

# AMNESTY INTERNATIONAL PUBLIC STATEMENT

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## **Kenya: NEW CONSTITUTION MUST ENSURE RIGHTS FOR ALL**

Amnesty International calls on Kenya's Parliament to ensure that the draft Constitution of Kenya upholds respect for, the protection and fulfilment of all human rights. The draft Constitution should retain social and economic rights as enforceable rights. In addition, the organization also calls on Parliament to remove the provision stipulating that the right to life begins at conception and if the article on abortion access is retained, provide for abortion for rape victims. The draft Constitution should provide for the abolition of the death penalty. It should also provide for strengthened protections for equality in the Constitution.

In January, the Parliamentary Select Committee (PSC) removed the rights to food, housing, water, health, education and social security as enforceable rights from the draft Constitution, and treated such rights only as guiding principles. In addition, the PSC entirely removed the right to sanitation, provisions for equal rights of men and women and the rights of minorities, persons with disabilities, older members of society, youth and children. The Committee of Experts has now presented a revised draft Constitution to Parliament that reinstates provisions on economic and social rights and other rights relating to equality and the rights of minorities, persons with disabilities, older members of society, youth and children.

In keeping with the draft presented by the Committee, Parliament must ensure that provisions guaranteeing social and economic rights as enforceable rights are retained. Any step to remove these rights from the Constitution would be a step backwards since these rights had been included in the draft Constitution since the constitutional review process was started in 2002. Enforceable social and economic rights would, among other situations, allow people to hold the government accountable when they are arbitrarily denied access to health care or because they do not have access to primary education. They would allow people forcibly evicted from their homes to seek justice from the courts. Kenya has ratified both the International Covenant on Economic, Social and Cultural Rights and the African Charter on Human and Peoples' Rights, both of which uphold social and economic rights. If Kenya fails to include enforceable social and economic rights in its Constitution, Kenyans will not have a remedy within the country for violations of their rights.

Many countries globally include enforceable social and economic rights in their Constitutions, for example South Africa, Mozambique, Senegal, Brazil, Colombia, Bolivia, Indonesia and Thailand. Such rights have made a significant difference to people's lives. In South Africa, for example, people were able to go to court to demand that housing policies were reformed so that they stopped ignoring the needs of the people facing the most desperate situations.

Amnesty International believes that abortion with the informed consent of the concerned woman should be regulated by health legislation rather than by constitutional or criminal law. The constitutional clause on protection of the right to life from conception may be invoked to investigate and prosecute women who have had a miscarriage, to preclude sex education and to ban some contraceptive methods. It may also interfere with the provision of timely and effective treatment for pregnant women and girls who have miscarriages or complications related to abortions and their right to access such treatment. The State should protect prenatal life through measures, such as women's access to comprehensive maternal health care that

are compatible with the rights of women, including right to life, health and autonomy, as required under international and regional human rights law.

If the Constitution explicitly limits women's access to abortion services, it must, at least ensure women's access to safe and timely abortion services in cases of risk to the life or health of the woman or pregnancy resulting from rape or incest. Such an exemption is required by international law and is required by the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, which Kenya signed in 2003. In view of the high number of maternal deaths resulting from abortion complications, the State should protect women's right to life by ensuring meaningful access to sexual and reproductive health services including information and contraception and commit to address sexual violence and coercion.

Article 26 of the proposed draft Constitution guarantees the right to life but fails to prohibit the use of the death penalty. Article 26 (3) provides that "a person shall not be deprived of life intentionally, except to the extent authorised by this Constitution or other written law". This provision leaves the applicability of the death penalty for capital offences under Kenyan penal law. Amnesty International opposes the death penalty in all cases as the ultimate cruel, inhuman and degrading punishment. There is emerging international consensus on excluding the use of the death penalty. The UN General Assembly adopted a resolution in December 2007 calling for a worldwide moratorium on executions. Although Kenya abstained from voting, the resolution was adopted by an overwhelming majority of 104 UN member states in favour, 54 countries against and 29 abstentions. In August 2009, the President commuted to life imprisonment the death sentences of more than 4,000 prison inmates facing execution. In a statement, the President stated that an "extended stay on death row causes undue mental anguish and suffering, psychological trauma, anxiety, while it may as well constitute inhuman treatment". The constitutional making process offers Kenya an opportune moment for outlawing the use of the death penalty and parliament should seize this opportunity to do so.

Amnesty International also calls on parliament to ensure equality to all people. Article 27 of the draft Constitution should therefore prohibit discrimination on the grounds of gender identity and sexual orientation. Amnesty International notes that Article 24 (4) of the Constitution limits the guarantee of equality to the extent necessary for the application of Muslim law before the Kadhi's courts. This provision should be revised to ensure that decisions by the Kadhi's courts conform to the equality provisions in the Constitution.

### **Background**

Under international law binding on Kenya, States must progressively realise economic, social and cultural rights within the maximum of resources available to them. Economic and social rights allow people to monitor how their governments are using available public resources and prevent the government from deliberately interfering with economic, social and cultural rights already held by people. Economic, social and cultural rights are enshrined in the International Covenant on Economic, Social and Cultural Rights which Kenya ratified in 1972. Some of the rights included in this treaty are the rights to health, social security, education and the right to adequate standard of living, including food and housing. The UN Committee of Experts monitoring this treaty has indicated that the right to water is also implicitly included in the right to an adequate standard of living and that special attention is required for marginalised and vulnerable groups including children, minorities and older persons.

Kenya ratified the African Charter on Human and Peoples' Rights in 1992. Some of the rights included in this treaty include the rights to health, education and the African Commission on Human and People's Rights has also stated that the Charter requires governments to guarantee the rights to housing and food. It also states that the aged and the disabled shall also have the right to special measures of protection. In 2008, the UN General Assembly, where Kenya is represented, unanimously established an individual complaints mechanism for violations of economic, social and cultural rights.

Article 14 (2) of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (which Kenya signed in 2003) commits States to "protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus." Guidance provided to Kenya by the UN Committee on Economic, Social and Cultural rights in December 2008 stated that the full implementation in Kenya of the right to the highest attainable standard of health required "decriminalizing abortion in certain situations, including rape and incest."

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