



KENYA'S 3RD CYCLE UPR REVIEW
SUBMISSION ON THE STATUS OF REALIZATION OF
THE RIGHT TO FAMILY AND THE RIGHT TO LIFE
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A. EXECUTIVE SUMMARY

Organizations submitting the report

1. This is a joint submission by the Kenya faith-based stakeholders' coalition on the UPR. The participating institutions include; Edmund Rice Advocacy Network, Pax Romana- (ICMICA*), Kenya Movement of Catholic Professionals, Secular Franciscan Order, JPIC office of the Comboni Missionary of the Heart of Jesus, Jesuit Hakimani Centre, Dominicans for Justice and Peace in East Africa, Embulbul Education and Counselling Centre, Fahamu Africa, Kenya Christian Professionals Forum, Paralegal Network of End Poverty with Justice Initiative, Alabasta Africa, Pearls & Treasures Trust, Edmund Rice Foundation Kenya and Ruben FM.
2. **Alabasta Afrika** is a community based organization founded to restore dignity to lives of women and children and offer them hope for a better future. **Dominicans for Justice and Peace** is the advocacy arm of the Order of Preachers (Dominicans). It was established to champion and promote social justice education including action on environmental justice. (logo req'd) **Edmund Rice Advocacy Network (ERAN)** is a Faith-Based Organisation under the leadership of the Christian Brothers in the East Africa District with a vision to promote social justice and transformative change. **End Poverty with Justice Initiative (EPJI)** A social justice and paralegal network based at Ongata Rongai and working in Kajiado County which focuses on promotion of access to justice & human rights advocacy. **Kenya Movement of Catholic Professionals (KMCP)** is an organization of Catholic professionals who support the church in tackling social-economic matters. It is the Kenyan chapter of Pax Romana- International Catholic Movement for Intellectual and Cultural Affairs. **Embulbul**

Education and Counselling Centre is a Catholic institution offering education and counselling services to local communities. **Fahamu Africa** is a network for social justice motivated by the desire to see a world where people emancipate themselves from all forms of social injustice whilst recognising their social responsibilities, respecting each other's differences and realising their full potential. **Jesuit Hakimani Centre** is a Jesuit institution involved in research and education that addresses social justice issues in Kenya especially in marginalized communities. **Comboni Missionaries of the Heart of Jesus (MCCJ)** a group established by the Comboni Missionary Congregation working for social justice and social transformation. **Kenya Christian Professionals Forum (KCPF)** is an umbrella ecumenical organisation in Kenya. It is engaged in policy, legal and social advocacy on governance, religion, life and family. **Ordo Franciscanus Saecularis** is a Franciscan secular order - is a Franciscan secular order promoting pastoral work, social work, human rights for those living in abject poverty, environmental action and peace building. **Pearls & Treasures Trust** is a pro-life organization in Kenya bring healing & restoration where there has been compromise and abuse. They support women in crisis pregnancy and return of affected girls to school. **Ruben FM** is a community radio station in Mukuru, Nairobi using radio for advocacy

Methodology

3. Kenya is due for review in the third cycle of the UPR in 2020. The Kenya Faith-based coalition for the UPR has monitored the period under review (2015-2019) and found the following major gaps: weak protection of the family and infringement on the right to life of the unborn. The Kenya faith-based Stakeholders Coalition for the Universal Periodic Review makes recommendations in the report for adoption and implementation of relevant policy and institutional reforms that should be undertaken by the State in the period after the UPR review in January, 2020.
4. This report has been prepared by the Kenya Faith-Based Stakeholders' Coalition for the Universal Periodic Review (UPR) comprising of 16 faith leaning institutions working at grass-roots on issues that directly affect human rights and development. The Coalition was convened by the Edmund Rice Advocacy Network and held several meetings, the first of which was capacity building workshop facilitated by the Africa office of the UPR-Info. Further meetings and cluster working groups identified issues that informed the final Report that was validated on 3rd June 2019.

B. NORMATIVE & INSTITUTIONAL FRAMEWORKS FOR THE PROMOTION AND PROTECTION OF THE RIGHTS TO FAMILY AND LIFE

5. The Family is recognized by the Constitution of Kenya Chapter 4, Article 45 as the natural and fundamental unit of the society and the necessary basis of social order and should therefore enjoy the recognition and protection of the State. It further states that, every adult has the right to marry a person of the opposite sex, based on the free consent of the parties. In Article 45 (3), the Constitution states that parties are entitled to equal rights at the time of the marriage, during the marriage and at dissolution of the marriage. In addition to the Constitution, at national level there are the following legislations which are relevant to the family in general and to specific family members and issues affecting them: The Marriage

Act 2014; The Matrimonial Properties Act 2014; The Protection Against Domestic Violence Act 2015; The Children's Act 2001; The Social Assistance Act, 2014; The Persons with Disabilities Act 2003; and the Sexual Offences Act 2006.

6. The right to Life is the most fundamental for humans. The government has an obligation to ensure that human life of Kenyans is preserved and protected. It does this through the Penal Code, Police, Public health and safety polices and laws. The right to life is affirmed in Article 26 of the constitution; Sections 158 to 160 and 228 and 240 of the Penal Code; the occupational safety and health act 2007 and the Work Injury Benefits Act 2007 *inter alia*.
7. Under article 2 (5) and (6) of the constitution, the general rules of international law apply to Kenya and any treaty ratified by Kenya forms part of the law. Kenya has made commitments under the international instruments that affirm the right to family and the right to life. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State. – Universal Declaration (1948), Article 16 (3); ICESCR (1976), Article 10-1; ICCPR (1976), Article 23-1; Disabilities (2006), Preamble (x).)

C. ACHIEVEMENTS, GAPS, AND RECOMMENDATIONS

Weak protection of the family

8. The contribution of the family to the realization of the right to an adequate standard of living for its members, particularly through its role in poverty eradication and achieving sustainable development is undisputed¹. The constitution of Kenya recognises the family as the natural and fundamental unit of society and the necessary basis of social order, that should enjoy the recognition and protection of the State². The government, in collaboration with relevant stakeholders developed a draft family protection policy 2017. The draft policy is aimed *inter alia* at: promoting and encouraging a culture of marriage; Enhancing parental ability and capability to protect children from exposure to, and participation in activities that may be detrimental to their physical, emotional, psychological and intellectual well-being; promoting and enhancing religious and cultural practices that are legally acceptable and supportive to the dignity of the family; and empowering families to effectively play their role as the primary educators of their children.
9. The main challenge however is the reluctance in adopting and implementing the Family protection policy which would go a long way in promoting and fulfilling the related human rights.

10. Recommendations to the State

- i. **Adopt and implement the Family Protection Policy 2017**
- ii. **Promote and protect the right of parents as primary educators and the right of parents to direct the education of their children especially in matters of human sexuality.**

¹ A/HRC/31/37

² 2010 Kenya Constitution, Art. 45(1), Universal Declaration (1948), Article 16 (3); ICESCR (1976), Article 10-1; ICCPR (1976), Article 23-1; Disabilities (2006), Preamble (x)

- iii. **Assess all laws, policies and program for their impact on the institution of the family and ensure that all such policies and programs affirm rather than negate the family as the natural and fundamental group unit of society entitled to protection by society and the State.**
- iv. **Analyse, from a gender perspective, all policies and programmes and assess their impact on family well-being and conditions in view to adjusting them, as appropriate for the protection of the family.**

Infringement on the right to life of the unborn

11. The constitution of Kenya protects the fundamental right to life of all persons including the unborn from the time of conception³. It is very clear that the life of an individual human being starts at conception. A sperm left on its own would die a sperm while an egg would die an egg. But when the two come together at conception, a new human life starts. Despite its proviso, Article 26(4) of the constitution specifically prohibits abortion. The Penal Code Act Cap 63 defines and punishes felonies associated with procuring of abortion and the supply of drugs and instruments for procuring abortions⁴. The annual crimes reports of 2013 to 2016 place the procurement of abortions under homicide⁵. Further Section 181(2) of the Criminal Procedure Code Cap 75 provides that even if someone charged with any other form of homicide is found not guilty but that he is guilty of the offence of killing an unborn child, he may be convicted of that offence although he was not charged with it⁶.
12. During the period under review, a homicide against a pregnant mother in which the unborn dies has been treated as double homicide⁷ by the courts and the Directorate of Public Prosecutions. To protect the life of the unborn, the Kenya Film Classification Board banned advertisements⁸ for Abortion on Kenya media. The Kenya Medical Practitioners and Dentists board issued a ban on an abortion provider requiring them to submit weekly returns to the regulator during the period under review⁹.
13. However, the proviso to Article 26 (4) creates an anomaly when it prohibits abortion expressly and then allows abortion if in the opinion of a trained health professional,

³Article 26 (1)&(2) of the Constitution of Kenya 2010.

⁴Sections 158 &160 of the Penal Code Act.

⁵National Police Service, Annual Crime Report(s) 2015 and 2016.

⁶ Section 181(2) of the Criminal Procedure Code Cap 75

⁷<https://www.standardmedia.co.ke/article/2001298338/obado-slapped-with-second-murder-charge>

⁸ The regulator also barred the provider from running advertisements that contravene Public Health Facilities Advertising Rules, 2016 <https://kfcfb.co.ke/no-more-marie-stopes-kenya-abortion-adverts/> also available at <https://www.standardmedia.co.ke/article/2001303049/why-marie-stopes-has-been-asked-to-stop-abortion-services?fbclid=IwAR3nE4ITuD5c6eNiDfmz3EuzHEWEKDoFazlpGS1TvIkgXBZ1FICOdmeTOQ8>

⁹ <https://www.the-star.co.ke/news/2018-11-16-marie-stopes-banned-from-conducting-abortions-in-kenya/>

there is need for emergency treatment or the life or health of the mother is in danger. By granting a health exception for abortion, the proviso increases the grounds upon which an opinion to carryout an abortion and thus kill an unborn could be formed. By providing that an abortion could be carried out in the opinion of any trained health professional, the proviso lowers the caliber of the practitioner from that of a registered medical practitioner who takes an oath to protect life. This ambiguity allows economic beneficiaries to the abortion industry thrive and attack the right to life of the unborn.

14. Unless the definition of abortion is made very clear, the ambiguity of this section of the constitution will continue to be abused. Since the constitution is not a medical document, abortion needs to be defined in social and not medical terms. Abortion is the intentional termination of a pregnancy after conception. It allows women to put an end to their pregnancies but involves killing the undeveloped embryo or fetus¹⁰. In Kenya, the only cadre of health professionals who are trained to be proficient to give an opinion as to whether there is need to terminate a pregnancy are the medical doctors. By their training, doctors are supposed to preserve life and there is not a single medical reason why a doctor would terminate an otherwise normal pregnancy by deliberately killing the preborn person. On the other hand, the termination of an abnormal pregnancy e.g. where the baby is dead or the pregnancy is ectopic is considered as treatment and not an abortion.
15. A further ambiguity is that on the one hand the penal code fails to recognize the victim status of women in crisis pregnancy who may consider abortion. It criminalizes women in crisis pregnancy¹¹ along with the abortion providers who are economic beneficiaries of the crime¹². On the other hand, the constitution limits the decision for an abortion on the opinion of a trained health professional¹³. This should shield the mother from liability in the event of the crime for the procurement of abortion.
16. The National guidelines for quality Obstetric and Gynaecological care provide for post abortion care Post Abortion Care targeted at providing clinical treatment to all women and girls seeking care, for complications of incomplete abortion and miscarriage as well as counseling¹⁴. There is however no requirement to document and notify the police of the cases as they present themselves. Such a practice would contribute to the development on verifiable statistics on the risks and the protection of preborn life.
17. **Recommendations to the state**
 - i. **Adopt the following definition for abortion for the purpose of removing ambiguity from article 26(4): Abortion is the termination of a normal pregnancy by deliberately killing the preborn person.**

¹⁰ <https://www.thoughtco.com/what-is-abortion-721095>

¹¹ Section 159 of the Penal Code Act

¹² Section 160 of the Penal Code Act

¹³ Article 26 (4) of th 2010 constitution.

¹⁴ Ministry of Health, Sanitation and Medical Services (2009)

- ii. Pass additional legislation clarifying the definition of health of the mother in Article 26 (4) as as serious physical impairment that likely would occur if the pregnancy were to continue and specifying that every attempt should be made to save both the baby and the mother where possible.**
- iii. Guarantee the right to the highest attainable standard of health care by clarifying that the calibre of the health professional who can form an opinion on the termination of a normal pregnancy is a registered medical practitioner.**
- iv. Protect the right to life by requiring that all cases that present for post abortion care are reported to the police for documentation in view to establish credible and reliable statistics on this phenomenon.**
- v. Fulfill the right to life by working with county governments and faith based organizations in providing crisis pregnancy centers across the country that provide help to expectant mothers with crisis pregnancies to carry and deliver their babies safely, and provide options after birth such as adoption services as well as mother and baby wellness support.**