



Promoting the Right to Health in the Kenyan Constitution 2010



This booklet is developed by HERAF with the financial and technical support from UNDP Amkeni Wakenya. The content of this booklet is the sole responsibility of HERAF and can in no way be taken to represent the views of the UNDP Amkeni Wakenya.

A publication of
Health Rights Advocacy Forum (HERAF)

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ACKNOWLEDGEMENTS

This booklet has been made possible through the financial support of the UNDP Amkeni Wakenya, “Civil Society Democratic Governance Facility” whose main objective is to support Kenyan Civil Society Organizations to participate more effectively in democratic governance and reforms through the implementation of the constitution. The facility aims at supporting CSOs to empower citizens to demand for and influence public policies, laws and institutions.

We would like to thank the lead consultant, Winfred Lichuma for taking the lead in the development and compilation of this booklet, HERAF’s Executive Director, Miano Munene for his technical input including peer review and HERAF’s Program Officer, Beatrice Gachambi for planning the development and critiquing the booklet.

Finally, we wish to thank everyone who in one way or another participated and contributed to the successful completion of this booklet. Your expertise, resources and guidance have been invaluable.

Introduction

Health Rights Advocacy Forum (HERAF) is a non-governmental organization that brings together health professionals, NGOs, FBOs and PLWHA organizations to advocate for health as a fundamental human right in Kenya. It was established in 2006 and registered as a nongovernmental organization in Kenya by the NGO coordination board in 2007. The organization's envisions, a Kenya where health is upheld and enjoyed as a fundamental human right for all. To ensure this becomes a reality, the organisation advocates, promotes and empowers Kenyan's to realise the right to health.

To ensure there is there is a solid foundation for advocating, promoting and empowering citizens on right to health in Kenya, HERAF among other civil society organisations relentlessly advocated for recognition of the right to health in the Constitution. Though this was a major achievement in the health sector, expected gains may not be realised unless civil society among other stakeholders are continually informed and educated about the Constitution, mobilised, empowered and provided with opportunities to proactively engage in all implementation processes, especially in development and implementation of the necessary health legislations and policies.

HERAF is therefore engaged in processes of enabling civil society and citizens appreciate the meaning of health as a right and the rights based approach to health as provided for under the Constitution. This is with anticipation that informed civil society and citizens will be able to exercise their rights and demand that the right to health is upheld, protected and promoted as envisaged in the Constitution.

The Right to health and the Kenya Constitution 2010

In the history of Kenya, this is the first time the Constitution has provided for the right to health care including reproductive health care together with other Economic, Social and Cultural Rights as fundamental rights in the bill of rights. For HERAF this is a partial realization of her dream.

The right to health does not mean the right to be healthy. The WHO Constitution and other subsequent documents for example the International Covenant of Economic Social and Cultural Rights define health thus: "Health is 'a state of complete physical, mental, and social well-being and not merely the absence of disease or infirmity'"(WHO1946).

Largely, health is influenced by the environments in which people live. Currently in Kenya, there exists gaps between those who enjoy higher standards of health and quality services and those who, for a mix of civil, political, economic, social or cultural reasons, are more vulnerable to ill-health and inadequate access to health related services. Health care services in the public health facilities are very poor and unaffordable by majority of citizens in Kenya especially with the introduction of the cost sharing effects of the Structural Adjustment Programmes (SAPs) of the 1980s.

The right to the highest attainable standard of physical and mental health is a fundamental human right protected under international and regional law. The right to information, education, housing and safe working conditions, and social security, for example are particularly relevant to the health of human rights relationship. The principles of equality and non-discrimination, right to enjoy the benefits of scientific progress are closely allied to the right to health.

In essence, the right to health involves the following features:

- It is a right to enjoyment of variety of health facilities, goods and services and conditions necessary for the realisation of the highest attainable standard of health.
- It contains general freedoms and entitlements including freedom to control one's health and body, freedom from non-consensual medical treatment and experimentation among others.
- It is an inclusive right extending to the underlying determinants of health, such as access to safe and portable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health.
- It includes specific entitlements, such as the right to health facilities, goods and services, prevention, treatment and control of diseases, maternal, child and reproductive health, and health natural and workplace environments.
- It provides for non-discrimination and equal treatment in access to health care and underlying determinants of health.
- The active and informed participation of individuals and communities in decision making that bears upon their health.
- Accountability and transparency are a vital element of the right to health. All duty bearers are to be held to account by the rights holders.

Why was it important to guarantee the right to health in the Constitution?

- a) Kenya is a signatory to numerous treaties at the international and regional level that guarantee the right to health. Under Kenya's obligations to respect, protect, promote and fulfil the treaties, it is important to domesticate the treaties' provisions locally. The Constitution thus provides that the general rules of international law shall form part of the law in Kenya and that any treaty or convention ratified by Kenya shall form part of the law in Kenya (Article 2(5) (6)).

In 1946, the WHO constitution first articulated the right to health and its preamble defines health as "a state of complete physical, mental and social well being and not merely the absence of diseases or infirmity."

The 1948 Universal Declaration of Human Rights also recognize the right to health and states that "Everyone has the right to a standard of living, adequate for health and well being of himself and of his family, including food, clothing, housing and medical care and necessary social services and the right to security in the event of unemployment, sickness, disability, widowhood, old age or lack of other livelihood in circumstances beyond his control."

Key among treaties ratified by Kenya which are binding and provide for the right to health include the:

- International Covenant on Economic Social and Cultural Rights (II1966 ICESCR),
- International Covenant on Civil and Political Rights (ICCPR) (1966), International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (1965),
- Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) (1979),
- Convention on the Rights of the Child, (CRC) (1989),
- Convention Against Torture and other Cruel, inhuman Degrading Treatment or Punishment (CAT) (1984),
- International Convention on the Protection of the Rights of All Migrant workers and members of their Family (MWC) (1990),
- Convention on the Rights of Persons with Disabilities (CRPD),

In the African system the following have been ratified the:

- African Charter on Human and Peoples Rights,
 - African Charter on the Rights and Welfare of the Child and
 - Protocol to the African Charter on Human and People's Rights of Women in Africa
- b) There is increase in chronic diseases like diabetes, hypertension, heart diseases and cancer that requires patients to be assisted to access specialized treatment.
- c) There is increased number of PLWHA accessing the Anti Retroviral drugs.
- d) There are Increased injuries suffered from Gender Based Violence and others like motor vehicle accidents requiring victims to access health services urgently and at the most affordable price..

Is there need for review of existing legislations and policies?

Yes, the legislation and policies in existence are only valid to the extent that they comply with the constitution. By virtue of S. 7 of the Sixth Schedule on the transitional and consequential provisions, all law in force immediately before the effective date of the Constitution continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the constitution.

There is need to re-evaluate health policies that were in existence before the promulgation of the Constitution to reflect the new expected health management that is proposed at the national level dealing with health policy, national referral health facilities, capacity building and technical assistance to the counties and others promoting the underlying determinants of health like labour standards, consumer protection, education policy, veterinary policy, housing policy, protection of the environment including water protection and at the county levels addressing the County health services including county health facilities and pharmacies, ambulance services, promotion of primary health care, licensing and control of undertakings that sell food to the public, veterinary services excluding regulation of the profession and others.

Understanding The Right To Health In The Kenyan Constitution

The World Health Organization defines health as a state of complete physical, mental and social well-being and not merely the absence of disease and infirmity. Effective promotion of health is highly dependent on the prevailing constitutional framework. The Kenyan Constitution affirms the importance of the right to health for ALL and thus provides:

- Article 43 1(a): 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(2): A person shall not be denied emergency medical treatment
- The right to health is a fundamental human right that is associated with access to health care.

What entails the right to health care?

The right to health care means that there must be an effective and integrated health system encompassing health care and the underlying determinants of health that is responsive to national and local priorities and accessible to all. Health care must be timely and appropriate. The right to health does not mean the right to be healthy. It means:

- Access to health facilities, goods and services on a non-discriminatory basis especially for the vulnerable and marginalized groups.
- Access to the underlying determinants of health discussed below.
- Equitable distribution of all health facilities, goods and services.
- Provision of essential drugs.

The highest attainable standard implies that certain key elements must be in place. In accordance to General Comment No. 14 on the interpretation of the right to health, it means that the services must be Available, Accessible, Acceptable and of Quality (AAAQ).

- Available- Functioning public health and health care facilities, goods and services and programmes.
- Accessible- The facilities, services and programmes must be accessible physically, economically and information must be available to all without discrimination.
- Acceptable- The facilities, goods and services must be respectful of medical ethics and culturally appropriate and sensitive to gender.

- Quality (AAQ) - Facilities, goods and services must be scientifically and medically appropriate and of good quality.

Human rights are interdependent, indivisible and interrelated. The underlying determinants of health are guaranteed in Article 43(1) (b)-(f) of the current Constitution and include:

- The right to accessible and adequate housing, and reasonable standards of sanitation;
- The right to be free from hunger, and to have adequate food of acceptable quality;
- The right to clean and safe water in adequate quantities;
- The right to social security and the
- The right to education.

Specific rights related to the right to health

They are both freedoms and entitlements. This includes:

- The right to be free from non-consensual medical treatment, such as medical experiments and research.
- The right to be free from torture and other cruel, inhuman or degrading treatment or punishment.
- The right to a system of health protection forbidding any discrimination,
- The right to prevention, treatment and control of diseases.
- The right to access to essential drugs.
- The right of the population to participate in decision making.
- The right to equal and timely access to basic health services.
- The right to health education.
- The right to life.
- The right to dignity
- The right to be free from forced labour
- The right to privacy.
- Right to a clean environment.
- Children have a right to basic nutrition, shelter and health care.

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 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.

The right to reproductive health means that all couples and individuals have the basic right:

- To decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so; freedom from interference in reproductive decision-making; to plan one's family
- To have the right to attain the highest standard of sexual and reproductive health.
- To make decisions concerning reproduction free of discrimination, coercion and violence.

The right to reproductive health care entails the following:

- Promotion of education on reproductive health care.
- Family planning information and services.
- Pre-natal, delivery and post-natal care.
- Safe motherhood (Infant's health care).
- Prevention and treatment of sexually transmitted diseases/infections.
- Prevention of abortion, management of complications of unsafe abortion, post abortion care and safe termination of pregnancy in compliance with article 26(4) of the Constitution.
- Treatment of infertility.

The right to reproductive health care obligates governments:

- To ensure the availability of reproductive health services which includes information and access by men and women to safe, effective, affordable and acceptable methods of family planning of choice, as well as other methods of their choice for regulation of fertility which are not against the law, as well as access to appropriate health care services by women that will enable them to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant
- To remove legal barriers to reproductive health care.

Specific Rights Relevant to Reproductive Health

This includes:

- Right to the highest attainable standard of health or right to health.
- Right to life and survival.
- Right to liberty and security of person.
- Right to be free from torture, cruel, inhuman or degrading treatment.
- Right to decide freely and responsibly the number and spacing of one's children and have information and means to do so.
- Right to marry and found a family.

- Right to privacy.
- Right to education/family planning education.
- Right of access to information.
- The right to control own fertility.
- Right to choose any method of contraception.
- Right to self protection and to be protected against sexually transmitted infections including HIV and AIDS.
- Right to participation.
- Right to be informed.
- Right to enjoy the benefits of scientific progress and its application, and to consent to experimentation.
- Right of women to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion discrimination and violence.

What is meant by Progressive realization of the Right to Health?

Internationally, Economic, Social and Cultural Rights are subject to progressive realization. This means that:

- The State must demonstrate that it is doing everything possible within its available resources to fulfil, protect and promote the right to health including allocating and spending sufficient budget on health matters.
- The state must seek assistance from international partners to fund health services.
- Taking steps to realize the right to health requires numerous strategies that are appropriate to a State.

Health Related Issues Requiring Laws And Policy Implementation Framework In The Health Sector

Introduction

The Kenya Constitution 2010 came into effect on the 27th August 2010 after a period of two decades where Kenyans yearned for a new constitutional dispensation. The Constitution is the supreme law of Kenya and any other laws and or policies that go against it are null and void. In simple terms, the Constitution is a social contract between the governor (the Government) and the governed (people). A good constitution addresses the rights of everyone including the marginalized and most vulnerable.

One of the great achievements of the Constitution 2010 is the guaranteeing of Economic, Social and Cultural Rights (ECOSOC) under article 43. This is the first time in the history of Kenya for these rights to be enshrined and recognized in the constitution. This write up analyzes the health related issues in the current Constitution requiring either legal or policy framework.

The Right to Health in the Kenyan Constitution

The Constitution 2010 provides 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 Constitution also provides for other ECOSOC rights which by extension form the underlying determinants of health. These are the right to adequate housing and reasonable standards of sanitation, the right to be free from hunger, and to have adequate food of acceptable quality, the right to clean and safe water, the right to social security and the right to education (Article 43 (1) (b-f)). Further the Constitution states that no person shall be denied emergency medical treatment (Article 43(2) and that the State shall provide social security to persons who are unable to support themselves and their dependants (Article 43(3)).

The Right to Health is subject to Progressive Realization

ECOSOC rights are subject to progressive realization. This means its implementation takes into account both individuals, biological and socio-economic pre-conditions and the State's available resources. It is the responsibility of individuals to protect themselves from known causes of ill health and thus they should avoid unhealthy and risky behaviours that endanger their lives causing ill health. However some elements of the right to health are subject to immediate realization for example non-discrimination and the right not be subjected to cruel inhuman treatment.

The Major Constitutional provisions related to the Right to Health

Article The Linkage to the Right to Health

2(5)	The general rules of international law shall form part of the law in Kenya.
2(6)	Any treaty or convention ratified by Kenya shall form part of the law in Kenya
19 (3) (a)	The rights guaranteed in the bill of rights belong to each individual and are not granted by the state.
20(5)	<p>In applying any ECOSOC right under article 43, it is the responsibility of the State to show that the resources are not available.</p> <p>In allocating resources for ECOSOC rights, due consideration and priority shall be given to the vulnerable groups or individuals.</p> <p>The court or tribunal cannot interfere with a decision by a state organ concerning the allocation of available resources solely on the basis that it would have reached a different conclusion.</p>
22(1)	Every person has the right to institute court proceedings when their rights are violated.
22(2)	A person acting on behalf of another, or in the interest of a group or in public interest or association acting in the interest of one or more of its members can institute court proceedings.
26	<p>Protecting the right to life begins at conception</p> <p>Death penalty is still authorized by the Constitution and other written law</p> <p>Termination of pregnancy is only permitted if in the opinion of a trained health professional there is need for emergency treatment or the life of the mother is in danger or is permitted by another written law.</p>

27	<p>Equality and non-discrimination is promoted Women and men have a right to equal treatment including the right to equal treatment including the right to equal opportunities in political, economic, cultural and social spheres. Direct or indirect discrimination by the State against any person is prohibited of various grounds including health status, disability and culture among others.</p>
28	<p>Every person has the inherent dignity and the right to have that dignity respected and protected.</p>
29(c)(d) (e) (f)	<p>No person should be subjected to :</p> <ul style="list-style-type: none"> ▪ Any form of violence from either public or private sources ▪ Torture in any manner whether physical or psychological ▪ Corporal punishment ▪ Treated or punished in a cruel, inhuman degrading manner.
30	<p>No person shall be held in slavery or servitude or required to perform forced labour.</p>
31	<p>Every person has the right to privacy</p>
32	<p>Every person has the right to freedom of conscience, religion, thought, belief and opinion.</p>
35	<p>Every person has the right to access information held by the State</p>
41	<p>Every person has the right to fair labour practices and reasonable working conditions.</p>
42	<p>Every Person has the right to a clean and healthy environment</p>
69 (g)	<p>The state shall eliminate processes and activities that are likely to endanger the environment.</p>
43 (1) (a-f)	<p>Every person has the right to health care including reproductive health and; the right to:</p> <ul style="list-style-type: none"> ▪ Adequate housing ▪ Free from hunger ▪ Clean and safe water ▪ Social security ▪ Education

44(3)	In promoting the right to language and culture, a person shall not compel another person to perform, observe or undergo any cultural practice or rite.
46	Consumers have the right to goods, services of reasonable quality and to information necessary for them to gain full benefit from goods and services.
51	Among the rights of persons detained, held in custody or imprisoned, is that they will be treated in a humane way while in custody and enjoy all rights in the bill of rights except where the confinement itself brings forth limitations. The rights to be enjoyed include the right to health.
53	Every child has the right that includes basic education, basic nutrition, shelter and health care, to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman and degrading treatment and punishment and hazardous or exploitative labour. In all a child's best interest are of paramount importance in every matter concerning the child.
54	Person's with disability are entitled to be treated with dignity and have access to information
55	The Youth have the right to access relevant education and training and to be protected from harmful cultural practices and exploitation.
56	The minorities and marginalized groups must through affirmative action have reasonable access to water, health services and infrastructure
57	The older members of society have the right to participate in the affairs of society, live in dignity and receive reasonable care and assistance from the family and the State.
174/176	Among the objects of devolution are to facilitate decentralization of state organs, their functions, services from the capital city to the counties.

186 and Fourth Schedule	<p>The National Government in health will be responsible for Consumer protection, including standards for Social security and professional pension plans.</p> <p>Development of policies on housing, protection of environment, National referral health facilities, health policy</p> <p>At the County level County health services include country health facilities and pharmacies , ambulance services, promotion of primary health care, licensing and control of undertakings that sell food to the public, veterinary services except for licensing cemeteries, funeral parlous, refuse removal among others.</p>
204 (20)	<p>The National government shall use Equalization Fund only to provide basic services including water, roads, health facilities and electricity to marginalized areas to bring equality.</p>

Operationalisation of the Right to Health Provisions in the Kenyan Constitution 2010

It is the obligation of the State to respect, protect and fulfil the rights provided in the schedule above among others. Despite the fact that ECOSOC rights are subject to progressive realization, the right to health imposes some obligations that are of immediate nature that include providing the services without discrimination of any kind and to take steps towards full realization of the right to health. The steps to be taken by the government must be concrete and deliberate and therefore:

- The obligation to respect requires that the state refrains from interfering directly or indirectly with the enjoyment of the right to health.
- The obligation to protect requires the state to take measures that prevent third parties from interfering with the right.
- The obligation to fulfil requires states to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the right to health.

Government's obligation in the Realization of the Right to Health

It is the individual's responsibility to secure healthy behaviour and avoid engaging in risky behaviour that is likely to cause ill health. Nevertheless it is the responsibility of the government to do the following:

- To legislate on the subject area in order to ensure that the health care services including reproductive health care are made available, accessible, acceptable and of good quality.
- To provide the services on a non-discriminatory basis to all including women and men, the vulnerable and the marginalized and those in detention or prison.
- To ensure Kenyans have access to the underlying determinants of health including basic shelter, housing and proper sanitation with adequate supply of water.
- To develop policies to ensure equitable access to the services and to provide essential drugs.
- To develop and implement a national public health strategy and plan of action and replicate the same at the county levels.
- To create room for citizen's participation in implementation of the right to health. This can be at individual level or through Civil Society Organizations or other local associations like the Community Based Organizations or Faith based Organizations.
- To have clear mechanisms in place for accountability and seeking remedy for violations.

Promoting the Human Rights Based Approach in Implementing the Health related Provisions in the Constitution.

Article 10 of the Constitution provides for the national Values and Principles of Governance to apply in the implementation of the Constitution. These include among others patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people, human dignity, inclusiveness and equality, human rights, non-discrimination and protection of the marginalized.

In promoting and implementing the right to health, citizen's participation in all health –related decision making at the community level is very important.

Also in realizing the right to health, there should be equal treatment and non-discrimination in access to health including access to the underlying determinants of health. The vulnerable members of society must be given priority and protected. These include women, children, the marginalized communities, people with disabilities, people with terminal illnesses and people living with HIV and AIDS among others.

The vulnerable members of society must be protected. It will be the responsibility of the State to provide those who lack sufficient means with necessary health insurance and health care facilities to prevent discrimination.

As the country moves towards operationalisation of the two systems of government, at the National and County levels, allocation of resources will be crucial to the realization of the right to health. The allocation of resources for curative vis –a–vis primary and preventive health care is important and will impact differently to different population of the communities.

Key Populations Requiring Special attention during implementation of the health related provisions in the Kenyan Constitution 2010

a) Gender

Gender perspective must be mainstreamed in all laws and policies and programmes. The social needs of men and women both biological and socio-cultural play a significant role in influencing their health.

b) Women's need to Health

There is need for a clear strategy for promoting women's rights to health including reproductive health. Where men and women have reproductive health needs, it affects women more than men. It is for this reason that the Constitution provides for the right to health care including reproductive health care. In implementing the constitution, there is need to review the current Reproductive Health Policy and Strategy to reflect health as a right and to ensure high quality and affordable health care in accessing sexual and reproductive health. The aim of this will be to reduce the unacceptably high rate of maternal mortality that currently stands at 488 per 100,000 live births.

c) Children and the Youth (Adolescents)

The right to health must be accessed by adults and children and the youth alike. The services provided must aim at reducing child mortality and thus must provide for pre-and post natal care for mothers. The services must be both child and adolescents friendly. The adolescents must be able to access health related education and information. The Government must provide legislations and policies that will give safe and supportive environment for children and adolescents to participate in decisions affecting their health. The structures must have youth friendly health care services that will respect the confidentiality and privacy of the clients and give appropriate sexual and reproductive health care services. It is important to remember that in all interventions affecting the children, the principle of the best interest of the child prevails is paramount (Article 53 (2)).

d) Older Persons

Older members of society will require to be facilitated to fully participate in the affairs of society. In terms of their health provisions, there will be need for clear policies providing for both preventive and curative and rehabilitative health treatment for older persons. The older persons are usually neglected and there is need to pay more attention to them in terms of care and treatment especially those who are terminally ill. They must be treated with humane and afforded treatment to reduce pain to preserve their dignity up to the time of their death.

e) Persons with Disabilities

Persons with Disabilities (PWD) are to be treated with dignity and respect and not to be referred to in a manner that is demeaning. They should also have access to educational institutions and facilities, reasonable access to all places, public transport and information among other rights. In access to health, both the public and private providers' facilities should comply with the principle of non-discrimination in availing services to persons with disabilities. PWD are entitled to enjoy all the rights associated with health care including reproductive health care rights.

f) Minorities and Marginalized Groups

The groups classified as minorities and marginalized are to enjoy all the rights related to health care. The State shall put in place affirmative action programs to ensure that they enjoy all the guaranteed rights including that they have reasonable access to water, health services and infrastructure.

Proposed Constitutional Implementation Framework for Health Sector stakeholders

a) What has the government done so far?

First and foremost, the responsibility to progressively realize the right to health is with the Government. The Government must take steps towards realization of the right to health including the underlying determinants of health discussed above. The obligation to respect, protect and fulfil the rights must be implemented expeditiously and effectively both at the National level and at the Country levels once they become operational in line with Schedule 4 of the Constitution 2010. The obligation to respect requires states to refrain from interfering directly or indirectly with the enjoyment of the right to health. The obligation to protect requires states to take measures that prevent third parties from interfering with the right to health and the obligation to fulfil requires states to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the right to health to all.

To this end, the Ministries responsible for health (Ministry of Medical Services and the Ministry of public health and sanitation) have developed a position paper on the implementation of the Constitution in the Health sector that presents the Health Sector's position on key issues in relation to the implication of the implementation of the Constitution.

In putting up the position paper, the ministries paid attention to the value of participation and involved health sector partners to strengthen the inputs and positions in order to foster partnerships. The position paper looks at the current health situation in Kenya, paying attention to the health sector organization and investment that includes leadership and governance, health care financing, health workforce, medical products, vaccines and technologies, health information and service delivery systems. It further looks at the emerging issues and implications of the Kenyan constitution 2010 on the health sector considering main articles in the constitution that have a bearing on the health sector. It goes on to review provisions under the bill of rights and the health component implementation in the devolved government. It then discusses the right to the highest attainable standards of health, the right to emergency treatment, responsibilities of the rights holders and the duty bearers, the health sector and devolution, organization, management of County health services that includes cross county and multi government level health functions, county health facilities, managing shared responsibilities between National and County government, procurement of health commodities and county

levels, planning, budgeting and monitoring and evaluation at the county levels and the merger of ministries and stakeholder partnership structures/framework. Finally the paper articulates 43 different health sector positions' option and justification. These are in response to the emerging issues.

The proposals are to have health legislations, policies, strategies and guidelines that will operationalize different sections of the Constitution 2010. (For more details, see the position paper –current position available on the MoH websites at <http://www.publichealth.go.ke/> and <http://www.medical.go.ke/>

In the realization of the right to health through the legislative framework the Ministry of Health has a draft health law that is undergoing the participatory process of review by stakeholders. The legislation must provide measures to ensure that there is equal access to health care and health related services. In terms of providing emergency services, the law must compel the public services providers as well as the private health providers alike to provide the services. The law must also prohibit any practice of harmful cultural practices that are contrary to the constitution. It must prevent third parties from limiting the enjoyment of rights. In fulfilling the right to health, the law must have clear redress mechanisms for the citizens when the rights are violated. It should also prohibit any form of discrimination in access to health care services including reproductive health. It must also make provisions to access to minimal essential food, access to essential drugs and ensure equitable distribution of health facilities, goods and services.

b) Other proposed measures the Government must take include:

- 1) Adoption of a National Health Policy as envisaged in schedule 4 of the Constitution that will give direction on the implementation at both the National level and the County level. The policy will give direction on all health issues that are a priority towards realization of the MDGs and the Vision 2030. The policy should ensure reproductive, maternal and child health care, provide for immunization against major infectious diseases, to prevent and control epidemic and endemic diseases and to provide education on main health problems and to train health care providers on the new requirements. In the spirit of the underlying determinants, the National Health policy must be developed jointly with stakeholders in the water, agriculture, education, housing and the private sector.

- 2) Adoption of a National Health Strategy: This will ensure that all the rights in the bill of rights are realized to boost the enjoyment of the right to health based on human rights based principles of equality and non-discrimination, indivisibility and universality of rights and interdependence of human rights aimed at realizing transparency and accountability and sustainability. The strategy should identify the available resources and the cost effective way of using the same equitably at the national and the 47 counties. The National Strategy must be complemented with National and County plans of Action to implement the relevant sections of the constitution. Development of the strategy and action plan must be participatory involving citizens and stakeholders and take into consideration the National values in Article 10 of the constitution.
- 3) The National referral health facilities must be also be guided through a national policy that will clearly designate what facilities will be referrals and how the operations will be guided to ensure that all people enjoy and realize the right to health. These will enable county government to operate smoothly once established.
- 4) Budgetary Allocations: The Kenya government has not lived to realize the Abuja Declaration of 2001 where up to 15 % of the government budget was to go towards health care. It will be incumbent upon the government to show that the resources are not available. The government must take all steps necessary to the maximum of its available resources to realize the right to health. As the duty bearer, the government has the highest duty to prioritize health care services including reproductive health. The government has the obligations to develop clear guidelines on the expenditures on health at the national and county level with due consideration and affirmative action geared towards the marginalized and vulnerable groups.
- 5) Development of other Policies/Standards/Guideline/Protocols: It will be the responsibility of the MoH to develop various standards, guidelines and protocols to operationalise various sections of the Constitution that are relevant to the realization of the right to health. Theses would be for example providing guidelines to define who is a trained health professional for the purposes of article 26(4) of the constitution. The guidelines will also stipulate what emergency treatment would make a health professional to terminate pregnancy and what also amounts to a mother's health being in danger. In realization of ECOSOC rights, there is

need for clear guidelines on what will conditions will fall under emergency treatment and how this will be administered by both public and private sector. In accessing right to health, clear guidelines must demonstrate how the services will be accessed by all with the limitation on facilities and the providers, otherwise it will amount to numerous violations yet the government lacks enough resources. There is need for policy guidance in terms on provision of appropriate social security to persons who are unable to support themselves and their dependants (Article 43(3)).

- 6) Develop Indicators and benchmarks: In order to measure implementation levels at the national level and the 47 counties, there is need to identify and develop indicators and benchmarks that are rights-based that will be used to measure implementation. These should have clear mechanisms of monitoring the national strategy and the action plans.
- 7) Devolved Structures: The MoH position paper has made proposals on how to devolve the health sector at the County level. This must be subjected to citizens review and align it to the proposed county legislations.

c) Proposed Direction for Other Health Stakeholders

- 1) Monitor the implementation of the Constitution with specific attention to the right to health: As the duty bearers go through the processes of legislative, policy and administrative framework, the other stakeholders and specifically CSOs could monitor the implementation to ensure that it complies with the health provisions of the current Constitution.
- 2) Education/Capacity building/awareness raising: CSOs can make campaigns that can educate, built capacity and raise awareness on the right to health provisions in the constitution including the underlying determinants. These will draw attention of the citizens on the right to health and what it means. Efforts can be made to build the capacity of both the duty bearers and rights holders. CSOs can work with individual citizens, other CSOs, CBOs, and FBOs. These teams should be empowered to enjoy their rights.

- 3) Working with duty bearers to develop a framework for making the Services available: Stakeholders can work with duty bearers to develop the National Strategy and Action plan to make the services available. On the other hand CSOs can work with health care providers so that they avoid barriers that constitute violations of the right to health.
- 4) Working with Counties to understand the right to health: stakeholder can work with various counties to sensitize them on the constitution and specifically on the right to right to health and the underlying determinants.
- 5) Litigation as a strategy to hold the Government accountable: Litigation is an accountability strategy. This is the basis for make health as a legal right in the constitution Stakeholders can work with citizens and institutions to litigate on public interest litigations- where violations of the right to health may occur. Litigation will advance the human rights related to health and hold the government as the duty bearer accountable. The litigation will cover areas of discrimination and failure to provide the services as stipulated. CSOs can borrow a leaf from South Africa and India that have very good jurisprudence on litigating on the right to health.
- 6) Undertake Advocacy of the right to health: Since this is the first time in the history of Kenya health is guaranteed as a right, there will be need to develop various advocacy programmes to promote health as a right and continuously hold the duty bearers accountable. The advocacy will also play the informational role by ensuring that communities are informed about the right to health.
- 7) Document and disseminate the best practices: As Kenya is anxious to find its bearing in implementing the right to health with limited resources, it will be important for some stakeholders to document and disseminate the best practices that have been experienced by other countries that have successfully made health a right in the constitutional framework.

d) What HERAF proposes to do

- 1) Undertake review of existing legal and policy framework and propose areas for amendment to the Ministry responsible for health and the Commission on Implementation of the Constitution.
- 2) Undertake public education and raise awareness on the Bill of Rights in the Constitution to its members, health professional bodies and citizens of Kenya.
- 3) Collaborate with other like minded organizations working on promoting the right to health and the underlying determinants of health to advocate for implementation of Article 43 of the Constitution 2010.
- 4) Build and strengthen the capacity of duty bearers (Government, Private sector, CSOs, FBOs) and the rights holders (Citizens, CBOs, FBOs, CSOs) to hold the government to account and to demand their right to health.
- 5) Partner with other Organizations both governmental and non-governmental organizations to develop the right to health implementation framework on the rights guaranteed in the constitution.
- 6) Strengthen the citizen's right to participation by giving them a voice to raise the issues surrounding the right to health care including reproductive health care and ensure that the participation is meaningful.
- 7) Develop position papers on how to implement the right to health at the national and county level.
- 8) Undertake advocacy campaigns to popularize the right to health and promote the right to information by development of IEC materials.
- 9) Monitor implementation of the right to health at both the national level and at the county level with particular keen interest in budget allocation.
- 10) Undertake research and document violations of the right to health at the national and county levels.





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