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# Right to Health and Emerging Issues



**Policy Brief**

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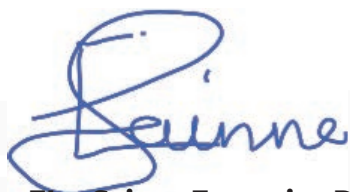
# Acknowledgment

To contribute to the realisation of the Right to Health, ICJ Kenya has utilised innovative approaches in developing its knowledge products to effectively involve and include all relevant stakeholders in the health sector to address policy, legal gaps, and challenges that impede access to healthcare services in Kenya.

This policy brief is among the series of knowledge products under our Right to Health project. It analyses various right to health issues as captured in ICJ Kenya's compendium on the right to health and the review of the legal and policy frameworks on the right to health in Kenya. It offers various policy recommendations towards enhancing Kenya's health governance.

We sincerely thank the ICJ Kenya Council for its leadership. In particular, we are grateful to the ICJ Kenya Secretariat team comprised of Geoffrey Odhiambo, Christine Akinyi, Lucy Bosibori, David Thuku and Vincent Kimathi, who tirelessly worked to ensure this policy brief is finalised. This publication is richer because of the team's dedication and input.

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**Elsy Sainna Executive Director ICJ Kenya.**

# Executive Summary

This Policy Brief presents a holistic approach to address critical aspects of healthcare, emphasising the Right to Health (RTH). The emerging issues, especially during the COVID-19 pandemic, discussed in this brief are legal and policy gaps, questions on access to information, health governance, mental health, reproductive health rights, health inequalities, health technology and privatisation of healthcare services. By addressing these crucial elements, policymakers can create a foundation for a robust and inclusive healthcare system in Kenya.

Access to information is paramount in empowering individuals to make informed decisions about their health. This brief recommends implementing comprehensive health information systems that ensure accurate, reliable, and easily accessible health-related data to the public. Such systems should emphasise health literacy and be available in multiple languages and formats to reach diverse populations effectively.

Good governance is essential for the efficient and equitable delivery of healthcare services. The policy brief underscores the need for transparent and accountable governance structures, promoting stakeholder engagement, and combating corruption in the health sector. It advocates for establishing regulatory bodies to monitor quality standards and enforce ethical practices.

Mental health is a crucial but often neglected aspect of overall well-being. The brief emphasises the integration of mental health services into primary healthcare systems, increasing awareness and reducing stigma surrounding mental health issues. It calls for increased funding and resources to develop accessible, community-based mental health services.

Reproductive health rights are fundamental to individual autonomy and well-being. This policy brief buttresses the need for comprehensive sexual education, access to family planning services, safe and legal abortion services, and equitable maternal healthcare. It calls for policies that uphold reproductive rights and eliminate discriminatory practices.

To address health inequalities and the privatisation of healthcare services, the brief emphasises the right to health as a fundamental principle for ensuring equitable access to quality healthcare. It underscores the need for targeted interventions to address health inequalities by prioritising vulnerable and marginalised populations. It calls for policies that address social determinants of health, such as poverty and discrimination, to reduce disparities. Additionally, the brief raises concerns about privatising healthcare services and advocates for regulatory frameworks that safeguard the right to health, prevent exploitation and maintain affordability, accessibility, and quality of care for all.

By adopting the recommendations outlined in this brief, policymakers can take substantial steps towards promoting equitable access to healthcare and improving overall population health.

# 1.0

## Introduction

The Right to Health is a fundamental human right recognised by international human rights instruments (the Universal Declaration of Human Rights (UDHR)<sup>1</sup>, International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>2</sup>, Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”)<sup>3</sup>, the Convention on the Rights of Persons with Disabilities (“CRPD”)<sup>4</sup>, and the Convention on the Rights of the Child (“CRC”)<sup>5</sup>, among others). The African Charter on Human and People’s Rights recognises the right at the regional level<sup>6</sup> and in Kenya’s Constitution 2010 under Article 43.

The right to health is crucial for the well-being and dignity of individuals and societies. This policy brief aims to highlight the significance of the right to health and shed light on emerging issues captured in the ICJ Kenya compendium on the right to health and the report on legal and policy frameworks that inhibit access to health rights in Kenya. The policy brief further underscores some of the challenges to the realisation of the right to health. By addressing these emerging issues, policymakers can promote equitable access to quality healthcare and foster healthier communities. The right to health encompasses the right to the highest attainable standard of physical and mental health. It includes access to healthcare services, essential medicines, safe and clean water, adequate nutrition, and a healthy environment as key determinants.

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1 Article 25 (1), *Universal Declaration of Human Rights*.

2 Article 12 (1), *International Covenant on Economic, Social and Cultural Rights*.

3 Articles 12 (1) and 14 (2) (b), *Convention on the Elimination of All Forms of Discrimination against Women*.

4 Article 25, *Convention on the Rights of Persons with Disabilities*.

5 Article 24, *Convention on the Rights of a Child*.

6 Article 16 (1), *African Charter on Human and People’s rights*.

## 2.0

# Emerging Issues from the Compendium and the Report on Legal and Policy Frameworks on the Right to Health in Kenya

### i) Health Inequalities, policy, and legal obstacles

Socio-economic and geographic disparities continue to hinder the realisation of the right to health in Kenya. Vulnerable populations, including the poor, marginalised groups, and rural communities, often face barriers to accessing healthcare services, resulting in significant health inequities. The lack of a comprehensive social health insurance scheme against the backdrop of privatising health services has effectively led to the exclusion of millions of Kenyans from accessing quality health-care services. It remains a significant threat to the goal of Universal Health Coverage by 2030.<sup>7</sup>

Further, in terms of policy and legal obstacles, there is a lack of adequate National and County legal and policy instruments to meaningfully give effect the right to health guaranteed under Article 43(1)(a) and (2). While the right to health is a devolved function in Kenya, the deficiency of inter-governmental mechanism(s) to ensure equitable access to health care services and referral among Counties and national and County Governments has impeded the full enjoyment of the right to health. The country also lacks affirmative action and social health insurance policies and legislation to protect and cushion vulnerable and marginalised groups and indigent individuals from the risks of catastrophic health expenditures.

### Recommendations

1. The government should implement the universal health coverage scheme that provides essential health services to all individuals, regardless of their socio-economic status. The scheme should focus on marginalised groups and vulnerable populations to address health inequalities.
2. There is a need to fully operationalise the newly amended National Health Insurance Fund Act into a comprehensive national social health insurance scheme to ensure all Kenyans have access to the highest attainable standard of health care services guaranteed under Article 43 of the Constitution of Kenya. Develop tools and guidelines to identify and protect the vulnerable and needy groups who cannot afford insurance premiums under NHIF from discrimination and exclusion in accessing quality healthcare services.
3. Policy and legislative makers need to review legislation and public policies to assess their consistency with human rights norms, standards, principles, and the capacity of institutional mechanisms to ensure the implementation and enforcement of the right to health as guaranteed by the Constitution of Kenya and attendant legislation.
4. There is a need to define the minimum essential elements of the right to health to include equitable access to and distribution of health facilities and services, reproductive health, maternal and child health services; access to health-related education and information; and the availability of appropriately trained health personnel; and sufficient budgetary allocations for health care provision to ensure universal health coverage.

<sup>7</sup> ICJ Kenya (2023). *Review of the legal and policy frameworks on the right to health in Kenya*. Available at <https://icj-kenya.org/wp-content/uploads/2023/04/Health-Rights-Review-Report.pdf> p. 11.



5. Both levels of government need to improve access to quality health care by incorporating considerations for persons living with disabilities in all the designs of health facilities, infrastructure, and provision of services.
6. There is a need to strengthen policies that address social determinants of health, such as safe and clean water, adequate nutrition, a healthy environment, poverty, and discrimination to reduce disparities.

## ii) Emerging Infectious Diseases: Government measures and preparedness during health emergencies

*The emergence of novel infectious disease, such as the recent COVID-19 pandemic, highlights the need for robust and responsive healthcare systems. Governments must invest in surveillance, early detection, and rapid response mechanisms to effectively combat emerging infectious diseases. Strengthening global cooperation, information sharing, and research collaboration is vital to prevent and control future outbreaks*

The COVID-19 pandemic had significant implications for the right to health. Governments worldwide implemented various measures to contain the spread of the virus, including lockdowns, travel restrictions, and social distancing measures. While these measures were necessary to protect public health, they also adversely affected healthcare systems and access to healthcare services.

***The enforcement of pandemic measures also led to human rights violations by state agencies, with security agencies being the top offenders.***

The pandemic strained healthcare infrastructure, leading to overwhelmed hospitals and limited resources. The diversion of resources to the COVID-19 response also disrupted essential healthcare services, such as routine vaccinations and treatments for non-communicable diseases. The pandemic further exposed existing health inequalities, disproportionately affecting marginalised communities and exacerbating socio-economic disparities in access to healthcare. Additionally, inadequate health system preparedness for health emergencies such as accidents and pandemics is majorly due to the lack of sufficient equipment, medication, facilities, and human resources to provide emergency treatment.

### Recommendations:

1. The government and all relevant actors should enhance preparedness to address the implications of pandemics, strengthen healthcare systems, and ensure equitable access to healthcare services during and beyond health pandemics such as COVID-19.
2. There is a need to develop policy guidelines to be followed in response to health emergencies such as COVID-19 to guard against decisions and actions that endanger the human right to health while responding to health crises.
3. There is a need to develop national policy guidelines on a rights-based approach to managing public health emergencies and protecting human rights and the right to health during health emergencies such as pandemics, disasters and other humanitarian situations.
4. MOH to establish a national healthcare system capacity-strengthening strategy or program on health emergency preparedness and management that considers the needs of vulnerable groups during health emergencies.



5. Policy and legislative makers to strengthen the right to health during emergencies and humanitarian situations by developing and implementing regulations on the right to emergency medical treatment to operationalise the Kenya Emergency Medical Care Policy 2020 – 2030.

### iii) Digital Health Technologies

The Health Act 2017 establishes a unified health system encompassing public and private institutions and providers of health services at the national and County levels. It provides for the regulation of health care services, health care service providers and health technologies. Rapid advancements in digital health technologies, including telemedicine, mobile health applications, and health data analytics, have the potential to revolutionise healthcare delivery. However, the right to health in Kenya is undermined by several factors, including a lack of advanced healthcare technology and innovations and a weak supply management system for technologies. It is worth noting that the widespread adoption of health technology and innovations also raises concerns related to privacy, data security, and equitable access.

#### Recommendations:

1. The national and County governments must establish regulatory frameworks that balance innovation with patient rights and ensure equitable access to digital health technologies.
2. There is a need to review the concurrent function relating to Kenya's Health Information System (HIS) (data collection, collation, analysis, and reporting, supportive supervision, patient and health facility, records, and inventories) and associated investments in technology such as digital platforms - Electronic Medical Records Systems, Logistical Management Information Systems (LMIS). Further, the associated funding should be shared equitably and the component for County Governments should be transferred directly to counties.

### iv) Mental Health

*Mental health stigma remains a barrier to seeking help and support. Public awareness campaigns and educational initiatives are crucial in challenging these stigmas and promoting a more understanding and compassionate society.*

Mental health disorders represent a growing global burden, necessitating increased attention to mental healthcare. Governments should allocate adequate resources to mental health services, promote awareness, reduce stigma, and integrate mental health into primary healthcare systems. While Kenya has made commendable legal and policy developments in addressing mental health, several challenges still remain a concern. One of the most significant challenges is the lack of implementation and enforcement of existing laws and policies. Many mental health facilities in Kenya continue to face inadequate funding, staffing, and infrastructure, which hinders the delivery of effective and accessible mental health services. Furthermore, mental health stigma remains a barrier to seeking help and support.

Recognising mental health as an essential component of the right to health is crucial for creating resilient and inclusive healthcare systems. This can be achieved through implementing comprehensive mental health legislation in Kenya in a way that protects the rights of individuals with men-

tal health conditions, promotes access to mental health services, and establishes mechanisms for oversight and enforcement; allocating sufficient financial resources to mental health services and programs, ensuring that they are on par with physical healthcare funding; investing in training and expanding the mental healthcare workforce, including psychiatrists, psychologists, social workers, and peer support specialists; and promoting mental health literacy through education and public awareness campaigns to destigmatise mental health issues and promote mental well-being.

Mental health stigma remains a barrier to seeking help and support. Public awareness campaigns and educational initiatives are crucial in challenging these stigmas and promoting a more understanding and compassionate society.

### **Recommendation:**

1. Establish a public education program to increase awareness of the right to health and the social, religious and cultural practices that inhibit the realisation of the right to health, including mental and sexual reproductive health.
2. The government should prioritise resource allocation and investment in mental health services. This includes increasing funding for mental health facilities, training healthcare professionals in mental health care, and integrating mental health services into primary healthcare settings.
3. Non-governmental organisations (NGOs) should support mental health initiatives and programs by collaborating with the government to enhance the mental health system in Kenya.

### **v) Access to Information:**

*Access to information is a fundamental right that enables the realisation of all human rights and freedoms, including the right to life, health and education. The promulgation of the Constitution in 2010 marked the liberalisation of human rights, including access to information protected under Article 35.*

The right to health and access to information are interconnected and mutually reinforcing. Access to accurate and timely information is vital in promoting and protecting the right to health. Individuals need access to reliable health information to make informed decisions about their health, seek appropriate healthcare services, and adopt preventive measures. Transparent and accessible health information also facilitates effective policy making and resource allocation by governments and health authorities. Access to comprehensive and up-to-date health information allows policymakers and health authorities to make informed decisions as it enhances understanding of the current health status of the population, identifying health trends and emerging threats, and evaluating the impact of existing policies and interventions. The health data can also be used to determine the most pressing health issues and areas where intervention is needed most urgently. The information helps set priorities for resource allocation, ensuring that resources are directed toward the most significant health challenges. Further, the right to health requires access to information on healthcare services, treatment options, disease prevention, and public health initiatives. Both rights are essential for empowering individuals, promoting health literacy, and fostering a healthcare system that prioritises the well-being of communities.

Further, access to and disclosure of information critical for the enjoyment of the right to health is challenging due to weak enforcement of legal provisions and lack of clear guidelines. Also, poor management of health information systems and failure to share data impede the effective provision of services due to insufficient information. Within the health information system, data from the private sector is often missing due to non-compliance with reporting by private facilities and weak enforcement mechanisms at both levels of government.

#### **Recommendation:**

1. The government should implement comprehensive health information systems that ensure accurate, reliable, and easily accessible health-related data to the public. Such systems should emphasise health literacy and be available in multiple languages and formats to reach diverse populations effectively.
2. The Ministry of Health (MOH) should promote health literacy and awareness by encouraging health education programs to enhance public awareness of health rights, prevention strategies, and healthy lifestyles. Effective communication campaigns can empower individuals to make informed decisions about their health and well-being.
3. Human rights organisations, including Civil Society Organisations, should develop information education and communication materials on the right to health and package targeted information for diverse audiences such as the public and decision-makers.
4. Both National Government and County Governments and agencies should promote and create safe spaces for citizens to actively and meaningfully participate in legislation, policymaking, and decision-making related to the right to health and the provision of health care services. Such efforts should be coupled with civic education to enable meaningful public participation.

#### **vi) Sexual and Reproductive Health Rights: The issue of safe abortion for SGBV survivors**

The right to health encompasses sexual and reproductive health rights (SRHR), recognising the importance of comprehensive and accessible healthcare services in relation to sexuality and reproduction. SRHR includes access to family planning, safe and legal abortion services, maternal healthcare, prevention and treatment of sexually transmitted infections, and education on sexual and reproductive health.

*Through General Comment No. 4 on adolescent health and development, the Committee on the Rights of the Child (CRC) noted that State parties have not given sufficient attention to the specific concerns of adolescents and the youth as rights holders and to promoting their health and development.*

***From the Protocol to the African Charter of Human and Peoples Rights (ACHPR) on Women's Rights (Maputo Protocol), States have a duty to provide safe abortion services to survivors of sexual violence as a component of the right to health.***

Upholding SRHR is crucial for promoting gender equality, reducing maternal mortality, preventing unintended pregnancies, and ensuring individuals have the autonomy to make decisions about their bodies and reproductive choices.

In Kenya, the State spends an average of 7.4 hours of health care personnel time on treating a woman from complications of unsafe abortions. Financially, in 2012, the treatment of unsafe abortion complications cost the public health system a total of Kshs 432.7 million; in 2016, it was estimated to reach 533 million. This causes a significant drain on the health system, yet the time and money can be directed to deal with the cause of the problem altogether<sup>8</sup>.

***Some of the Barriers to Accessing Safe Abortion Services for Survivors of Sexual Violence in Kenya include, lack of availability, accessibility and quality of Abortion Services in Kenya and ambiguity of legal provisions limiting the accessibility of safe abortion services.***

Protecting and fulfilling SRHR is essential for individuals' overall well-being, dignity, and empowerment, and it is a crucial component of the right to health.

### **Recommendations:**

1. National and County governments to ensure policies conform with the Constitution to allow abortion services for survivors of violence.
2. There is a need to advocate for fast-tracking the enactment of the Reproductive Health Bill 2019 and the National Community Health Services Bill 2019 into law.
3. There is a need for continuous sensitisation among medical practitioners and law enforcement agencies to understand the legal parameters regarding the provision of abortion services in Kenya.

### **vii) Health Governance**

*Governance determinants include the roles played by all the arms of the government – Executive, Judiciary and Legislature.*

The right to health is closely intertwined with governance structures. Effective governance is essential for ensuring equitable access to healthcare, allocating resources efficiently, and prioritising health policies that promote the well-being of all individuals. Robust governance arrangements are characterised by transparency, accountability, and the meaningful participation of communities and stakeholders in decision-making processes. The structures should also incorporate human rights principles into health policies and programs, ensuring that the right to health is at the core of governance frameworks. This could be achieved through developing clear and comprehensive policy statements that affirm the government's commitment to upholding the right to health for all citizens; aligning domestic health policies and programs with the provisions of international human rights instruments; and addressing the social determinants of health, such as income inequality, education, housing, and access to clean water and sanitation, recognising their impact on health. By fostering good governance, governments can strengthen health systems, improve healthcare delivery, and advance the realisation of the right to health for all.

<sup>8</sup> Ministry of Health, Kenya. *The Costs of Treating Unsafe Abortion Complications in Public Health Facilities in Kenya*. Available at [https://aphrc.org/wp-content/uploads/2019/07/The-Costs-of-Treating-Unsafe-Abortion-Complications-in-Public-Health-Facilities-in-Kenya\\_Final.pdf](https://aphrc.org/wp-content/uploads/2019/07/The-Costs-of-Treating-Unsafe-Abortion-Complications-in-Public-Health-Facilities-in-Kenya_Final.pdf)



### Recommendations:

1. The Council of Governors and the Ministry of Health need to collaborate to ensure full operationalisation of the Health Sector Inter-Governmental Consultative Forum and other health sector intergovernmental coordination mechanisms established under the Health Act, 2017 for mutual consultation, coordination and collaboration between the National Government and County Governments on all matters related to health including the implementation of the right to health and health service delivery.
2. There is a need to integrate human rights into health policies: Incorporate a human rights-based approach into health policies and programs, ensuring that the right to health is at the core of decision-making processes. This includes meaningful participation of communities and individuals in healthcare planning and implementation.
3. Both levels of government to strengthen healthcare infrastructure and workforce: This entails investing in healthcare infrastructure, particularly in underserved areas, and prioritising training and recruitment of healthcare professionals. It also requires incentivising healthcare providers, especially within the public sector, to work in remote and marginalised communities.
4. There is a need to foster international cooperation: Promote collaboration among nations to address global health challenges and share best practices. International cooperation can strengthen health systems and facilitate knowledge transfer and support.

### viii) Privatisation of Healthcare Services

The right to health encompasses providing quality healthcare services to all individuals. Privatisation of healthcare services can have both positive and negative implications for the realisation of this right. On the positive side, privatisation enhances competition, innovation, and efficiency in healthcare delivery, potentially improving service quality and patient satisfaction. It can also attract investment and expertise into the healthcare sector. However, private healthcare providers are often profit-driven entities. Their primary goal is to generate profits, which can lead to higher costs for healthcare services. This includes inflated prices for medical procedures, medications, and healthcare technologies.

Further, many private healthcare systems operate on a fee-for-service model, where healthcare providers are paid for each service. The model can incentivise overutilisation of services, as providers are financially interested in performing more tests and procedures, driving up healthcare costs. Consequently, privatisation has resulted in unequal access to healthcare services, as not everyone can afford the high costs associated with private care. It creates disparities in access to care, with marginalised populations, low-income individuals, and the uninsured facing barriers to essential services. The lack of adequate regulation has also led to suboptimal care, especially when profit maximisation precedes patients' well-being.

The growth of private health providers has been encouraged by public policies that have supported private sector engagement in healthcare over the last few decades, which have not been accompanied by sufficient regulation and monitoring of private healthcare actors, thus contributing to a proliferation of poorly established private clinics, nursing homes and laboratories. While a legal framework for regulating and monitoring private healthcare providers exists, it has not been

sufficiently implemented in practice. The lack of a comprehensive social health insurance scheme against the backdrop of the privatisation of health services has led to the exclusion of millions of Kenyans from accessing quality healthcare services. It remains a significant threat to the attainment of the goal of universal health coverage by 2030.

***Careful regulation and monitoring are necessary to ensure that privatization does not undermine the equitable access and affordability of healthcare, particularly for vulnerable groups***

#### **Recommendations:**

1. On privatisation of health services, there is a need to adopt regulatory frameworks that safeguard the right to health, prevent exploitation, and maintain affordability, accessibility, and quality of care for all—additionally, establish regulatory bodies to monitor quality standards and enforce ethical practices.
2. Promote strategic dialogue with the private sector on health financing, taking into account the obligation of the State under General Comment 7 of the African Commission on Human and Peoples' Rights to effectively regulate any private provision of social services to ensure that these actors prioritise the public interest rather than private or commercial interests.
3. Ensure the implementation of the Kenya Health Financing Strategy 2020–2030<sup>132</sup> and the domestication of the same at the county level to increase investment and public spending in health throughout the country. It will help rationalise health expenditure, improve aid effectiveness and ensure the provision of adequate safety mechanisms for the poor and vulnerable as the country works towards achieving universal health coverage and the right of every person to the highest attainable standards of health, as enshrined in the Constitution of Kenya.

## 3.0 Conclusion

This policy brief underscores the importance of the right to health in shaping resilient and equitable healthcare systems amidst a rapidly evolving landscape of emerging issues. Access to information emerges as a cornerstone, empowering individuals to make informed decisions about their health and advocating for their rights. Further, government efforts are indispensable in translating the right to health into actionable policies prioritising accessibility, affordability, and quality of care. In light of recent health pandemics, such as the COVID-19 crisis, we have witnessed the urgent need for adaptive healthcare systems. The pandemic underscored the crucial role of health technology, telemedicine, and data-driven decision-making in ensuring continuity of care and crisis management.

Crucially, collaborative efforts by stakeholders – governments, healthcare providers, tech innovators, civil society, and international organisations – will lead to success. Together, they can surmount the challenges posed by emerging health issues, eliminate disparities, and promote holistic well-being for all. By placing the right to health at the forefront of our policymaking, we can build a future where everyone enjoys the highest attainable physical and mental health standard, regardless of their circumstances.



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