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## RECENT CASE

### REPRODUCTIVE RIGHTS — KENYAN LAW — CONSTITUTIONAL LAW — *PAK v. Attorney General* (2022) 262 K.L.R. 1 (H.C.K.) (Kenya).

As access to abortion is a rapidly developing question in the United States's legal landscape, courts across the world are revisiting criminalization and constitutional protections or constraints on this specific right of reproductive healthcare. In March 2022, in *PAK v. Attorney General*,<sup>1</sup> the Kenyan High Court held that medically necessary abortion is a fundamental constitutional right.<sup>2</sup> The court's reasoning addressed the confluence of Kenya's constitutional provisions, national criminal laws, and international commitments and how malleable rights manifest within those legal frameworks. The ruling shows how statutory vagueness in abortion policy enables pernicious criminalization of patients and providers.

The 2010 Kenyan Constitution left the constitutionality or criminality of abortion in legal flux. Prior to the constitutional update, the 1963 Penal Code criminalized all participation in or solicitation of abortion procedures.<sup>3</sup> However, the Right to Life Article in the 2010 Constitution, Article 26(4), protected abortions to save a mother's life.<sup>4</sup> The ability to arrest or detain patients seeking care and providers aiming to provide necessary reproductive care derived from Penal Code sections 158, 159, and 160, which were attached to the 1963 Constitution of Kenya.<sup>5</sup> These provisions had not been brought in line with the current Constitution, leaving a gap for interpretation.<sup>6</sup> Whereas many had considered that

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<sup>1</sup> (2022) 262 K.L.R. 1 (H.C.K.) (Kenya).

<sup>2</sup> *Id.* at 21.

<sup>3</sup> Penal Code (2010) Cap. 63 §§ 158–160 (Kenya); *see also* Press Release, Ctr. for Reprod. Rts., High Court Judgement in Malindi Protects Women, Girls and Healthcare Providers from Arbitrary Abortion-Related Arrests and Prosecutions (Mar. 25, 2022), <https://reproductiverights.org/high-court-judgement-in-malindi-protects-women-girls-and-healthcare-providers-from-arbitrary-abortion-related-arrests-and-prosecutions> [<https://perma.cc/4AVP-A4XN>] (explaining that the 1963 Penal Code “criminalize[d] all abortion care”).

<sup>4</sup> CONSTITUTION art. 26(4) (2010) (Kenya) (“Abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law.”).

<sup>5</sup> *See* CONSTITUTION (1963) (Kenya); Penal Code (2010) Cap. 63 §§ 158–160 (Kenya). Note that section 228 of the Kenyan Penal Code of 1963, titled “Killing unborn child,” is potentially the most punitive. *Id.* § 228 (“Any person who, when a woman is about to be delivered of a child, prevents the child from being born alive by any act or omission of such a nature that, if the child had been born alive and had then died, he would be deemed to have unlawfully killed the child, is guilty of a felony and is liable to imprisonment for life.”). After the decision in *PAK*, section 228 would seemingly be unlikely to apply as a viable charge in most situations of evacuation or reproductive healthcare. *See PAK*, 262 K.L.R. at 19.

<sup>6</sup> *PAK*, 262 K.L.R. at 3. Section 158 criminalized any health provider's attempt to help administer an abortion (even if accidentally to a woman who is not pregnant) as a felony punishable by up to fourteen years in prison. Penal Code (2010) Cap. 63 § 158 (Kenya). Section 159 criminalized

the ratification of the 2010 Constitution implied that these provisions of the Penal Code had been overruled in a pro-choice victory, others argued that Article 26 was a concretization of pro-life principles.<sup>7</sup> However, the criminalization of constitutionally mandated emergency abortions was not explicitly overwritten with the Constitution's update. Neither constitutional exegesis nor any further statutes addressed the question of which Penal Code provisions must still hold sway given Article 26(4). Law enforcement took the matter of legal interpretation into its own hands and decided to enforce the twentieth-century criminal codes.<sup>8</sup>

On September 19, 2019, "PAK," a pregnant minor, began experiencing pregnancy complications in Ganze Location in Kilifi County in Kenya.<sup>9</sup> Seeking care for the pain and bleeding, PAK visited Chamalo Medical Clinic.<sup>10</sup> She was attended to by Salim Mohammed, a licensed clinical physician, who performed a manual evacuation after determining that she had suffered a spontaneous loss of her pregnancy.<sup>11</sup> Two days later, while PAK recovered in the women's ward, plainclothes police officers "stormed" the Chamalo Clinic without any advance "notice or permission," demanding and confiscating PAK's confidential treatment records.<sup>12</sup> In the police's haste to arrest PAK and Mohammed, they also arrested two women who worked as cleaners at the clinic.<sup>13</sup> The next day, September 22, police officers forced the minor to undergo a medical examination at Kilifi County Hospital.<sup>14</sup>

On September 23, PAK was charged in Kilifi County Criminal Court.<sup>15</sup> The case against PAK alleged that she had self-administered drugs which led to her miscarriage (thereby "procuring abortion" contrary to section 159 of the Penal Code).<sup>16</sup> Mohammed was charged in the same case on two counts: "procuring abortion" (contrary to section 158 of the Penal Code) and "supplying drugs to procure abortion" (contrary to section 160 of the Penal Code).<sup>17</sup> PAK was sent to Malindi

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a pregnant woman for any attempt to procure an abortion (even for submitting to potentially abortive means) as a felony punishable by up to seven years in prison. *Id.* § 159. And section 160 criminalized the supplier of any drugs or instruments relating to abortion as a felony punishable by up to three years in prison. *Id.* § 160.

<sup>7</sup> See, e.g., *A Chance to Improve How Kenya Is Run*, THE ECONOMIST (July 29, 2010), <https://www.economist.com/middle-east-and-africa/2010/07/29/a-chance-to-improve-how-kenya-is-run> [<https://perma.cc/KDM5-NSUG>].

<sup>8</sup> See *PAK*, 262 K.L.R. at 2.

<sup>9</sup> *Id.* at 18.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 18–19.

Juvenile Remand Prison for one month as she sought funds for bail.<sup>18</sup> PAK and Mohammed brought an action before the Kilifi Senior Principal Magistrates Court on October 23, 2019, to challenge the lawfulness of the charges under the 2010 Constitution, the 2006 Sexual Offences Act,<sup>19</sup> and the judgment of the High Court in *Federation of Women Lawyers v. Attorney General*.<sup>20</sup> (*FIDA*). The lower court refused to terminate the proceedings against PAK and Mohammed, so the two registered Constitutional Petition E009 of 2020 in defense of their rights.<sup>21</sup> The High Court temporarily halted the criminal proceedings before the Kilifi Magistrates Court to hear the case and determine the constitutional questions that it raised.<sup>22</sup>

Judge Nyakundi, writing for the court, released a fifty-page ruling that found abortion care to be a fundamental right under the Constitution of Kenya.<sup>23</sup> The court addressed whether there was a “lacuna,” or gap, in the statutory framework necessary to implement Article 26(4);<sup>24</sup> whether sections 154, 159, and 160 of the Penal Code were inconsistent with Article 26(4) of the Constitution;<sup>25</sup> whether the proceedings should be quashed;<sup>26</sup> and whether the constitutional rights of the petitioners were violated.<sup>27</sup>

On the first question of the potential statutory gap in guidance for implementing Article 26(4), the court ruled that the legal framework as it stood was inadequate.<sup>28</sup> Judge Nyakundi’s reasoning drew broadly from several human rights instruments and international laws to illustrate the significance of a fundamental right to abortion, even if limited by other laws, including General Comment Number 2 of the African Commission on Human and Peoples’ Rights;<sup>29</sup> the English and Wales Abortion Act of 1967;<sup>30</sup> General Comment Number 36 of the

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<sup>18</sup> See *id.* at 4; CTR. FOR REPROD. RTS. & REPROD. HEALTH NETWORK KENYA, ALIGNING THE PENAL CODE TO THE CONSTITUTION: THE MALINDI HIGH COURT DECISION ON THE QUESTION OF ABORTION IN KENYA 3 (June 4, 2022), <https://reproductiverights.org/wp-content/uploads/2022/06/crr-malindi-04-june-2022ruling.pdf> [<https://perma.cc/2VEM-F6BA>]. The court accepted a petition to place PAK in a state-run children’s home, but fundraising efforts materialized as PAK’s case caught the attention of international nongovernmental organizations, and PAK was able to return to school. Mohammed was detained for one week before posting bail. PAK received legal and financial assistance from the Reproductive Health Network Kenya and the Center for Reproductive Rights, after which she was able to post bail and to file an action. *Id.*

<sup>19</sup> The Sexual Offences Act, No. 3 (2006) (Kenya).

<sup>20</sup> (2015) Petition No. 266 (H.C.K.) (Kenya), <http://kenyalaw.org/caselaw/cases/view/175490> [<https://perma.cc/FH2E-PUZF>]; see also PAK, 262 K.L.R. at 20.

<sup>21</sup> See PAK, 262 K.L.R. at 18.

<sup>22</sup> See *id.* at 40.

<sup>23</sup> No dissenting opinions were filed.

<sup>24</sup> PAK, 262 K.L.R. at 40.

<sup>25</sup> *Id.* at 32.

<sup>26</sup> *Id.* at 37.

<sup>27</sup> *Id.* at 40.

<sup>28</sup> See *id.* at 31–32.

<sup>29</sup> *Id.* at 30.

<sup>30</sup> *Id.* at 31.

United Nations Human Rights Committee;<sup>31</sup> the Universal Declaration of Human Rights;<sup>32</sup> the work of the United Nations Committee on Economic, Social and Cultural Rights and Committee on the Elimination of Discrimination against Women as anchored by Article 17 of the International Covenant on Civil and Political Rights;<sup>33</sup> and even the now-overruled logic of *Roe v. Wade*<sup>34</sup> in linking reproductive rights to privacy. The court explicitly indicated how access to abortion fits into a larger infrastructure of gender justice (affecting other healthcare access, education, and economic opportunities): “Access to abortion is therefore fundamentally linked to protecting and upholding the human rights of women, girls and others who can become pregnant, and thus for achieving social and gender justice.”<sup>35</sup> The High Court instructed the legislature to “draft a law which recognizes right to abortion in consonance with [A]rticle 26(4) of the Constitution for protection of everyone[’s] right to life save in the exception provided by law.”<sup>36</sup>

To the second issue of conflict between sections 154, 159, and 160 of the Penal Code and Article 26(4) of the Constitution, the High Court broadly followed the mandate that the Penal Code must be read in consonance with the Constitution.<sup>37</sup> Judge Nyakundi recognized the pragmatic “typical impossib[ility]” of a “therapeutic abortion,” noting special difficulties in a “rural setup.”<sup>38</sup> The High Court acknowledged that while the Kenyan Constitution states that life begins with conception, it also explicitly subordinates fetal life to the life of the pregnant person, should the pregnant person be in Ddanger.<sup>39</sup> The court held that a statutory framework was necessary to bridge the gap.<sup>40</sup> The court denied mandamus,<sup>41</sup> injunctions,<sup>42</sup> and damages<sup>43</sup> as remedies. However, the High Court did not hesitate to lay down a powerful baseline: to criminalize abortion without clear laws and administrative frameworks for accessing therapeutic abortion as provided for in Article 26(4) “is an impairment” of women’s reproductive rights, as delineated by the Kenyan Constitution and human rights law.<sup>44</sup>

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<sup>31</sup> *Id.* at 26.

<sup>32</sup> *Id.* at 25.

<sup>33</sup> *Id.* at 29–30.

<sup>34</sup> 410 U.S. 113 (1973); see also *PAK*, 262 K.L.R. at 29.

<sup>35</sup> *PAK*, 262 K.L.R. at 26.

<sup>36</sup> *Id.* at 32.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 35.

<sup>39</sup> See *id.*

<sup>40</sup> *Id.* at 34.

<sup>41</sup> *Id.* at 45. The court refused to require the Attorney General to draft legislation, the Inspector General of Police to prevent harassment of providers by police officers, or the Director of Public Prosecutions to prevent specious prosecutions along facts like those in *PAK*. See *id.* at 43.

<sup>42</sup> *Id.* at 46.

<sup>43</sup> *Id.* at 49.

<sup>44</sup> *Id.* at 34.

To the third question of quashing the prosecutions of both Mohammed and PAK, the court ruled that the charges did not hold up.<sup>45</sup> The High Court cited the Kenyan Constitution of 2010 as having broken new ground for gender rights.<sup>46</sup> The rationale also called on High Court precedent from a 2015 decision, *FIDA*,<sup>47</sup> which affirmed that victims of sexual violence in Kenya had a constitutional right to abortion.<sup>48</sup> Judge Nyakundi wrote extensively about confidence in medical professionals and their decisionmaking.<sup>49</sup> Evaluating the needs of pregnant people is often delegated to healthcare providers in jurisprudence the world over, as the opinion's reasoning reflected.<sup>50</sup> Still, recognition of the psychological and socially weighty burdens of the process was evident throughout the ruling.<sup>51</sup>

To the fourth question whether Mohammed and PAK had suffered constitutional rights violations, the High Court ruled that several "gross violation[s]" had taken place.<sup>52</sup> Judge Nyakundi found that "access to health care and especially reproductive health care" had not been provided.<sup>53</sup> "This was a gross violation of [A]rticle 43(1)(a) of the constitution as [PAK] was entitled to access to the highest standards of health care and more specifically reproductive health."<sup>54</sup> Judge Nyakundi further found "that her arrest was degrading and inhumane. . . . [I]t is crystal clear that her rights under [A]rticle 25(a) and 28 were grossly violated."<sup>55</sup> The court spent several pages weighing the legal heft of the *stigmatization* that PAK endured at the hands of her teachers and peers in school.<sup>56</sup> Significantly, the constitutional violations were attached to a clear rule that arbitrary arrest and/or prosecution of either patients seeking care or health care providers offering such abortion services is illegal. The ruling also explicitly protected access to abortion for its

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<sup>45</sup> *Id.* at 40.

<sup>46</sup> *Id.* at 38. The 2010 Constitution included provisions addressing "securing seats for women's political participation, landmark reforms for women's freedom of movement, principles of non-discrimination and equality." Catherine N. Githae et al., *Key Ingredients to Women's Legal Rights in Kenya*, WORLD BANK BLOGS (July 7, 2022), <https://blogs.worldbank.org/developmenttalk/key-ingredients-womens-legal-rights-kenya> [<https://perma.cc/7KWH-UWYM>].

<sup>47</sup> *PAK*, 262 K.L.R. at 38.

<sup>48</sup> Fed'n of Women Laws. v. Att'y Gen. (*FIDA*) (2015) Petition No. 266, at 61 (H.C.K.) (Kenya), <http://kenyalaw.org/caselaw/cases/view/175490> [<https://perma.cc/FH2E-PUZF>].

<sup>49</sup> *PAK*, 262 K.L.R. at 38.

<sup>50</sup> *Id.*

<sup>51</sup> *See id.* at 29, 35, 38.

<sup>52</sup> *Id.* at 41. The court also found that PAK's constitutional right to counsel was violated. *Id.* at 42.

<sup>53</sup> *Id.* at 41.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 49; *see also* CONSTITUTION arts. 25(a), 28 (2010) (Kenya). Article 25(a) protects fundamental freedoms. *Id.* art. 25(a) (guaranteeing "freedom from torture and cruel, inhuman or degrading treatment or punishment"). Article 28 codifies the right to dignity. *Id.* art. 28 ("Every person has inherent dignity and the right to have that dignity respected and protected.").

<sup>56</sup> *See PAK*, 262 K.L.R. at 41.

relationship to vital constitutional values, including dignity, autonomy, equality, and bodily integrity.<sup>57</sup>

The immediate impact of the ruling revokes the police's *carte blanche* to arrest and detain patients and providers suspected of violating residual penal code provisions. The onus rests solidly on Parliament's shoulders to innovate a statutory framework that makes sense of the interstices among written constitutional law, outdated common law, and law enforcement. Where new legal developments displace outdated abortion policy, but it is unclear how much of the old policy remains, there exists a statutory gap. The court's ruling shows how a statutory vagueness gap too easily facilitates patterns of criminalization of patients and providers. This "vagueness" concern, born of conflicts between older penal codes and current mandates, is more salient than ever as many countries — and now, states within the United States, as well — navigate massive landscape shifts in reproductive healthcare.

It is reasonable to read the Kenyan Constitution as setting a *floor* of minimum protection on all medically necessary procedures, such that further abortion policy can be built with legislation. The written mandate in the 2010 Kenyan Constitution does precisely this, with the explicit opening for further written law enabling abortions. Article 26(4) sets forth that abortion is permitted not only if "there is need for emergency treatment, or the life or health of the mother is in danger" but also "if permitted by any other written law."<sup>58</sup> The 2010 Kenyan Constitution's Article 26(4)<sup>59</sup> was a part of a constitution that centered women's rights in writing.<sup>60</sup> The 2010 Constitution also set an agenda for one-third of government seats to belong to women, improved protections of women's property rights, and expanded economic and social rights including a right to healthcare services.<sup>61</sup> Article 26(4) was the center of abundant controversy with churches and roused Republican lawmakers in the United States in 2010 who were looking to foreign aid

<sup>57</sup> *Id.* at 34 ("These cluster of rights includes, right to life, right to privacy, freedom of choice, dignity, security and conscience.").

<sup>58</sup> CONSTITUTION art. 26(4) (2010) (Kenya); see also Sam Kiplagat, *High Court to Decide on Landmark Post-abortion Care Case*, THE NATION (Dec. 28, 2021), <https://nation.africa/kenya/news/gender/high-court-to-decide-on-landmark-post-abortion-care-case-3665390> [<https://perma.cc/7DVW-599H>].

<sup>59</sup> The court also cited Article 26(4) in *FIDA*, declaring that abortion is legal for victims of sexual violence and, thus, that the Ministry of Health could not obstruct women's and girls' "right to the highest attainable standard of health" by refusing to publish training materials and standards of care for abortion procedures. See *Fed'n of Women Laws. v. Att'y Gen. (FIDA)* (2015) Petition No. 266, at 25–26 (H.C.K.) (Kenya), <http://kenyalaw.org/caselaw/cases/view/175490> [<https://perma.cc/FH2E-PUZF>].

<sup>60</sup> See Natasha W. Kimani & Lyndsey Jefferson, *Achieving Gender Equality in Kenya: "A Constitution Is Just a Piece of Paper if It's Not Implemented"*, CHATHAM HOUSE (July 1, 2020), <https://chathamhouse.org/2020/07/achieving-gender-equality-kenya-constitution-just-piece-paper-if-its-not-implemented> [<https://perma.cc/XAF6-SCK6>].

<sup>61</sup> See CONSTITUTION arts. 40(2)(b), 43(1)(a), 81(b) (2010) (Kenya); Susan Anyangu-Amu, *Kenya's New Constitution Protects Women's Rights*, MS. MAG. (Aug. 10, 2010), <https://msmagazine.com/2010/08/10/resounding-yes-to-kenyas-new-constitution> [<https://perma.cc/ZF5J-C7H8>].

as a means of reining in the mandate to legislate: the essential caveat in clause four that reads “or if permitted by any other written law.”<sup>62</sup> This caveat was bluntly dubbed “abortion on demand.”<sup>63</sup>

Realistically, the Kenyan Constitution does leave open the possibility of expanding abortion access, but it is a possibility entirely dependent on an abortion-friendly legislature. The first two parts of the ruling explicitly discussed the need for *more legislation*, but with the strong directive that such statutes be clear with regards to enforcement.<sup>64</sup> In discussing the reconciliation of any constitutional right with a potential criminal law, the High Court highlighted one of its canons of constitutional interpretation: “Adopt the interpretation that most favours the enforcement of a right or fundamental freedom.”<sup>65</sup> The rights to health and to abortion healthcare are explicitly included in the floor of constitutional prescriptions upon which the court suggested that legislators may then build further permissions.<sup>66</sup> However, if the legislature does not construct new statutory infrastructure, law enforcement can look to vague criminal law to reproduce historical patterns of oppressions on the new constitutional laws.

Legislative neglect to retire criminalizing abortion laws without adjusting for the recent constitutional architecture allows social mores to profoundly affect the enforcement of abortion laws. This in turn criminalizes the most vulnerable people who could be subjected to arrest or detention (those who are societally marginalized on the basis of socioeconomic status, marital status, age, gender, or ethnicity). A study done by the Kenyan government indicated that inducement and post-abortion care in Kenya are dangerous in a way that is medically unnecessary and that access to safe and effective procedures is severely limited by factors — like provider hesitation to treat patients — that have been shaped by social standards and stigmas.<sup>67</sup> For example, the Ministry of Health refused to retain its written, effective abortion care guidelines until mandated to reimplement the guidelines with the close of the *FIDA* case in 2021.<sup>68</sup> Young women and divorced women seeking abortion

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<sup>62</sup> See Jeffrey Gettleman, *Kenyan Constitution Opens New Front in Culture Wars*, N.Y. TIMES (May 13, 2010), <https://www.nytimes.com/2010/05/14/world/africa/14kenya.html> [<https://perma.cc/V4Z4-A26C>] (quoting CONSTITUTION art. 26(4) (2010) (Kenya)).

<sup>63</sup> *Id.*

<sup>64</sup> See *PAK*, 262 K.L.R. at 30, 34.

<sup>65</sup> *Id.* at 32.

<sup>66</sup> *Id.* at 30 (“Parliament should therefore, as the legislative body, fast track legislation that provide for access to safe abortion for women in Kenya and to actualize the provisions of [A]rticle 26(4) of the Constitution. . . . [O]ther legislation exists to effectuate other provisions of the [C]onstitution including the Access to Information Act 2016, meant to actualize [A]rticle 35 of the Constitution.”).

<sup>67</sup> REPUBLIC OF KENYA MINISTRY OF HEALTH, INCIDENCE AND COMPLICATIONS OF UNSAFE ABORTION IN KENYA 8–9 (2013).

<sup>68</sup> See Press Release, Ctr. for Reprod. Rts., Kenya’s High Court Issues a Landmark Ruling on Access to Safe Abortion in a Case Against Ministry of Health (June 12, 2019), <https://reproductiverights.org/kenyas-high-court-issues-a-landmark-ruling-on-access-to-safe-abortion-in-a-case-against-ministry-of-health> [<https://perma.cc/CFY3-LDMG>].

care or post-abortion care — patients facing some of the most severe social stigma — saw the highest rates of severe complications, including potential sepsis and organ failure.<sup>69</sup> An estimated twenty-eight women and girls die from unsafe abortions every week in Kenya.<sup>70</sup> PAK's facts and public face indicated who is made vulnerable by a lack of clarity in the law. The gap between the Penal Code and Constitution opened room for the criminalization of the most vulnerable members of the community, such as PAK, who, unable to raise 50,000 Kenyan shillings for bail, ended up imprisoned for a month for the "crime" of having a miscarriage.<sup>71</sup> Young reproductive subjects are typically excluded from property ownership and taught complex social lessons about the value and valence of their bodies. Young people who can get pregnant are imagined, even by scholars outside the legal arena, to be the discursive grounds upon which state articulations of social organizing principles and gendered order play out.<sup>72</sup> However, the intervening twelve-year period in which the incompatibility of the Penal Code and the Constitution were running up against one another was a statutory "lacuna"<sup>73</sup> that most affected bodies caught in historical patterns of oppression.

Many countries and states are faced with similar statutory lacunae; deferring the clarity that closes the gap between potential criminalization and a fundamental right to health, including reproductive health, places the most marginalized members of society in danger. Changes in the reproductive health landscape are occurring rapidly across the globe, many in response to such lacunae. Last September, Mexico's Supreme Court issued a ruling binding on all states that struck down a law imposing prison terms on patients and providers involved in illegal abortions.<sup>74</sup> In February 2022, Colombia's constitutional court voted to decriminalize abortion for the first twenty-four weeks of pregnancy.<sup>75</sup>

<sup>69</sup> REPUBLIC OF KENYA MINISTRY OF HEALTH, *supra* note 67, at 7.

<sup>70</sup> CTR. FOR REPROD. RTS. ET AL., FIDA KENYA & 3 OTHERS VS. ATTORNEY GENERAL & 2 OTHERS CONSTITUTIONAL PETITION NO 266 OF 2015, at 2 (2019), <https://reproductiverights.org/sites/default/files/2019-10/CFHR101-Cover.pdf> [<https://perma.cc/56PV-Q36A>]. The increased use of medication abortion has the potential to greatly improve some of these outcomes, but access to those kinds of pills is aggressively regulated, possibly because of how these medications could be used for abortions deemed "voluntary," not "medically necessary." See *Health Intermediaries in Kenya Support Women in Abortion Self-Care*, IPAS (Nov. 22, 2019), <https://www.ipas.org/news/health-intermediaries-in-kenya-support-women-in-abortion-self-care> [<https://perma.cc/F5MB-EGHS>].

<sup>71</sup> CTR. FOR REPROD. RTS. & REPROD. HEALTH NETWORK KENYA, *supra* note 18, at 3.

<sup>72</sup> See, e.g., JENNIFER L. MORGAN, LABORING WOMEN: REPRODUCTION AND GENDER IN NEW WORLD SLAVERY 14 (2004); Lata Mani, *Contentious Traditions: The Debate on SATI in Colonial India*, CULTURAL CRITIQUE, Autumn 1987, at 119, 123.

<sup>73</sup> PAK, 262 K.L.R. at 49.

<sup>74</sup> Vanessa Romo, *Mexico's Supreme Court Has Voted to Decriminalize Abortion*, NPR (Sept. 7, 2021, 7:12 PM), <https://www.npr.org/2021/09/07/1034925270/mexico-abortion-decriminalized-supreme-court> [<https://perma.cc/2XRD-RRMW>].

<sup>75</sup> Samantha Schmidt & Diana Durán, *Colombia Court Decriminalizes Abortion, Adding to Regional Momentum*, WASH. POST (Feb. 21, 2022, 8:04 PM), <https://www.washingtonpost.com/world/2022/02/21/colombia-decriminalize-legal-abortion> [<https://perma.cc/2FQG-WVU6>].

Decriminalization or the active striking down of criminal laws is a clear, step-by-step path to avoid vagueness in potential enforcement. Last year in Argentina, President Alberto Fernández signed legislation allowing abortion during the first fourteen weeks of pregnancy,<sup>76</sup> following on the heels of a case of an eleven-year-old having a forced birth following rape that garnered global attention.<sup>77</sup> Pre-2021 Argentine law provided for abortions to save a mother's life, but there were gaps as to those provisions' application.<sup>78</sup> The specter of criminal repercussions interceded, and the eleven-year-old was forced to give birth. Conscientious objection continues to exacerbate stigma for women seeking abortion care and post-care in Argentina.<sup>79</sup> However, the move to legalize ensures that fewer people's safety will need to be compromised — and legal accommodations can be made around inevitable health realities. In India, the abortion-enabling Medical Termination of Pregnancy Act's 2021 Amendment adjusted the legal abortion window up from twenty to twenty-four weeks in select conditions, adding another four weeks to protect pregnant people in the subcontinent,<sup>80</sup> since reproductive outcomes are affected by police disregard for pregnant people's needs and waiting/travel times are exacerbated by the lack of healthcare providers throughout rural areas.<sup>81</sup>

In the United States, the Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization*<sup>82</sup> has left states who hadn't tightened up their post-*Roe* legal infrastructure scrambling. The lack of guidance has had variegated impacts. In Kansas, a July referendum upheld state constitutional protections after the federal protections fell, keeping abortion legal in Kansas for up to twenty-two weeks.<sup>83</sup> In Texas, Attorney General Ken Paxton is filing emergency motions to be able to enforce

<sup>76</sup> Kevin Sieff et al., *Abortion Rights Advocates Throughout Latin America Draw Inspiration from Argentina Vote*, WASH. POST (Dec. 30, 2020, 5:06 PM), [https://www.washingtonpost.com/world/the\\_americas/argentina-abortion-legal-fernandez-senate-vote/2020/12/28/4a6d77d4-492a-11eb-a9f4-0e668b9772ba\\_story.html](https://www.washingtonpost.com/world/the_americas/argentina-abortion-legal-fernandez-senate-vote/2020/12/28/4a6d77d4-492a-11eb-a9f4-0e668b9772ba_story.html) [<https://perma.cc/FJ4C-J59K>].

<sup>77</sup> Michael Brice-Saddler, *An 11-Year-Old Pleaded for an Abortion After She Was Raped. She Was Forced to Give Birth.*, WASH. POST (Feb. 28, 2019, 8:23 PM), <https://www.washingtonpost.com/world/2019/03/01/an-year-old-pleaded-an-abortion-after-she-was-raped-she-was-forced-give-birth/> [<https://perma.cc/R772-9M2H>].

<sup>78</sup> *Id.*

<sup>79</sup> Daniel Politi, *Abortion Is Now Legal in Argentina, But Opponents Are Making It Hard to Get*, N.Y. TIMES (Mar. 7, 2021), <https://www.nytimes.com/2021/03/07/world/americas/argentina-abortion-opposition.html> [<https://perma.cc/KX9E-F8KV>].

<sup>80</sup> Medical Termination of Pregnancy (Amendment) Act, 2021, Bill No. 8 of 2021, § 3 (Mar. 25, 2021) (India).

<sup>81</sup> See generally APARNA CHANDRA ET AL., LEGAL BARRIERS TO ACCESSING SAFE ABORTION SERVICES IN INDIA (2021), [https://reproductiverights.org/wp-content/uploads/2021/08/Legal-Barriers-to-Accessing-Safe-Abortion-Services-in-India\\_Final-for-upload.pdf](https://reproductiverights.org/wp-content/uploads/2021/08/Legal-Barriers-to-Accessing-Safe-Abortion-Services-in-India_Final-for-upload.pdf) [<https://perma.cc/TWZ9-9W46>].

<sup>82</sup> 142 S. Ct. 2228 (2022).

<sup>83</sup> Mitch Smith & Katie Glueck, *Kansas Votes to Preserve Abortion Rights Protections in Its Constitution*, N.Y. TIMES (Aug. 2, 2022), <https://www.nytimes.com/2022/08/02/us/kansas-abortion-rights-vote.html> [<https://perma.cc/ZE53-DB4P>].

the state's pre-*Roe* criminal statutes and prosecute abortions thereunder.<sup>84</sup> In Louisiana, hospitals have refused to perform abortions for women carrying fetuses with medical conditions that will definitely result in stillbirth or infant death within days of birth.<sup>85</sup>

Unclear legal boundaries can lead to medical decisionmaking paralysis, with providers often erring on the side of less liability. The rational desire not to incriminate oneself as a provider in a nebulous legal situation puts patients experiencing pregnancy complications or loss at a higher risk in such situations than in situations where explicit legal structures (explicit insofar as the law demarcates either that it is definitively legal or definitively illegal to procure voluntary abortions or lifesaving reproductive healthcare within given state boundaries) incentivize a patient to cross state lines or enable a provider, doula, or another party to advise the patient on feasible options.<sup>86</sup> Less ambiguity in layers of abortion-related legal guidance can result in fewer patients experiencing lethal pregnancy complications/losses and fewer patients and providers facing unpredictable arrests and detention.<sup>87</sup>

In the process of reconciling conflicting abortion policy, the facts that led to the complaint in *PAK* offer an essential lesson in who suffers from the lacunae in statutes where outdated policies are not explicitly overwritten. This is especially salient given the fraught environment in which pregnant people seek reproductive healthcare. Vagueness punishes the most marginalized members of society, and clearer regulation is necessary, especially where new policies are innovated — or older ones overturned. The legal reasoning the High Court offered in *PAK* sets out a path for activists seeking legal recourse to preempt harmful overcriminalization: call on your legislators to clearly demarcate the boundaries of policing abortion, or law enforcement will tend in the direction of reinforcing social hierarchies and patterns of historical oppression. A flat decriminalization of abortion is the clearest floor from which to work. When the question of what law to follow is constantly hanging over healthcare providers, the desire to avoid any potential criminal liability often leads to the exclusion of pregnant people from accessing necessary and potentially lifesaving forms of care.

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<sup>84</sup> Press Release, Ken Paxton, Att'y Gen. of Tex., AG Paxton Files Emergency Motion with Texas Supreme Court in Support of Pre-*Roe* Statutes Barring Abortions (June 30, 2022), <https://www.texasattorneygeneral.gov/news/releases/ag-paxton-files-emergency-motion-texas-supreme-court-support-pre-ro-e-statutes-barring-abortions> [<https://perma.cc/4GVD-UPB8>].

<sup>85</sup> Amanda Musa, *Louisiana Woman Claims She Was Denied an Abortion After Fetus Was Diagnosed with a Fatal Condition*, CNN (Aug. 20, 2022, 12:09 AM), <https://edition.cnn.com/2022/08/20/us/louisiana-abortion-fatal-condition/index.html> [<https://perma.cc/6U5D-DXQD>].

<sup>86</sup> Dov Fox, *Medical Disobedience*, 136 HARV. L. REV. (forthcoming) (manuscript at 47–50) (explaining that medical providers are more likely to fall on the side of omitting to act on a potential abortion that is legally risky), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4152472](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4152472) [<https://perma.cc/NR5Y-2QBV>].

<sup>87</sup> Cf. NAACP v. Button, 371 U.S. 415, 423–33 (1963) (noting that “a vague and broad statute lends itself to selective enforcement against unpopular causes,” *id.* at 435).