Kenya: New Constitution Clarifies Law on Abortion and Guarantees Right to Reproductive Health

Summary and Comments by Anna Pippus

In a referendum on August 4, 2010, 67% of Kenyans voted in favour of a proposed new constitution. The draft had already been approved by Parliament, following months of consultations and revisions. The constitutional overhaul included much-needed clarification on rights pertaining to abortion and reproductive health.

Under "Rights and fundamental freedoms," Article 26 provides that: "(1) Every person has the right to life. (2) The life of a person begins at conception. (3) A person shall not be deprived of life intentionally, except to the extent authorised by this Constitution or other written law. (4) Abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law."

This provision appears to give full legal personhood to fetuses, with attendant rights including the right to life. Thus, pregnant women are not permitted to terminate unwanted pregnancy in contravention of the fetuses' right to life. However, 26(4) provides three exceptions to this ban, in the case that: emergency treatment is needed OR the life or health of the mother is in danger OR if permitted by any other written law. It is not clear whether "health" includes both mental and physical health. This provision appears to leave open the possibility that Parliament may pass other laws further broadening legal access to abortion.

26(4) also specifies that abortion is permitted if it is "the opinion of a trained health professional" that there is a need for emergency medical treatment. This grants decision-making authority to health professionals. Whereas, in the face of legal uncertainty, health professionals might otherwise err on the side of staying within the bounds of the law and not performing abortions, the phrasing of 26(4) indicates a willingness to defer to health professionals' expertise as to whether emergency treatment including pregnancy termination is needed. It is not clear from the provision's syntax whether "the opinion of a trained health professional" may also determine whether abortion is required to ensure the life or health of the pregnant woman, or whether the latter is to be determined in another manner, such as by an objective and/or external fact-finder.

It remains to be seen whether, in practice, Kenyan women will be able to access abortion when they are lawfully entitled to one. The constitution does not mandate abortion under such circumstances but merely allows it.
Under "Economic and social rights," Article 43 provides that: "Every person has the right (a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care...". It is thus made explicit that, within the constraints of available governmental resources, women have the right to reproductive health care. It is not clear what the scope of "reproductive health care" will be. Nevertheless, the explicit inclusion of the term signals the visibility of reproductive health as a distinct health concern worthy of protection.

The full impact of these new Constitutional provisions will be determined by women's practical abilities to realize their rights and, ultimately, by judicial interpretation.

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