People's Daily Online, "Nepal House passes interim constitution amendment bill to extend CA term", <http://english.people.com.cn/90001/90777/90851/7004561.html>

Part 4 Responsibilities, directive principles and policies of the State

Article 33. Responsibilities of the State:

The State shall have the following responsibilities:

- (h) to pursue a policy of establishing the rights of all citizens to education, health, housing, employment and food sovereignty,

Article 35. State Policies:

- (1) The State shall pursue a policy of raising the standard of living of the general public by fulfilling basic needs such as education, health, transportation, housing, and employment of the people of all regions, by equitably distributing investment of economic resources for balanced development of the country.
- (8) The State shall pursue a policy of encouraging maximum participation of women in national development by making special provision for their education, health and employment.
- (10) The State shall pursue a policy which will help to uplift the economically and socially backward indigenous ethnic groups, Madhesis, Dalits, including marginalized communities, and workers and farmers living below the poverty line by making provisions for reservations in education, health, housing, food security and employment for a certain period of time.

5.9 Sri Lanka

The Constitution of the Democratic Socialist Republic of Sri Lanka, as of 20 December 2000 (source: Government of Sri Lanka, <http://www.priu.gov.lk/Cons/1978Constitution/Index.html>).

Article 27. Directive Principles of State Policy

- (9) The State shall ensure social security and welfare.

Ninth Schedule (Provincial Council List)

11. Health

- 11:1 The establishment and maintenance of public hospitals, rural hospitals, maternity homes, dispensaries (other than teaching hospitals and hospitals established for special purposes);
- 11:2 Public health services, health education, nutrition, family health, maternity and child care, food and food sanitation, environmental health;

- 11:3 Formulation and implementation of Health Development Plan and of the Annual Health Plan for the Province;
- 11:4 The provision of facilities for all institutions referred to in 1 above within the Province, excluding the procurement of drugs;
- 11:5 Awarding of Scholarships for Post-Graduate Education within Sri Lanka to personnel attached to the Institutions specified in 1 above.

5.10 Thailand

Constitution of the Kingdom of Thailand, as of August 2007 (source: Secretariat of the House of Representatives, http://www.opm.go.th/OpmInter/content/cplo/data/picture/Constitution_50_En.pdf)

CHAPTER III

Rights and Liberties of the Thai People

Part 2 Equality

Section 30. (para 3)

Unjust discrimination against a person on the grounds of the difference in origin, race, language, sex, age, disability, physical or health condition, personal status, economic or social standing, religious belief, education or constitutionally political view, shall not be permitted.

Part 9 Rights to Public Health Services and Welfare from the State

Section 51.

A person shall enjoy an equal right to receive public health services which are appropriate and up to the quality, and the indigent shall have the right to receive free medical treatment from public health centres of the State. A person has the right to receive public health services from the State, which shall be provided thoroughly and efficiently. A person has the right to be appropriately protected by the State against harmful contagious diseases, and to have such diseases eradicated, without charge and in a timely manner.

Part 10 Rights in connection with Information and Complaints

Section 67.

The right of a person to give to the State and communities participation in the conservation, preservation and exploitation of natural resources and biological diversities and in the protection, promotion and preservation of the quality of the environment for regular and continued livelihood in the environment which is not hazardous to his or her health and sanitary condition, welfare or quality of life, shall be protected as appropriate.

Any project or activity which may seriously affect the community with respect to the quality of the environment, natural resources and health shall not be permitted, unless, prior to the operation thereof, its impacts on the quality of the environment and on public health have been studied and assessed and a public hearing process has been conducted for consulting the public as well as interested persons and there have been obtained opinions of an independent organisation, consisting of representatives from private organisations in the field of the environment and health and from higher education institutions providing studies in the field of the environment, natural resources or health

CHAPTER V

Directive Principles of Fundamental State Policies

Part 4 Directive Principles of State Policies in relation to Religions, Social Affairs, Public Health, Education and Cultural Affairs

Section 80.

The State shall pursue directive principles of State policies in relation to Social Affairs, Public Health, Education and Cultural Affairs, as follows:

- (2) to promote, support and develop the health system based upon the fostering of health that leads to a sustainable state of happiness of the people, provide and promote public health services that meet the standard thoroughly and efficiently, promote participation by private individuals and communities in the development of health and the provision of public health services, provided that persons who, under the duty to provide such services, have performed the duty in accordance with the professional standard and ethics, shall be protected;
- (5) promote, maintain and protect the quality of natural resources in accordance with the sustainable development principle, control and eradicate polluted conditions affecting health, sanitary conditions, welfare and the quality of life of the public, provided that members of the public, local residents and local government organisations shall have due participation in determining the direction of such work.

CHAPTER XIV

Local Government

Section 290.

- (3) the participation in considering the initiation of any project or activity outside the area of the locality which may affect the quality of the environment, health or sanitary conditions of the inhabitant in the area;

5.11 Timor-Leste

Constitution of the Democratic Republic of East Timor, as of 20 May 2002 (source: Government of the Democratic Republic of Timor-Leste, <http://www.gov.east-timor.org/constitution/constitution.htm>)

Title III Economic, Social and Cultural Rights and Duties

Section 57 (Health)

- (1) Everyone has the right to health and medical care, and the duty to protect and promote them.
- (2) The State shall promote the establishment of a national health service that is universal and general. The national health service shall be free of charge in accordance with the possibilities of the State and in conformity with the law.
- (3) The national health service shall have, as much as possible, a decentralised participatory management.

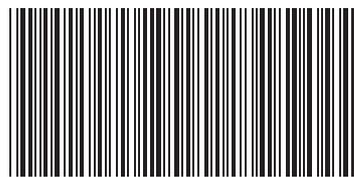
This document examines references to the “right to health” in the constitutions of the 11 Member States of the World Health Organization's South-East Asia Region. In some constitutions of the Region, the right to health is a constitutionally protected right, whereas in others health-care provision may only be an obligation of the state, not a right of citizens. This survey looks into the distinctions between these different types of constitutional provisions. From a rights-based perspective, does it make a difference if a constitution names rights for the citizens or obligations for the state, or both?

In addition to briefly discussing the meaning of “right to health” in constitutions, the survey also looks at recent developments in the Region. Many Member States have very recently included health-related rights in their constitutions. An overview of the status of the right to health in the Member States of the Region is given, as well as a compilation showing all right-to-health provisions from Member State constitutions.



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