

THE GAINS OF THE NEW CONSTITUTION: STRONGER PROTECTIONS FOR THE LIVES AND HEALTH OF WOMEN

- The new Constitution affirms that **“every person has the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care.”** [Article 43(1)(a)].

- The **“right to health care services”** is explicitly guaranteed, providing content to the right to health and placing clear obligations upon the government to provide health care services.
- **“Reproductive health care”** is included in the definition of the right to health and health care services, affirming that reproductive health care is essential to the right to health and forms part of the health care services to which people are entitled.
- Although reproductive health is not defined in the Kenyan Constitution, Kenya—along with 178 other countries at the 1994 International Conference on Population and Development—endorsed the following definition:

Reproductive health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes. Reproductive health therefore implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so. Implicit in this last condition are the right of men and women to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of their choice for regulation of fertility which are not against the law, and the right of access to appropriate health-care services that will enable women to go safely through pregnancy¹

- The new Constitution provides that **“A person shall not be denied emergency medical treatment.”** [Article 43(2)].

- This provision places a strong obligation on the government to ensure that all persons, including women seeking post-abortion care or emergency abortion services, receive necessary medical treatment. The inability to pay for services, providers’ or institutions’ private objections to providing certain types of care, and stigma-related delays in care are impermissible, unconstitutional grounds on which to deny emergency treatment, including abortion-related emergency treatment.

- By specifying conditions under which abortion may be legally provided, the Constitution addresses the terrible toll caused by unsafe illegal abortion. **The new Constitution explicitly permits abortion when “in the opinion**

of a trained health professional, there is need for emergency treatment, or the life or health of the [pregnant woman] is in danger, or if permitted by any other written law.” [Article 26(4)].

- A **“trained health professional”** should be interpreted to include doctors, clinical officers, nurses, and midwives who have the appropriate training.
- The Committee of Experts explained its rationale when drafting this language, stating that unnecessarily requiring:

that abortions only be performed by medical practitioners means that women in poor rural communities that have no such services will be unable to access medical facilities from alternative health workers such as clinical officers or nurses with serious potentially fatal repercussions for poor women.²

- **“Emergency treatment”** is treatment that must be immediately rendered to the patient to prevent further disability or death. This separate ground for providing abortion services is distinct from the life and health exceptions, indicating that these other two exceptions must be interpreted more expansively than simply permitting access to abortion in emergency situations.
- Although not defined in the Kenyan Constitution, **health** is defined by the World Health Organization as **“a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.”**³
- The African Charter on Human and Peoples’ Rights,⁴ the International Covenant on Economic, Social and Cultural Rights,⁵ the Kenyan Ministry of Health⁶ and the Kenyan Medical Practitioners and Dentists Board⁷ also define health to include both mental and physical health. **Under the new Kenyan Constitution, women have the right to access safe and legal abortion where the pregnancy presents a danger to their mental or physical health.**
- Access to safe abortion in cases of pregnancy resulting from **sexual violence** should also be—and, in Kenya, has been—understood as central to preserving a woman’s life and health.⁸
- The clause **“or if permitted by any other written law”** makes clear that the grounds listed in this provision are the **minimum conditions** under which abortion should be legal; it leaves open the possibility for further legislation, which could create additional conditions under which abortion is permitted. Significantly, this clause **does not** allow for a written law which would further limit access to abortion.

¹ Programme of Action of the International Conference on Population and Development, Cairo, Egypt, Sept. 5-13, 1994, U.N. Doc. A/CONF.171/13/Rev.1 (1995) ¶ 7.2.

² Committee of Experts on Constitutional Review, Report of the Committee of Experts on Constitutional Review, Issued on the Submission of the Proposed Constitution of Kenya, at 14 (Feb. 23, 2010), available at http://www.coekeny.go.ke/images/stories/Resources/final_report_to_the_psc_23_02_10.pdf.

³ The World Health Organization defines health as “a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.” Preamble to the Constitution of the World Health Organization as adopted by the International Health Conference, New York, June 19-22, 1946; signed on July 22, 1946 by the representatives of 61 States (Official Record No. 2, World Health Organization, at 100); and entered into force on April 7, 1948.

⁴ African Charter on Human and Peoples’ Rights, adopted June 27, 1981, art.16, O.A.U. Doc. CAB/LEG/67/3, rev.5, 21 I.L.M. 58 (1982) (entered into force Oct. 21, 1986).

⁵ International Covenant on Economic, Social and Cultural Rights, adopted Dec. 16, 1966, art.12, G.A. Res. 2200A (XXI), U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316 (1966) (entered into force Jan. 3, 1976).

⁶ See, for example, the 2009 Ministry of Public Health and Sanitation’s *National Guidelines on Management of Sexual Violence in Kenya*, which permits access to safe abortion services in cases of sexual violence as part of the mental health exception to the law criminalizing abortion in Kenya. MINISTRY OF PUBLIC HEALTH AND SANITATION & MINISTRY OF MEDICAL SERVICES [KENYA], NATIONAL GUIDELINES ON MANAGEMENT OF SEXUAL VIOLENCE IN KENYA 13 (2nd ed. 2009), available at <http://www.svri.org/nationalguidelines.pdf> (last visited Mar. 28, 2011).

⁷ See CENTER FOR REPRODUCTIVE RIGHTS, IN HARM’S WAY 35 (2010), available at http://reproductiverights.org/sites/crr.civicactions.net/files/documents/InHarmsWay_2010.pdf (documenting interviews with the Chairman and Chief Executive Officer of the Kenyan Medical Practitioners and Dentists Board in which each states clearly that the definition of health encompasses both physical and mental health).

⁸ See *R v. Bourne*, [1939] 1 K.B. 687, [1938] 3 All E.R. 615; *Mehar Singh Bansal v. R*, 1959 E. Afr. L. Rep. 813 (Kenya) (affirming *R v. Bourne* in the East African Court of Appeal); and the NATIONAL GUIDELINES ON MANAGEMENT OF SEXUAL VIOLENCE IN KENYA, supra note 6, at 13: “If they [survivors of sexual violence] present with a pregnancy, which they feel is as a consequence of the rape, they should be informed that in Kenya, termination of pregnancy may be allowed after rape (Sexual Offences Act, 2006). If the woman decides to opt for termination, she should be treated with compassion, and referred appropriately.”