



Huduma Namba: Time To Get It Right!

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Time to get it right



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Executive Summary



Digital Identity is one of the current concerns in the Human Rights and ICT sectors in Kenya, given the Government's Huduma Namba (Kiswahili term for Service Number) initiative and the planned adoption of the Huduma Namba across almost every sector. The Huduma Namba is the name given to Kenya's digital identification program known as the National Integrated Information Management System (NIIMS).¹

Unfortunately, over Eighteen Million persons in Kenya do not have legal identification for various historical and systemic injustices, and the shift towards Huduma would result in their further exclusion from access to Government and private sector services. Moreover, Kenya is yet to put in place an appropriate policy, legal and multistakeholder framework to tackle privacy concerns, information security threats, discrimination and exclusion concerns, lack of legal IDs by persons from marginalized communities and regions, best interest of the child, as well as other emerging issues relating to digital IDs.

The goal of this policy brief is to provide a snapshot of the state of policy, legal and institutional framework for identity in Kenya, with a view to informing the future actions by state and non-state actors in the transition to digital IDs in Kenya.

The Policy brief calls for the establishment and implementation of effective policy, legal and institutional frameworks to secure the right to privacy, protection of personal data, inclusion, best interest of the child and fair and responsive administrative procedures. The aim is to address any issues related to registration, legal identity and the administration and use of digital IDs.

¹ Huduma Namba, last modified 3rd August 2020 <https://www.hudumanamba.go.ke/>

Approach and Methodology

B



This brief is based on a study Kenya's journey toward a digital ID system from a Human Right's perspective conducted by the Kenya ICT Action Network (KICTANet). The study is guided by the Human Rights Impact Assessment approach² as advanced by The International Business Leaders Forum (IBLF) and the International Finance Corporation (IFC), in association with the UN Global Compact.

The study used a mixed approach method which commenced with a desktop review of relevant literature, policies, laws, regulations, cases, reports and other documents from Kenya, International bodies and other relevant jurisdictions. A consultative meeting was thereafter convened and focus group discussions were conducted with several representatives from government, industry, civil society, media and academia. All the information collected was analyzed and forms the basis of this brief.

² Guide to Human Rights Impact Assessment and Management (HRIAM), last modified 3rd August 2020 https://www.globalgovernancewatch.org/docLib/20140206_hriam-guide-092011.pdf

Huduma Namba: State of Affairs



The National Integrated Identity Management System (NIIMS), was introduced by section 9A of the Statute Law Miscellaneous (Amendment) Act No. 18 of 2018,³ an omnibus Act. This meant that the section was part of a host of other statutory amendments. As such, most people were unaware of the Bill and the Huduma Namba project until the Bill was signed into law, and the government rolled out an advertising campaign that led to the Huduma Namba launch on 2nd April 2019.

There is evidence that there was more public participation, public conversation and awareness campaigns relating to Huduma Namba after the Huduma Amendment was passed than before the amendments were proposed by the Government and under debate in parliament.⁴ The lack of public awareness of the Huduma namba proposals hindered robust public participation at the point of law formulation and reform. This, coupled with Government's statements on the mandatory nature of Huduma Namba and the anticipated effects of system roll out resulted in public interest litigation seeking to ensure that Huduma Namba was rolled out in a constitutional and inclusive manner.

The Nubian Rights Forum, Kenya Human Rights Commission and the Kenya National Commission on Human Rights filed petitions in Court challenging the roll out of Huduma number. The 3 Petitions were consolidated into one case: The Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 9 others (Interested Parties) [2020] eKLR⁵ popularly known as the Huduma Case.

³ Statute Law Miscellaneous (Amendment) Act No. 18 of 2018, last modified 3rd August 2020

<http://kenyalaw.org/kl/fileadmin/pdfdownloads/AmendmentActs/2018/StatuteLawMiscellaneousNo18of2018.pdf>

⁴ Huduma Bill Public Participation a Terrible Flop, last modified 3rd August 2020

<https://www.nation.co.ke/kenya/blogs-opinion/opinion/huduma-bill-public-participation-a-terrible-flop-198124>

⁵ "Nubian Rights Forum & 2 others v Attorney General & 9 others (Interested Parties) [2020] eKLR," last modified May 15, 2020, <http://kenyalaw.org/caselaw/cases/view/189189/>

Policy environment



Kenya does not have a substantive Digital Identity policy, and in the absence of this, the implementation of Huduma Project is currently guided by the Data Protection Policy 2019 and the ICT Policy as it relates to use of ICT in the project, as well as cybersecurity elements.

While the Data Protection Policy and ICT Policy add value to the Huduma Namba implementation process, Kenya still needs a substantive Digital ID policy to guide the establishment, roll out, use and any further development of the Huduma system.



In November 2019, Kenya enacted the Data Protection Act, 2019.⁶ Though a big win for the protection of personal data in the country, the Act exempted Huduma system from the provisions of this Act.⁷ As things stand, there is no substantive data protection law that applies to the Huduma system or data collected under the Huduma project.

Further, Kenya also lacks a comprehensive Huduma Registration Rules and Regulations framework to guide the registration process, offices, institutions and citizens. However, pursuant to the judgement issued in the Huduma Namba Case, the Attorney General proceeded to publish two sets of draft regulations - The Registration of Persons (National Integrated Information System Regulation 2020⁸ and the Data Protection (Civil Registration) Regulations, 2020⁹ – to provide the required enabling legal framework for continued roll out of NIIMS. These draft regulations were then presented to the public for review.

The Registration of Persons (National Integrated Information System Regulation 2020) provides for definition of terms related to NIIMS; the structure, components and functions of NIIMS, the Huduma Database, Huduma Card and Huduma Number; the enrollment of minors, adults and foreign nationals to NIIMS; the issuance of Huduma Namba and Huduma Card; procedure for updating information on NIIMS; the application of the Data Protection Act to NIIMS as well as the access of NIIMS by various Agencies (other than Ministry of Interior).

The Second Draft Regulation is the Data Protection (Civil Registration) Regulations, 2020.¹⁰ The Regulations stem from the Data Protection Act 2019 and expound on the rights of the Data Subject in relation to Civil Registration. The regulations provide for the data protection principles applicable to NIIMS database, the rights of data

⁶ Data Protection Act, No.24 of 2019, last modified 3rd August 2020

<http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/2019/TheDataProtectionActNo24of2019.pdf>

⁷ Section 51 (2) (b) Data Protection Act 2019 last modified 3rd August 2020 http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/2019/TheDataProtectionAct_No24of2019.pdf

⁸ The Registration of Persons (National Integrated Information System Regulation 2020, last modified 3rd August 2020 <https://ict.go.ke/wp-content/uploads/2020/02/THE-REGISTRATION-OF-PERSONS-NATIONAL-INTEGRATED-IDENTITY-MANAGEMENT-SYSTEM-REGULATIONS-2020.pdf>

⁹ The Data Protection Civil Registration Regulations, last modified on 3rd August 2020

<https://ict.go.ke/wp-content/uploads/2020/02/THE-DATA-PROTECTION-CIVIL-REGISTRATION-REGULATIONS-2020.pdf>

¹⁰ The Data Protection Civil Registration Regulations, last modified on 3rd August 2020

<https://ict.go.ke/wp-content/uploads/2020/02/THE-DATA-PROTECTION-CIVIL-REGISTRATION-REGULATIONS-2020.pdf>

subjects, obligations of the civil entities collecting this data, the security safeguards required to ensure that personal data is adequately protected, the criteria for conducting a data impact assessment as well as the prescribed forms for requesting the deletion of data or restriction of processing of personal data.

This policy brief notes that while the above efforts are commendable, the legal framework should have been in place before the roll out of the Huduma project began.

There is also a *Draft Huduma Bill* that had been published by the Government in 2019.¹¹ Though a step in the right direction, the draft bill was published after establishment of NIIMS and after the filing of the Huduma Namba case. Preferably, The bill and the Data Protection Act, 2019 should have preceded the establishment of the Huduma system to avoid data protection gaps.¹² Over 12 months later, this Bill is yet to be published by the Kenya Gazette or submitted to parliament for debate and public comment.

Whatever legal frameworks the country chooses to consider and adopt, it is important to complete the enactment process while learning lessons from other jurisdictions¹³ as well as from the process leading up to the amendments that established NIIMS.

¹¹ Huduma Bill, 2019, last modified on 3rd August 2020

<https://www.ict.go.ke/wp-content/uploads/2019/07/12-07-2019-The-Huduma-Bill-2019-2.pdf>

¹² Kenya's Huduma Namba: Ambition Fraught With Risk, last modified 16th August 2020

<https://www.mondaq.com/southafrica/privacy-protection/960004/kenya39s-huduma-namba-ambition-fraught-with-risk>

¹³ "National Digital Identity Programmes: What's next? Access Now Policy Paper 2018,," last modified 16th August 2020,

<https://www.accessnow.org/cms/assets/uploads/2018/06/Digital-Identity-Paper-2018-05.pdf>

Institutional Arrangements



An effective institutional framework is key to ensure proper uptake and use of digital IDs in Kenya. There ought to be clear leadership, coordinated and multi-stakeholder approaches, commitment from relevant institutions, accountability, roles and responsibilities, clear procedures and transparency. There should also be open participation of all relevant stakeholders drawn from academia and research, the business community, civil society, Government and the technical community. The country is yet to achieve this.

One of the most prominent challenges surrounding the uptake and implementation of digital IDs in Kenya includes the fact that the Office of the Data Protection Commissioner is yet to be established. Considering that the Data Protection Act was passed in November 2019, the Government is behind in operationalization of this Act. The delay in establishment of the Office of the Data Protection Commissioner¹⁴ makes it hard to implement data protection safeguards relevant to NIIMS and all other Government systems and databases. Further, it raises issues around the procedure for the intended promulgation of NIIMS regulations.

Questions abound regarding the drafting of Data Protection Regulations before the establishment of the Office of the Data Commissioner under the Data Protection Act. As per the Act, regulations should be formulated by the Data Commissioner in consultation with the Cabinet Secretary for ICT. Due process has not been followed as the regulations have been drafted in the absence of the establishment of the Office of the Data Protection Commissioner.

The government also needs to clarify the Huduma system institutional framework within the Ministry of Interior and Coordination of National Government including who is in charge of the system, and whether NIIMS will be administered by a department already in existence or by a new department or office to be formed for that purpose.

¹⁴ Labour Court Suspend Interviews for New Data Commissioner, last modified 3rd August 2020, <https://www.nation.co.ke/kenya/news/labour-court-suspend-interviews-for-new-data-commissioner-position-1446752>

Conclusion and Recommendations



The Huduma Namba initiative by the Government is commendable in respect of the desire to provide digital identity to residents of Kenya. It is a step in the right direction and fits within the broader international framework for provision of legal identities.¹⁵ The government however needs to ensure it is implemented in line with the Constitution of Kenya, the Bill of Rights, and in a free and fair manner with due regard for special and vulnerable groups.

The uptake and success of Huduma Namba in Kenya will depend on resolution of the gaps identified within the policy, legal and institutional framework as well as the redress of key public and stakeholder concerns. Accordingly, promulgating a Digital Identity Policy; enacting the needed Huduma Namba and System Regulations; the establishment of the Office of Data Protection Commissioner, and the recruitment of a substantive holder of office are key. In addition, the clarifying of the institutional framework for administration of the Huduma system within the Ministry of Interior are critical at this stage.

The National Government and agencies, in collaboration with all relevant stakeholders should strive to deliver and implement an effective, responsive and inclusive digital ID system for Kenya. This calls for developing appropriate policies and practices, implementing relevant information security safeguards, focusing on people, and marshalling the necessary political will to make digital ID a reality in Kenya.

Accordingly, the following propositions are necessary:

Policies

Kenya needs a comprehensive Digital ID policy that enables the implementation of a digital ID that is fit for purpose, inclusive, offers choice and is secure. Good digital identities offer a reliable way for individuals to build trust in who they claim to be, to exercise their rights and freedoms, and demonstrate their eligibility to access services. Inclusive identity removes structural barriers that prevent anyone from accessing the systems as well as outline administrative procedures to address incidences of actual or alleged bias, prejudice or discrimination. Useful digital identities offer access to a wide range of useful services. Further the digital ID policy should provide the specific

¹⁵ "Sustainable development goals," last modified 16th, August 2020, <https://sustainabledevelopment.un.org/sdg16>

uses of the Data collected and prohibit use of data for other purposes rather than the one stated in the law. The policy should ensure individuals are given a choice as to how their data is used and ways to access their data, exercise their rights including provisions related to data storage, retention and security.¹⁶ They should not be denied access to basic services for lacking a digital identity. The policy should also provide information security guidelines¹⁷ that ensure the data is safe and guarded and the citizens are protected from identity theft, unauthorized data sharing and human rights violations. The policy should also restrict lawful interception and monitoring of digital identities as this may lead to the monitoring and privacy invasion of people regarded as unfriendly to the government.

Further, the policy should have specific sections that deal with how children's data is handled. Children's data is by law sensitive data and should be handled with the highest degree of care. The section should also elaborate rights of a child relating to their data and decisions made on their behalf that may be exercised by the child on attaining the age of majority.

The Registration of Persons (National Integrated Information System Regulation 2020 and the Data Protection (Civil Registration) Regulations, 2020 and the Data Protection (Civil Registration) Regulations, 2020, stem from the Data Protection Act 2019. These Draft regulations need more refining and amending in line with public consultations and stakeholder concerns.

The Government needs to address key concerns regarding: enabling robust public participation in particular for matters affecting human rights; privacy concerns including enacting adequate applicable data protection laws and regulations for digital IDs in Kenya. Additionally, safeguards against collection of excessive and intrusive information like DNA and GPS; information security, particularly clear information security standards; and procurement and security of services and technologies being used to collect personal data. Additionally, protocols and standards regarding data breaches; identity theft and compromise; and banning or regulating sharing of NIIMS data with third parties. Finally, provisions relating to collection and processing of child data in order to safeguard the best interest of the child, as well as those dealing with discrimination, exclusion and denial of social economic rights, and interference with access to essential services or exercise of political rights.

Political Will

Clear leadership and institutional structures coupled with political are is key in achieving a digital ID system that is fit for purpose, is inclusive, offers choice and is secure. This includes establishing the Office of Data Protection Commissioner; clearly demarcating and communicating the department/ institution in charge of Huduma System, the leadership structure as well as accessibility and channels for the public to communicate and engage with Huduma Namba implementers.

In addition, the government would need to allocate and make financial and human resources available for the implementation of digital IDs in Kenya as well as ensure appropriate and sufficient stakeholder engagement. Adequate financial and human

¹⁶ "National Digital Identity Programmes: What's next? Access Now Policy Paper 2018,," last modified 16th August 2020, <https://www.accessnow.org/cms/assets/uploads/2018/06/Digital-Identity-Paper-2018-05.pdf>

¹⁷ Ibid

resources should be allocated towards ensuring the huduma system is security and resilient against cyber threats and attacks. Additionally, all legal and policy reforms should be done in a manner that is representative, multi-stakeholder in nature and informed by international best practice, as well as local realities. Policy makers need to understand that without multi-stakeholder collaboration, digital ID systems can result in more harm than good.

People

A digital ID system that is fit for purpose, inclusive, secure and offers choice is centered on people. All measures taken whether policy, legislative or administrative should be buttressed by public participation.

From the onset, there should be meaningful public participation when it comes to developing any policies regarding NIIMS. This is not only in line with Article 10 of the Constitution of Kenya, 2010 but is also important for avoiding litigation processes such as the Huduma Namba case. The government should engage stakeholders in every step of formulating policies.

Further, the Government should entrench culturally appropriate cyber hygiene practices to enable citizens take responsibility for protecting the digital identities as well as provide appropriate channels of communication to report any security breaches or incidence of identity theft or compromise.

Moreover, the Government should adequately educate the public about the uses and usage of digital IDs in Kenya in a manner that is educative, clear, simple and consistent, and culturally relevant.

The process of developing, implementing and maintaining Kenya's digital identity system should comply with the constitutional requirements for public participation and respect for Human Rights as provided for in the Bill of rights.

