Commentary on the draft Reproductive Health and Rights bill, 2008, Kenya

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Introduction

This bill addresses the issues of reproductive health pertinent to Kenya, in particular: sex/health education (including HIV/AIDS), contraception, abortion, assisted reproductive technology (ART) and female genital mutilation. The bill presents yet another attempt to expand the notion of rights to include access to reproductive technologies, extensive contraceptive options and legal abortion. It seeks to achieve such outcomes in part by advocating particular educational practices. The bill poses a significant threat to unborn human life by promoting and allowing very easy access to services which threaten human life before birth, especially through abortion. The criteria for abortion are so wide as to provide no real protection for the unborn child; safeguards are virtually non-existent. Giving no credence to conflicting views about the moral significance of unborn human life, the bill presumes there to be no question about moral significance and assumes that life between conception and birth is effectively disposable. This is reflected not only in the bill's criteria for legal abortion, but also through the introduction of reproductive technologies and the bill's failure to distinguish between contraceptive methods which endanger unborn life and those that do not.

In addition to this, the bill undermines the right of health care providers to conscientiously object to certain practices. It also establishes a Reproductive Health and Rights Board and Tribunal[1], both of which indicate the seriousness with which the bill's expectations are laid down. While the bill strives to overcome certain gender imbalances through actions such as prohibiting the practice of female genital mutilation, it imposes a particularly western and dangerously liberal perspective on reproduction and sexuality. It encourages abortion over and above any preventative measures and installs abortion as a response to poverty and other injustices.

It seems ironic that the opening paragraph expresses the bill's intention to provide for the recognition of (amongst other things), *"the right to make decisions regarding reproduction free from discrimination* [and]

[1] The powers of the Tribunal are considerable, and include the threat of fines and/or imprisonment to force a health care provider to answer questions even if that may involve breaches of confidentiality (s32).

coercion", yet it indirectly creates measures which are both discriminatory and coercive in nature.

Key aspects of the bill and their implications

Expansion of threat to unborn life: ART and contraception

The definition provided for 'Reproductive Rights'[2] is broad and encompasses a variety of practices, including:

- new and safe reproductive technologies, including artificial insemination, s3(d).
- safe and accessible abortion related care, s3(e).
- information and education on all matters of reproductive and sexual health, s3(g).
- specialized education for children, adolescents and marginalized groups on sexual and reproductive rights, s3(h).
- prenatal diagnostics for the purpose of identifying foetal diseases and deformities, s3(j).

Notably absent from the list of 'reproductive rights' is any reference to these rights being inclusive of a right to abortion on demand, even though that is a major focus of this bill. The only reference to abortion is to *"safe and accessible abortion related care"*, which would typically be interpreted as the general care of women in the circumstances surrounding an abortion, rather than reference to actual access to state-sanctioned and provided abortion. Such evasion of the harsh reality that the major element of 'reproductive rights' that is being promoted is abortion is not surprising. Such a strategy is in widespread use and is designed to promote acceptance of the euphemistic term 'reproductive rights', while hiding its real meaning - abortion. The proponents of abortion on demand, so clearly behind this bill, are using the term 'reproductive rights' to deceptively promote a pro-abortion agenda. Otherwise the list of 'reproductive rights' would make clear reference to abortion on demand – the major focus of this bill.

The term "reproductive technologies" (for ART, introduced in s3(d)above)), encompasses a wide range of possible techniques and is not confined to artificial insemination (which in itself does not threaten

[2] The language of 'reproductive rights' is becoming pervasive at national and international levels. Proponents of widespread access to abortion on demand seldom talk about abortion *per se* because it is confronting and likely to receive a negative response. Rather they talk about reproductive rights, informed choice, sexual health and planned parenthood. By co-opting these terms they act subversively to gradually soften resistance to their concepts and slowly work towards their goal. Communities who unwittingly accept such concepts, which are usually coupled to incremental legislative changes, eventually find themselves cornered into acquiescence on abortion.

unborn human life but raises questions for Roman Catholics and others as to the nature of the sexual act). ART includes *in vitro* fertilization (IVF), which involves collecting a woman's eggs, fertilising them *in vitro*, developing the embryos for several days, and then transferring them to the womb. Given that it is scientifically uncontroversial that a new individual human life begins at conception/fertilisation, the common practice of creating numerous embryos, many of which are routinely disposed of as part of ART practice, is clearly contrary to the unborn child's right to life.

While no further reference to "reproductive technologies" is made outside of the definition section of the bill, its inclusion is a clear strategic move on behalf of the drafters for future legislative proposals.

Part II of the bill, titled 'Access to Contraceptives and Family Planning Services' guarantees access to contraceptives including emergency contraception (s5(a)) and ensures access to the full range of contraceptive methods (s5(b)). The bill is promoting contraception, and in particular emergency contraception. The mere fact that a bill has been drafted to deal with an issue such as contraception is evidence of an unacceptable degree of state intervention into the private lives of its citizens – and all with a very particular moral perspective about the issue. Furthermore, it is not clear why such strong penalties are being applied to ensure information gathering on the prescription of contraceptives (s7&8).

As part of the requirements of informed consent, every health care service provider who prescribes a contraceptive method must provide all the relevant information pertinent to that method (s6). This should include information regarding the potential abortifacient effects of certain contraceptives, particularly in light of known ethical concerns regarding such matters. However, the bill makes no effort to highlight the distinction between contraceptives that have an abortifacient effect, such as hormonal contraceptives and inter-uterine devices, and those that do not. Failure to provide this information, whether indicated in the bill or not, represents a failure to provide genuine informed consent.

Abortion where pregnancy[3] poses a risk

The bill provides liberal criteria for the termination of pregnancy which, if passed, would equate to abortion on demand. s13(1) establishes that abortion is permissible where

[3] The bill defines pregnancy incorrectly as "the presence of a fetus in the womb". The majority of textbooks define pregnancy as occurring from the time of conception, which is equated with fertilization. The textbook definition of fetus is from 8 weeks of development onwards.

"the continued pregnancy would pose a risk of injury to the woman's physical or mental health." The omission of the word 'substantial' (referring to a pregnancy causing 'substantial risk' to a mother), which is commonly found in abortion legislation, is notable. By itself, the term 'risk' suggests the assessment is subjective and may refer to any perceived level of risk. Furthermore, the risk of injury being referred to is to any level of physical or mental harm. Therefore, minor physical or mental conditions, neither serious nor with grave effect, about which there is the hint of risk of occurrence, would be sufficient reason for an abortion. Indeed, given that there is always some risk of harm, albeit small, attached to a continued pregnancy, abortion would, under this bill, always be permissible.

Abortion in the case of foetal deformity

s13(1)(ii) allows for abortion where *"there exists a substantial risk that the foetus would suffer from a severe physical or mental abnormality."* Eugenic abortion, a key objective of the pro-abortion lobby, is particularly shameful in that it singles out and destroys the most vulnerable human beings. The more severely disabled a child may be, the more that child requires special protection by the State. That the risk of deformity must be substantial seems to suggest that the risk is reasonably (objectively) expected or even proven. Abnormalities are easily detected through modern technological approaches such as amniocentesis and ultrasound techniques. However, the term "substantial risk" may also refer to instances where one or both parents suffer from a genetic disorder or contractible disease such as HIV/AIDS. In such cases, the wording of the bill need not necessarily require *actual* proof of an abnormality but "substantial risk" based on nothing more than educated guesses.

The bill provides no definition for what constitutes *"severe physical or mental abnormality"* and hence may be interpreted broadly. Whether or not congenital deformities such as cleft lip and palate, for example, constitute a severe abnormality is a matter for interpretation.

Abortion and sexual assault

At s13(1)(iii) the bill makes a blanket statement that any pregnancy resulting from sexual defilement, rape or incest is a legitimate ground for abortion. While sexual offences are among the most heinous crimes, they stand alone as being crimes in which the perpetrator's (and victim's) child is punished. No other crimes allow revenge to be taken out on the perpetrator's and/or victim's offspring. Along with the victim the offspring is, after all, innocent.

The bill outlines that a statement by a pregnant woman to the medical practitioner is adequate to prove that her pregnancy is the result of sexual assault – see s13(2). While this may be considered just for women, especially those who have been disbelieved in their reports of assault, it is open to significant abuse. No inquiry is required to be made into the truthfulness of the claim, hence creating another opportunity for women with unwanted pregnancies to seek lawful termination.

Abortion and minors

The bill permits abortions to be carried out upon minors, and requires a health care service provider only to advise the child to consult with her parents or guardians. This means there is no requirement to consult, in which case the child could undergo an abortion without parental knowledge or consent. Even if the child did consult with her parents or guardians, it is unclear what authority, if any, the parents or guardians have with regard to an abortion decision. Presumably none. This represents an injustice to the child and her parents or guardians. It involves the state over-riding the rights of the parents who will have to care for the child following an abortion and deal with the physical and psychological consequences. It also allows the health care provider to exert undue influence over the child in the absence of parental input, and make determinations about the child's best interests in the absence of any continuing responsibility for the child, which the parents or guardians must bear. In the normal course of events, it is the parents or guardians who will have the child's best interests at heart, not state authorities.

Abortion and mental health

The bill introduces a new concept that a woman may be incapable of *"appreciating pregnancy"*. This allows for abortion where a woman is said to be unable, by virtue of being "mentally disordered", to 'appreciate' her pregnancy. A mentally disordered person is defined according to the Bill as *"a person who is suffering from mental illness, or arrested or incomplete development of mind."* How this may be interpreted by the courts is unclear and therefore faces the same risk of broad definitional problems as discussed previously.

According to s14(c), a health care service provider must consult with the guardian of the person with the mental disorder in order to be able to perform an abortion. Presumably a mere requirement to consult still leaves the decision to abort potentially out of the hands of the guardian as well as the mother, who because of the mental disorder does not have the capacity to consent. This is particularly open to abuse, especially in light of mental

illness not being fully defined and therefore not restricted to clinically recognised mental disorders. It could easily give rise to circumstances of coerced abortion applied to vulnerable women. There is a glaring inconsistency in s14 in that consent is required prior to abortion, yet those who cannot consent, minors and the mentally disordered, may be subjected to abortion.

Contraceptive failure

The bill takes a marked shift away from laws which permit abortion due to risk of harm and allows for abortion in cases of personal error and poor judgement. For example, s13(1)(v) of the bill allows for abortion where "*the pregnancy is a result of Contraception failure.*" A clause such as this not only dispenses with any concept of responsibility for sexual behaviour, but completely trivialises unborn human life. It is unforeseeable that a court would or could investigate whether or not contraception was being used at the time of the unintended pregnancy. It is hard to imagine a clause more liberal with regard to unscrutinised access to abortion, or more able to promote irresponsible sexual behaviour. In this sense the clause also contradicts the stated intention in the introduction of the bill for couples and individuals to act responsibly.

Extreme social deprivation

According to s13(1)(vi), abortion is justified in cases of "*extreme social deprivation.*" This represents discrimination against women suffering from poverty insofar as it determines a woman's suitability for childbearing according to her status in society. Rather than seeking to remedy the woman's position by providing basic needs for mother and child, this bill favours a eugenic approach whereby the unborn child is killed in response to poverty. Once again, the bill confronts the problem of undefined terms. In this case, "*extreme social deprivation*" is not defined by the bill and therefore is open to subjective interpretation which, at least by western standards, may include almost every woman in Kenya. This is an utterly disgraceful approach to the problem of third world poverty and ultimately adheres to the maxim: rather than eliminate the suffering, eliminate the sufferer.

Abortion counselling

The bill further undermines the seriousness of abortion by allowing it without mandatory counselling. s13(4) reads: "*Health providers shall offer non-mandatory and non-directive counselling, before and after the termination of a pregnancy.*" While the termination of a pregnancy may be considered by the drafters of this bill as merely a medical procedure like any other, they have failed to address the

extensive evidence for the damaging effects of abortion on women. This omission means that the draft bill falls short of its objective to provide for women to *"decide freely and responsibly"* as it fails to encourage proper consideration of abortion and its after-effects.

Conscientious objection

The elements of coercion evident in this bill, previously discussed, come to a head in the clause on conscientious objection. s14(c) provides that: *"A health care service provider who has a conscientious objection to the termination of pregnancy has a legal duty to refer the pregnant woman to a service provider who is willing to provide this service."* This sentence undermines the right for medical practitioners and other health care providers to conscientiously object to certain medical practices. A doctor's referral is a powerful tool and indicates that the referring doctor is making the referral with approval, to someone whom they respect. It is against good medical practice for a doctor to refer his or her patient to someone considered incompetent or unethical. The bill's proposed requirement for referral not only breeds bad medical practice, but also forces a doctor into complicity with what he or she considers unethical. Referrals for abortion represent indirect participation in the act of abortion, and hence abstention from this requirement must be respected in its entirety. Failure to allow such disassociation reveals that the bill's reference to the right of conscientious objection is nothing but an empty token. Moreover, such a restriction of the freedom of conscience is contradictory to internationally agreed human rights, contrary to agreed ethical principles and contrary to any decent and fair treatment of health care professionals in a democratic society. In addition, it is more reminiscent of the heavy handedness of a totalitarian state that health care professionals could be sentenced to a hefty jail term unless they act contrary to their most deeply held beliefs.

Coercion/discrimination implied through sex education framework

An important aspect of this bill is the emphasis placed on state run education on sex and reproduction. Sex education is listed in the definition section under the heading "Reproductive Rights" and refers specifically to the *"specialized education for children, adolescents and marginalized groups on sexual and reproductive rights."* This obviously refers to the whole expanse of reproductive rights listed, many of which threaten the life of the unborn child. Hence, a critical subtext of this bill is the education of the Kenyan population towards a pro-choice agenda. It is important to note that the targets of this agenda can be as young as 10 years of age. One must question whether the bill's

objective to help Kenyans to *"make informed decisions regarding their reproductive lives free from discrimination, coercion or violence"* (see full definition of "Reproductive Rights") is really possible in light of the biased position being presented. The bill represents an agenda which seeks to eliminate any views that may be held about the value of human life prior to birth. It is to be expected that state-run education on sexuality and reproduction would be structured and mandated to comply.

Coercion to abort is apparent for pregnancies where the unborn child is expected to contract HIV/AIDS from his/her mother. In this instance, the education (or counselling) towards a pro-abortion agenda is likely to come from a medical practitioner. Consider s18(c), which attempts to reaffirm a woman's right to abortion where HIV/AIDS is a concern. The language used is deceptively compassionate and appeals to the language of rights. The bill seeks to *"ensure counselling of pregnant women and their partners infected with HIV or suffering from AIDS on how to promote and sustain their reproductive health and to recognise their right to reproductive choice."* The all too familiar term 'reproductive choice' is a clear reference to abortion. Hence, this bill makes mothers with AIDS vulnerable to medical advice in favour of abortion. Once again, the drafter's eugenic intent is apparent, wherein the sufferer is eliminated in an attempt to eliminate suffering.

Uncontentious matters

The bill takes a position that is commendable on some matters. These include promoting safe motherhood by way of good maternal care, promoting health standards with regard to reproduction, and strongly proscribing female genital mutilation/cutting. The first two could readily be achieved without specific legislation, and the third could be added as an amendment to other legislation relating to medical treatment in general.

Summary and conclusion

The *Draft Reproductive Health and Rights Bill, 2008* for the Republic of Kenya introduces a series of policy changes, some of which are deeply unethical and which would undermine the value and dignity of human life before birth. Of particular concern is the bill's liberal criteria for abortion which would allow abortion on demand and at the same time provide an educational message that human life in its early developmental stages is disposable. Given the demographic of the Kenyan Republic, it is easy to see how abortion, if this bill were to pass, would become an easy response to poverty and the AIDS epidemic, without in reality doing

anything about those problems. The bill would also make it impossible for health care professionals to properly exercise their right to freedom of conscience. In summary, the bill undermines the goal of genuine reproductive health by permitting and promoting a mentality that is hostile to new life.

The numerous unethical elements of this bill make it unredeemable. It should be rejected outright.

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