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Kenya: New Constitution offers a basis for better protection and fulfillment of human rights but measures to end impunity still needed

On 4 August a significant majority (nearly two-thirds) of voters in Kenya's public referendum voted in favour of the adoption of a new Constitution. The President is scheduled to promulgate August 27 as the date for the coming into effect of the new Constitution.

Amnesty International welcomes provisions in the Constitution which more comprehensively recognize and protect human rights compared to the previous Constitution. The Constitution also introduces changes to Kenya's political and governance structure, entrenching the principle of checks and balances by delineating the roles and powers of the Executive, Legislature and Judiciary. There are provisions to check the exercise of presidential and other executive powers. It also introduces a devolution structure that seeks to ensure that public resources are equitably distributed across regional government units.

In keeping with Kenya's obligations under international human rights law the Bill of Rights under the new Constitution (Chapter 4) guarantees economic, social and cultural rights – including the rights to food, housing, sanitation, water, health (including reproductive health care), education, social security as enforceable rights, alongside civil and political rights – including rights to life, liberty and security of person, privacy, freedom of conscience, religion, belief and opinion, freedom of expression and freedom of association. In addition the Bill of Rights provides for other rights including equality and the freedom from discrimination and includes specific provisions on the rights of minorities, persons with disabilities, older members of society, youth and children. It also recognizes the right to pursue action in the courts in the event of denial of any of these rights. The inclusion of enforceable social and economic rights in the Bill of Rights will, for the first time in Kenya, ensure access to legal remedies and allow people to hold the government accountable for violations of these rights.

The Constitution also places an obligation on the state to “observe, respect, promote and fulfil” the rights and freedoms in the Bill of Rights and to enact and implement legislation to fulfil its international obligations in respect of human rights and freedoms (Article 21).

Despite these positive human rights provisions Amnesty International is concerned about a number of provisions in the Constitution which may unduly restrict certain human rights.

In a previous public statement (see *Kenya: New Constitution must ensure rights for all*, AI Index: AFR 32/001/2010) Amnesty International expressed concerns regarding a number of provisions in the then proposed draft Constitution which have been retained in the new Constitution, and which should be amended. These are:-

- While providing for the right to life in Article 26, the Constitution does not abolish the death penalty.

- The provision in Article 26(2)) which provides that “life begins at conception”, and prohibits abortion “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 (abortion) is permitted by any other written law”. This provision could be interpreted restrictively, and lead to investigation and prosecution of women who have had a miscarriage; bans on some contraceptive methods; and restrict the scope of sex education. 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 access to such treatment, thereby interfering with their right to health. In addition, any explicit constitutional provision limiting women’s access to abortion services should ensure, at least, 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.
- Article 24(4) of the Constitution which limits the guarantee of the right to equality “to the extent necessary for the application of Muslim law before Kadhi courts”. This provision should be revised to ensure that decisions of Kadhi courts conform to the equality provisions of the Constitution.
- The failure to explicitly include gender identity and sexual orientation in the prohibited grounds of discrimination in Article 27(4) of the Constitution.

Passage of the new Constitution provides an opportunity to deal with long-standing and much needed legal and institutional reforms, including of the police and judiciary in order to ensure better protection and fulfillment of human rights. In particular the government must take this opportunity to urgently tackle impunity for ongoing and past human rights abuses.

Amnesty International calls on the Kenyan government to:

- Ensure that the new comprehensive provisions on human rights become effective in practice with the promulgation of the new Constitution. It should ensure, where necessary and particularly for provisions guaranteeing economic and social rights, that enabling legislation is passed and institutional reforms undertaken to give effect to these provisions.
- Ensure urgent security sector and judicial reforms in line with the provisions of the new Constitution.
- Take decisive action to address impunity and bring to justice persons responsible for human rights abuses both current and past, including human rights abuses committed during the post elections violence of 2007/8, and other past human rights abuses committed in the context of politically and/or ethnically- motivated violence.
- Ensure that the ongoing truth, justice and reconciliation process being led by the Truth, Justice and Reconciliation Commission is complementary to other necessary accountability mechanisms and is credible, independent and impartial.