



# **ARTICLE 19 Eastern Africa and KICTAnet**

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## **Joint Memorandum**

### **Public Participation on the Registration of Persons (National Integrated Identity Management System) Regulations, 2020**

**To: The Cabinet Secretary, Ministry of Interior, and Coordination of National Government**

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## Kenya: Registration of Persons (NIIMS) Regulations 2020 2 March 2020

### Executive Summary

ARTICLE 19 Eastern Africa (or **ARTICLE 19 EA**) and the Kenya ICT Action Network (or **KICTAnet**) present this memorandum in response to the call for public participation on the said Registration of Persons (National Integrated Identity Management System) Regulations, 2020 currently being considered by the Cabinet Secretary, Ministry of Interior, and Coordination of National Government.

### Key Recommendations

The following is a summary of our key recommendations:

1. The civil registration and identity management framework should be enacted through a stand-alone Act of Parliament. This should be subjected to (bicameral) legislative oversight and effective public participation. Notably, regulations, which generally provide guidelines of practice, cannot be used to regulate and create substantive systems which have implications on the effective and proper functioning of government, and which directly affect individuals' identity.
  - a. **Recommendation:** Enact an 'appropriate and comprehensive' civil registration and identity management through an Act of Parliament introducing a Bill to amend the Registration of Persons Act (CAP 107).
2. The Regulations exceed the ambit of the Registration of Persons Act (CAP 107) and should not provide for the registration of infants and minors.
3. The Registration of Persons Act (CAP 107) should be amended to provide for a specific government entity responsible for the NIIMS, other than the Principal Secretary (whose docket is not named in either Act or the Regulations). All the functions relating to the registration of persons should be with the Principal Registrar and staff under section 4 (and Schedule) of the Registration of Persons Act (CAP 107).
4. The regulations should provide explicit (*technical, personnel and procedural*) safeguards to ensure that registration information is accorded the highest safety and security, management and governance protection. This will ensure that trust is maintained in the digital

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ecosystem, by providing sufficient protection against abuse by authorised persons (public organs and private entities), independent contractors, amongst others.

5. The regulations should provide explicit (*technical, personnel and procedural*) safeguards for the collection, processing, use, and transfer of NIIMS data relating to the registration of persons in line with the requirements under the Data Protection Act, 2019.
6. In conjunction with civil society and other stakeholders, the Ministry should develop ‘appropriate and comprehensive regulatory frameworks’ which adhere to the High Court’s orders in Consolidated Petitions No. 56, 58 and 59 (2019) and which pay appropriate homage to the Data Protection Act (2019). This will ensure that the Regulations adhere to and respect fundamental rights of freedom of expression (or **FOE**), the right to information (or **RTI**), the right to privacy in the Constitution of Kenya, 2010 and international law.

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**General Comments: Matrix Presentation**

<b>General Comments</b>			
<b>Comment</b>	<b>Clause</b>	<b>Proposal</b>	<b>Justification</b>
<b>General Comment 1</b>	Regulation 2: <i>Interpretation</i> “foundational data” means the basic personal data of an individual for attesting the individual’s identity and includes biometric data and biographical data	We recommend amendments to section 3, Registration of Persons Act (CAP 107)	<p>We note that the use of the term ‘foundational data’ in these Regulations and any reference to ‘biometric data’ should adhere to the restrictions set out by the High Court in Consolidated Petitions No. 56, 58 &amp; 59 of 2019. The High Court ordered that the “collection of DNA and GPS coordinates for purposes of identification is intrusive and unnecessary, and to the extent that it is not authorised and specifically anchored in empowering legislation, it is unconstitutional and a violation of Article 31 of the Constitution.”</p> <p>We recommend that the various terms under section 3, Registration of Persons Act (CAP 107), are amended to pay homage to the Court’s ruling.</p>
<b>General Comment 2</b>	Regulation 2: <i>Interpretation</i> “Huduma Namba” means a unique identification number issued to an individual under the Act;	We recommend amendments to the Registration of Persons Act (CAP 107)	<p>This is a substantive provision whose definition needs to be incorporated into, and standardised across the Registration of Persons Act (CAP 107).</p> <p>We draw attention to definitional challenges under Regulation 2 and Regulation 7. The former defines Huduma Namba as meaning “ unique identification number issued to an individual under the Act.” On the other hand, the latter defines Huduma Namba as a “unique and permanent personal identification number randomly assigned to an enrolled resident.”</p>

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<p><b>General Comment 3</b></p>	<p>Entire provisions</p>	<p>We recommend amendments to the Registration of Persons Act (CAP 107)</p>	<p>Conduct prior benchmarking (pre-implementation) and cost-benefit assessments to map out ‘appropriate and comprehensive’ technical and policy standards capable of addressing the challenges of shifting from an analogue to a digital ID system, in consultation with civil society organisations.</p>
<p><b>General Comment 4</b></p>	<p>Entire provisions</p>	<p>We recommend amendments to the Registration of Persons Act (CAP 107)</p>	<p>We note that various individuals and communities unable to enrol to NIIMS will face continued exclusion and discrimination. The primacy accorded to the Huduma Namba (<i>Regulation 10</i>) and its linkage to basic services and other identity documents risks exacerbating this exclusion, and will affect their rights and freedoms to expression, to access information, to privacy, and to freedom of association and assembly.</p>

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**Matrix Presentation**

<b>Clause</b>	<b>Provision</b>	<b>Proposal</b>	<b>Justification</b>
<b>Regulation 3</b>	<i>Object of the Regulations</i>	We recommend the deletion of Regulation 3 (c)	This provision is already captured under Regulation 3 (a).
<b>Regulation 4</b>	<i>NIIMS Component</i>	We recommend the deletion of this provision	This is a substantive clause that should be proposed as an amendment to the Registration of Persons Act (CAP 107).
<b>Regulation 5</b>	<i>NIIMS Database</i>	We recommend the deletion of this provision	This is a substantive clause that should be proposed as an amendment to the Registration of Persons Act (CAP 107).  <i>See: General Comment 1.</i>
<b>Regulation 6</b>	<i>Functions of NIIMS</i>	We recommend the deletion of this provision	These functions are already captured under section 9A, Registration of Persons Act (CAP 107).  <i>See: General Comment 1.</i>

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<p><b>Regulation 8</b></p>	<p><i>Huduma Card</i></p>	<p>We recommend the deletion of this provision</p>	<p>This is a substantive clause that should be proposed as an amendment to the Registration of Persons Act (CAP 107).</p> <p>We note that the principal Act and these Regulations fail to address format issues and fail to set out appropriate and comprehensive security standards for the protection of information captured, printed and distributed on the Huduma Card.</p> <p><b>Data Capture Concerns:</b> There is no reference about the mode of storage for <i>permissible</i> biometric data in either the principal Act or the Regulations. Typically, biometric data is captured and embedded into a digital ID card using computer chips (<i>i.e., regular contact or contactless interface, dual interface or hybrid</i>).</p> <p><b>Security Concerns:</b> We note that the principal Act and the Regulations fail to specify the design and type of security measures which will be put in place to protect permissible sensitive (biometric) data, in line with the Data Protection Act (2019) from risks, including software vulnerabilities and identity theft. In line with ongoing Open Contracting initiatives, the Constitution of Kenya (2010) and the Access to Information Act (2016), the principal Act should clearly specify which entity will be responsible for the development and management of the digital Huduma card.</p> <p><b>Card Durability (Renewal and Re-Issuance):</b> We note that the principal Act and these Regulations fail to explicitly take into account the durability of digital ID cards, which have a limited life span of <i>circa</i> five (5) to seven (7) years, before the need for renewal arises.</p>
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		We recommend the deletion of Regulation 8 (3) (a).	<p><b>Huduma Card for Children</b></p> <p>We note that minors do not fall within the ambit of the Registration of Persons Act (CAP 107).</p> <p>We note that the collection of biometric (fingerprint) data for children above six (6) carries adverse profiling risks, where fingerprint data is recorded to positively identify juveniles.</p>
<b>Regulation 9</b>	<i>Primacy of Huduma Namba</i>	We recommend the deletion of this provision	<p>This is a substantive clause affecting proof of identity. The identification and verification process - using the national identity card - to prove identity is already provided under section 9, Registration of Persons Act (CAP 107). This national ID card has, since independence, served as the foundational identity and verification document for citizens in Kenya. The transfer of primacy from the national ID card to the Huduma Namba can only be effected via amendments to the Registration of Persons Act (CAP 107).</p> <p>Subject to the comments under General Comment 1, the use of biometrics for authentication is a substantive amendment that should be effected via amendments to the Registration of Persons Act (CAP 107). The principal Act should provide for technical standards and the <i>limited</i> use of biometrics for authentication.</p> <p>Notably, a failure to provide for technical standards affects the sustainability, and robustness of identity systems (World Bank (2017)). In Kenya, the limited availability of biometric authentication systems and common frameworks in Kenya affects ‘<i>interoperability and interconnectivity.</i>’</p>



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<b>Regulation 10</b>	<i>NIIMS as primary source of foundational data.</i>	We recommend the deletion of this provision	<p>This is a substantive clause that should be proposed as an amendment to the Registration of Persons Act (CAP 107).</p> <p>We recommend amendments to the Registration of Persons Act (CAP 107) which bear in mind the security risks of centralised databases, and their implication on the rights to freedom of expression and privacy.</p>
<b>Regulation 11</b>	<i>Enrolment of adults</i>	We recommend the deletion of this provision	The registration process of persons is already provided for under section 6, Registration of Persons Act (CAP 107).
<b>Regulation 12</b>	<i>Enrolment of minors</i>	We recommend the deletion of this provision	This provision is <i>ultra vires</i> . Notably, minors cannot be enrolled/registered under the Registration of Persons Act (CAP 107), as evidenced by sections 3 and 6, Registration of Persons Act (CAP 107). Section 6 magnifies that this Act applies to “all persons who are citizens of Kenya and who have attained the age of eighteen years or over or where no proof of age exists, are of the apparent age of eighteen years or over.”
<b>Regulation 13</b>	<i>Assigning Huduma Namba</i>	We recommend the deletion of this provision	<p>The Registration of Persons Act (CAP 107) pre-supposes that the Principal Secretary shall solely have all responsibility for examining the applications of all resident individuals (i.e., more than 50 million people countrywide).</p> <p>This, in our considered view, is not practical nor feasible. The Principal Secretary (<i>whose docket is not named</i>) does not have the capacity to single-handedly implement the NIIMS. The principal Act should be amended to assign the responsibility for the Huduma Namba to a specific government <i>entity</i> and not an <i>individual</i>, for legal and practical purposes.</p>

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			<p>Secondly, there already exists a framework of Registrars (Principal and Deputy Principal) and staff who are appointed under section 4 and under the First and Second Category, Schedule, the Registration of Persons Act (CAP 107), to perform all registration functions under the principal Act, including NIIMS.</p> <p>The principal Act already provides for appeal mechanisms.</p>
<b>Regulation 14</b>	<i>Issuance of Huduma Card</i>	We recommend the deletion of this provision	<p>This is a substantive clause that should be proposed as an amendment to the Registration of Persons Act (CAP 107).</p> <p><i>See: General Comment 1.</i></p>
<b>Regulation 15</b>	<i>Update of Particulars</i>	We recommend the deletion of this provision	<p>This is a substantive clause that fails to fully adhere to the procedure for the rectification of information as contained in section 9A (2)(i), Registration of Persons Act (CAP 107). This clause specifies that ‘errors in registration details are to be corrected (i.e., right to rectification) at the initiative of both the individual and/or NIIMS (and its staff).’ This right is further expounded upon in the Data Protection Act (2019).</p>
<b>Regulation 16</b>	<i>Identity documents</i>	We recommend the deletion of this provision	<p>This is a substantive that should be proposed as an amendment to the Registration of Persons Act (CAP 107). Notably, section 10, Registration of Persons Act (CAP 107) already provides for production and granting of “any licence, permit or other document” in reliance on the national ID card.</p>

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<p><b>Regulation 17</b></p>	<p><i>Application of Data Protection Act. No. 24 of 2019</i></p>	<p>We recommend the establishment of an independent authority capable of conducting periodic audits of NIIMS and capable of imposing punitive sanctions on both state organs and private entities which misuse identification systems and information</p>	<p>The continued failure to operationalise the Office of the Data Protection Commissioner (or <b>ODPC</b>) compromises the protection and promotion of informational privacy in Kenya. This, in practice, means that no recourse is available for resident individuals following a breach of their foundational and/or functional data, unauthorised access and use, and the unlawful transfer of data to third (3rd) parties (<i>including government agencies</i>).</p>
<p><b>Regulation 18</b></p>	<p><i>NIIMS Linkages</i></p>	<p>We recommend the deletion of this provision</p>	<p>This Regulation is <i>ultra vires</i>. Notably, section 9A(2), Registration of Persons Act (CAP 107) does not provide for ‘NIIMS linkages’ of other agencies to the NIIMS database. Instead, the provision provides for the ‘harmonisation, incorporation and collation of information from other government agencies’ databases <i>relating to the registration of persons</i> (not the delivery of a public service) <i>into the register</i>.’</p> <p>We propose that the Cabinet Secretary to take remedial steps to de-link any unauthorised government agencies which have already been granted access to the NIIMS database, including the Kenya Revenue Authority.</p>

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### About the Partners

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**ARTICLE 19 Eastern Africa:** ARTICLE 19 Eastern Africa is a regional human rights organisation duly registered in 2007 as a non-governmental organisation in Kenya. It operates in fourteen (14) Eastern Africa countries and is affiliated to ARTICLE 19, a thirty (30) year old leading international NGO that advocates for freedom of expression collaboratively with over ninety (90) partners worldwide. ARTICLE 19 Eastern Africa leads advocacy processes on the continent on behalf of, and with, our sister organisations ARTICLE 19 West Africa and ARTICLE 19 Middle East and North Africa.

Over the past 10 years, we have built a wealth of experience defending and promoting digital rights at the local, regional, and international levels. We have contributed to several Internet Freedom Policies, Data Protection and Cybercrime Bills including Uganda's Data Protection and Privacy Act (2019), Kenya's Data Protection Act (2019), the Kenya Cybercrime and Computer Related Crimes Bill 2014, the Tanzania Cybercrime Act, 2015 and the Huduma Bill (2019), among many others. We were also part of the Inter-Agency Technical Committee of the Ministry of ICT that developed the Kenya Cybercrime Bill, 2016 and the Kenya Data Protection Bill, 2018.

If you would like to discuss this analysis further, please contact us at [kenya@article19.org](mailto:kenya@article19.org) or +254 727 862 230.

**Kenya ICT Action Network:-** The Kenya ICT Action Network (or **KICTAnet**) is a multi-stakeholder platform for people and institutions interested and involved in ICT policy and regulation. The network aims to act as a catalyst for reform in the ICT sector in support of the national aim of ICT enabled growth and development. KICTAnet is a space for translating the ideas given by listers into meaningful proposals for resolution of challenges facing the ICT sector.

The network has largely operated as a listserv and, in the last ten (10) years, over thirty thousand five hundred (30,500) messages have been exchanged. There have been over eight thousand (8,000) different discussion threads. Most discussions happened between 2011 to 2013, and again in 2016. Top threads included the *Vision 2030 and misplaced priorities*, *Hate text messages/KICA section 29*, *Digital migration and mass ignorance*. Notably, the ICT policy discussions have had the most engagement, with over twenty seven thousand (27,000) exchanges. This confirms that KICTAnet is indeed an ICT policy platform and a reservoir of critical dialogue on matters ICT policy.

If you would like to discuss this analysis further, please contact Grace Githaiga [ggithaiga@kictanet.or.ke](mailto:ggithaiga@kictanet.or.ke).