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Indirect Discrimination: Huduma Namba (Digital Identification) and the Plight of the Nubian Community in Kenya

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Abstract

Years after Kenya's independence, the Nubians in Kenya are yet to enjoy the status of being fully-fledged citizens in their country. This is due to a variety of factors including the government's refusal to formally acknowledge them as citizens, and its reluctance to streamline the current vetting process despite the overwhelming proof of its shortcomings. The discriminatory approach in the issuance of Kenyan identity cards (IDs) through the vetting process on grounds of religion and ethnicity not only entrenches the social, political, and economic exclusion of Nubians in Kenya but is also prohibited under Article 27(4) of the Constitution as indirect discrimination. Without taking adequate steps to change the status quo, the Kenyan government has instead launched a new digital identification system whose enrolment requires citizens' IDs. Despite the full roll-out being halted by the court on grounds of data protection concerns, the switch to the Huduma Namba system is nonetheless set to disproportionately affect the ability of Nubians to participate as Kenyan citizens and contribute to their 'otherness'. Consequently, this paper argues that the mandatory operationalisation of the Huduma Namba system in Kenya will constitute indirect discrimination against the Nubian community. It conducts this assessment by discussing the moral wrongfulness of indirect discrimination and laying out the architecture of indirect discrimination law in Kenya.

Keywords: *Indirect Discrimination, Article 27(4), Nubians, Huduma Namba, Exclusion*

* The author recently graduated from Strathmore Law School with First Class Honours and is keenly interested in all matters Constitutional Law and IT Law. Being especially drawn to anti-discrimination law, Natalie is passionate about dissecting the interaction between technology and the plight of protected groups. In doing so, she hopes to help in the fight for equality and in the protection of the rights of such groups in the digital age. She would like to extend her gratitude to Mr Cecil Abungu, for his great insight. She dedicates this paper to all marginalised people fighting for a better world.

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I. Introduction

For a long time, Nubians in Kenya have been described as one of the country's 'most invisible and underrepresented communities' in all spheres of life.[1] It is thus not surprising that they are the only community to have ever been labelled as *de facto* stateless[2] persons in Kenya.[3] This categorisation of Nubians was the result of arbitrary denials and repeated delays in the provision of key documentation such as national identity cards (IDs).[4] The issuance of IDs in Kenya is governed by the Registration of Persons Act which empowers registration officials to demand proof of information while processing ID applications.[5] This discretion has been used to include additional vetting requirements for communities residing in border regions in Kenya to prevent non-Kenyans from the surrounding countries from obtaining Kenyan citizenship.[6] Prominently, Nubians who are highly concentrated in Kibera, Nairobi, are the only ethnic group mainly residing in a non-border region to be subjected to the vetting process.[7]

The Kenyan government relies on ethnicity and territory to establish belonging.[8] Therefore, while members of certain ethnic communities are regarded as true Kenyan citizens, others have to prove their belonging.[9] Despite being the sixth generation descendants of the ex-Sudanese soldiers brought to Kenya by the British during the colonial era,[10] the Kenyan government has continuously

1 Adam H, 'Kenyan Nubians; Standing up to statelessness' 32 *Forced Migration Review,* 2009, 19.

2 Tucker J, 'Questioning de facto statelessness: By looking at de facto citizenship' 19 *Tilburg Law Review,* 2014, 277. This occurs when a person does not enjoy the protection of the government of their nationality and cannot establish *de jure* status. It is contrasted with *de jure* statelessness which is when a person is not considered a national by any state under the operation of its law.

3 Abubakar Z, 'Memory, identity and pluralism in Kenya's constitution building process' in Ghai P and Ghai J (eds) *Ethnicity, nationhood and pluralism: Kenyan perspectives,* Global Centre for Pluralism, Ottawa, 2013, 31.

4 The Equal Rights Trust, *In the spirit of harambee: Addressing discrimination and inequality in Kenya,* February 2012, 86.

5 Section 8, *Registration of Persons Act* (CAP 107).

6 Kenya Anti-Corruption Commission, *Examination report on the systems, policies, procedures and practises of the Ministry of Immigration and the Registration of Persons,* April 2006, 45. National security concerns have been used to justify the subjection of these communities to a more rigorous ID application process, but Nubians are noticeably absent from the discussed communities.

7 *Open Society Justice Initiative et al (on behalf of the Nubian Community in Kenya) v Kenya,* ACmHPR Comm. 317/2006, 12, para. 71.

8 Adam H, 'Kenyan Nubians', 19.

9 Kenya Human Rights Commission, *Foreigners at home: The dilemma of citizenship in northern Kenya,* 9 May 2008, 6.

10 Minority Rights Group International, *Kenya at 50: Unrealised rights of minorities and indigenous peoples*, January 2012, 14.

denied the Nubian community due recognition as a Kenyan community[11] and questioned their assertion of belonging.[12] Consequently, Nubians are subjected to a lengthier process when applying for IDs.[13] The government generally subjects persons from certain communities in Kenya to a vetting process in an attempt to verify their 'ethnic lineage and nationality'.[14] Hence, Nubians are firstly required to appear before local leaders and community elders, and later before other district officials, police, and intelligence officers.[15] At this stage, a Nubian applicant is expected to obtain a letter and a document detailing their family lineage from the area chief before receiving a recommendation letter from a local administrator.[16] Secondly, the applicant appears before a vetting committee where they are questioned to ascertain their nationality and, depending on the views of the committee, either have their application processed or denied.[17] Such an applicant may also be required to produce additional documentation[18] and swear an affidavit at a fee.[19]

These vetting committees[20] were established in the 1980s through government administrative actions to screen applications lodged in areas with porous borders.[21] The committees have been criticised as being used to 'institution-

11 Minority Rights Group International, *Kenya at 50: Unrealised rights of minorities and indigenous peoples*, January 2012, 14; The Equal Rights Trust, *Unravelling anomaly: Detention, discrimination and the protection needs of stateless persons',* July 2010, 76. Kenya determines citizenship on parentage *(jus sanguinis*) basis where at least one parent has to be a Kenyan citizen to transfer citizenship to the child.

12 National Gender and Equality Commission, *Status of equality and inclusion in Kenya,* 2016, 189.

13 Kenyan Somalis and Coastal Arabs also face a similar challenge in obtaining identification documents as they also live on the 'margins of Kenyan citizenship'. See The Equal Rights Trust, *Unravelling anomaly: Detention, discrimination and the protection needs of stateless persons',* July 2010, 74.

14 Kenya Human Rights Commission, *Foreigners at home: The dilemma of citizenship in northern Kenya,* June 2009, 34 – 36.

15 Caribou Digital, *Kenya's identity ecosystem*, 2019, 32.

16 Kenya National Commission on Human Rights, *Out of the shadows towards ensuring the rights of stateless persons and persons at risk of statelessness in Kenya,* July 2010, 16.

17 Kenya National Commission on Human Rights, *Out of the shadows towards ensuring the rights of stateless persons and persons at risk of statelessness in Kenya,* July 2010, 18.

18 In addition to their birth certificates, school leaving certificates and an ID of their parents, they are asked for their grandparents' birth certificates, religious cards such as Madrassa cards and signed affidavits from local chiefs. See Kenya National Commission on Human Rights, *Out of the shadows towards ensuring the rights of stateless persons and persons at risk of statelessness in Kenya,* July 2010, 24.

19 *Open Society Justice Initiative et al (on behalf of the Nubian Community in Kenya) v Kenya,* ACmHPR, 11, para. 70.

20 These vetting committees are made up of tribal elders, administrative officers and representatives from the National Security Intelligence service and only meet on Tuesdays and Thursdays. There are also no statutory guidelines hence the inconsistency of the interviews. See The Equal Rights Trust, *In the spirit of harambee,* 87, and *Nubian Rights Forum & 2 others v Attorney General & 6 others* (2020) eKLR para. 112.

21 Kenya National Commission on Human Rights, *An identity crisis? A study on the issuance of national identity cards in Kenya,* 2008, 2. These areas include Wajir, Turkana, Teso, and Mandera.

alise discrimination' against Nubians[22] a majority of whom, despite being the sixth-generation descendants of the ex-Sudanese soldiers in Kenya[23] still lack proper identification.[24] The African Commission on Human and Peoples' Rights (ACmHPR) also recognised that the subjection of Nubians to these processes is attributed to their ethnicity and religion[25] demonstrating the government's failure to recognise the Nubian community's 'genuine and effective link' to Kenya as well as their lack of connection to any other state.[26] Inevitably, this burden of statelessness is transferred to Nubian children[27] who have to wait until they attain the age of majority (18 years) to acquire citizenship, hence violating their right to nationality from birth.[28]

Therefore, it is unsurprising that Nubians are overrepresented in the lowest human development index ranks in Kenya alongside other similarly situated communities.[29] Although IDs are not formally recognised as proof of citizenship in Kenya,[30] the lack of it exposes persons to hostile treatment and attracts suspicion over their citizenship from authorities[31] as well as denies them access to opportunities easily available to ID holding residents and citizens.[32] Consequently, Nubians experience the same challenges faced by all those lacking effective nationality including lack of access to public services, the inability to leave the country, vote, or vie for electoral positions.[33] Furthermore, even scholars such as Samantha Balaton-Chrimes – who assert that it would be inaccurate to continue labelling Nubians as stateless persons due to the increase in the number

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22 Kenya National Commission on Human Rights, *An identity crisis? A study on the issuance of national identity cards in Kenya,* 2008, 10.

23 Balaton-Chrimes S, 'Indigeneity and Kenya's Nubians: Seeking equality in difference or sameness' 51 (2) *The Journal of Modern African Studies,* 2013, 341.

24 *Institute for Human Rights and Development in Africa et al (on behalf of children of Nubian descent in Kenya) v Kenya,* ACERWC Comm. 002/2009, 10, para. 46.

25 *Open Society Justice Initiative (Nubian Community) v Kenya,* ACmHPR, 12, para. 73.

26 *Open Society Justice Initiative (Nubian Community) v Kenya,* ACmHPR, 13, para. 77.

27 *Institute for Human Rights and Development in Africa et al (on behalf of children of Nubian descent) v Kenya,* ACERWC, 12, para. 57.

28 Article 53(1)(a), *Constitution of Kenya* (2010).

29 Abubakar Z, 'Memory, identity and pluralism in Kenya's constitution building process', 31.

30 Kenya National Commission on Human Rights, *Out of the shadows towards ensuring the rights of stateless persons and persons at risk of statelessness in Kenya,* July 2010, 14.

31 Kenya National Commission on Human Rights, *Out of the shadows towards ensuring the rights of stateless persons and persons at risk of statelessness in Kenya,* July 2010, 21; Kenya Human Rights Commission, *Foreigners at home: The dilemma of citizenship in northern Kenya,* 9 May 2008, 6.

32 Ghai Y, 'Interpreting the constitution: Balancing the general and the particular' in Ghai P and Ghai J (eds) *Ethnicity, nationhood and pluralism: Kenyan perspectives,* Global Centre for Pluralism, Ottawa, 2013, 141; Kenya National Commission on Human Rights, *Out of the shadows towards ensuring the rights of stateless persons and persons at risk of statelessness in Kenya,* July 2010, 31, 33.

33 ACmHPR, *The right to nationality in Africa,* May 2014, 5.

of Nubians with IDs – caution against celebrating this symbol of 'formal equality without considering the need for action in relation to the post-stateless inequalities'.[34] Evidently, merely obtaining IDs has not granted Nubians equal citizenship in comparison to other Kenyan citizens.[35] They are still vulnerable to indirect discrimination.

Despite these glaring issues, the government launched the National Integrated Identity Management System (NIIMS)[36] dubbed Huduma Namba in 2019 which is set to be a 'single source of personal information of all Kenyan citizens and registered foreigners resident in Kenya'.[37] This action triggered several petitions[38] against the system on grounds such as the system's potential to exacerbate the Nubian community's struggles by either excluding or incorrectly enrolling them in the system which requires IDs for enrolment.[39] Unconvinced by this argument,[40] the High Court authorised the launch of the system but only after the implementation of a robust and constitutional regulatory framework to address data privacy concerns and after a data protection impact assessment had been conducted.[41] Failing to obey this stipulation, the state was reprimanded by the High Court in a recent decision through a series of orders quashing the roll-out as ultra vires and mandating a data protection impact assessment before processing the collected data and rolling out the Huduma Namba cards.[42]

This paper aims to provide another perspective on the impropriety and unconstitutionality of the operationalisation of the system on the grounds that the system's mandatory operationalisation would indirectly discriminate against members of the Nubian community thus exacerbating the challenges they face

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34 Balaton-Chrimes S, 'Statelessness, identity cards and citizenship as status in the case of the Nubians in Kenya' 18(1) *Citizenship Studies*, 2014, 15.

35 Balaton-Chrimes S, 'Statelessness, identity cards and citizenship as status in the case of the Nubians in Kenya', 16.

36 Section 2, *Statute Law (Miscellaneous Amendments) Act* (Act No. 18 of 2018).

37 Section 9A, *Registration of Persons Act* (CAP 107).

38 They were consolidated as *Nubian Rights Forum & 2 others v Attorney General & 6 others* (2020) eKLR.

39 *Nubian Rights Forum & 2 others v Attorney General & 6 others* (2020) eKLR para. 929. The petitioners averred that as historical issues had not been addressed yet, automating the process would increase their difficulties.

40 *Nubian Rights Forum & 2 others v Attorney General & 6 others* (2020) eKLR para. 944 – 1012. The court however acknowledged the need for a 'clear regulatory framework' that addresses the possibility of exclusion. An appeal was also filed by the petitioners against the findings of the court.

41 Section 31, *Data Protection Act* (Act No. 24 of 2019); *Nubian Rights Forum & 2 others v Attorney General & 6 others* (2020) eKLR para. 1034 – 1038.

42 *R v Joe Mucheru – Cabinet Secretary Ministry of Information, Communication and Technology & 2 others; Ex Parte Katiba Institute & another* (2021), eKLR, 22.

in seeking documentation and effective citizenship in Kenya.[43] This perspective is crucial as this paper posits that even if the government addresses the data protection concerns arising from the use of the Huduma Namba, the system will still be in violation of other fundamental rights and freedoms, such as freedom from discrimination and the right to equality. To this end, this paper proceeds as follows. Firstly, Section II interrogates what makes indirect discrimination morally wrongful relying on equality- and liberty-based theories. Section III lays out the legal threshold for indirect discrimination in Kenya, mainly through an analysis of court cases. The section ultimately sets out the test for indirect discrimination in Kenya. Section IV examines whether the mandatory operationalisation of the Huduma Namba indirectly discriminates against the Nubian community, by using the test set out in Section III. Finally, the paper proposes possible safeguards against indirect discrimination against the Nubian community in the age of the Huduma Namba system.

II. The Moral Wrongfulness of Indirect Discrimination

The law on discrimination aims to protect members of society by eliminating the advantages of dominant groups over their contraries based on traits protected either statutorily or constitutionally.[44] Direct discrimination occurs where there is a measure or an act, which essentially sanctions the differential treatment of persons based on a protected characteristic.[45] This type of discrimination is condemned for its ability to demean,[46] disrespect,[47] and undermine the wellbeing[48] of its victims, among other reasons. Indirect discrimination, on the other hand, is an appreciation of the fact that obliviousness to group differences in the law leads to a 'false universalization of equality'.[49] This is because certain personal traits have in the past interacted with certain societal structures in ways that have resulted in making some demographics of people relatively more vulnerable[50]

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43 Khagai A, 'Identity week 2020 – A recap on Kenya's transition to digital ID system and the role of communities' Legal Empowerment Network, November 2020 -< https://community.namati.org/t/identity-week-2020-a-recap-on-kenyas-transition-to-digital-id-system-and-the-role-of-communities/77764 > on 28 September 2021.

44 Khaitan T, *A theory of discrimination law,* 1st ed, Oxford University Press, Oxford, 2015, 121.

45 Doyle O, 'Direct discrimination, indirect discrimination and autonomy' 27(3) *Oxford Journal of Legal Studies,* 2007, 538.

46 Hellman D, *When is discrimination wrong,* 1st ed, Harvard University Press, Cambridge, 2011, 30.

47 Eidelson B, *Discrimination and disrespect,* 1st ed, Oxford University Press, Oxford, 74.

48 Khaitan T, *A theory of discrimination law,* 138.

49 Feital T, 'Tax regressivity as indirect discrimination: An analysis of the Brazilian tax system in light of the principle of non-discrimination' 230 *Revista de Informacao Legislativa,* 2021, 225.

50 Feital T, 'Tax regressivity as indirect discrimination', 227.

and therefore in need of protection against outright discrimination and its subtler forms.[51] It not only allows us to detect inadvertent disparate effects but also compels all actors to interrogate the impact of their practices or policies on people who are different from them.[52]

Some theories of indirect discrimination characterise its moral wrongfulness as lying in its ability to entrench prior injustice.[53] Others criticise its unfair subordination to others,[54] its ability to take away the deliberative freedoms of its victims,[55] and the failure of its perpetrators to give proper weight to others' disadvantages in decision making.[56] Notwithstanding all the disagreements as to the validity, usefulness, and purpose of the concept of indirect discrimination as well as the moral culpability attached to its perpetrators (if any), there is consensus on the need to prohibit it.

i. Indirect discrimination as compounding injustice

Deborah Hellman advances a theory of indirect discrimination by developing the anti-compounding injustice principle. This principle argues that the immorality of indirect discrimination lies in the fact that an actor compounds the harm suffered by a victim of discrimination earlier[57] through their act or policy and that labelling it as such allows one to better recognise the systemic nature of discrimination.[58] Actors are expected to practice restraint in their dealings with such persons for the sake of justice in society.[59] However, for an actor to be morally blameworthy for compounding injustice, two conditions must first be met.

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51 Loenen T, 'Indirect discrimination as a vehicle for change' 6(2) *Australian Journal of Human Rights,* 2000, 86.

52 Brems E, 'Unequal human rights impact of the COVID-19 pandemic: The added value of indirect discrimination framing' Harvard Law School, Human Rights Program Working Paper Number 21-003, 2021, 41 – https://biblio.ugent.be/publication/8741244/file/8741252.pdf on 3 December 2021.

53 Hellman D, 'Indirect discrimination and the duty to avoid compounding injustice' in Collins H, Khaitan T (eds), *Foundations of indirect discrimination law,* Hart Publishing, Oxford, 2018, 106.

54 Moreau S, *Faces of inequality: A theory of wrongful discrimination,* Oxford University Press, New York, 2020, 185.

55 Moreau, *Faces of inequality: A theory of wrongful discrimination,* 78.

56 Moreau S, 'The moral seriousness of indirect discrimination' in Collins H, Khaitan T (eds), *Foundations of indirect discrimination law,* Hart Publishing, Oxford, 2018, 134.

57 Hellman D, 'Big data and compounding injustice' Social Science Research Network, 2020, 1.

58 Hellman D, 'Indirect discrimination and the duty to avoid compounding injustice', 120.

59 Hellman D, 'Indirect discrimination and the duty to avoid compounding injustice', 120.

Firstly, the actor's actions must either entrench or exacerbate the disadvantages suffered by protected groups due to unfair treatment in the past. An actor is thus morally blameworthy for their failure to interrogate their actions and their possible effects on persons bearing protected traits and take reasonable steps to avoid the occurrence of injustice.[60] Secondly, the actor must also rely on the previous wrong or its resultant effects in their decision-making. Failure to re-evaluate their actions in such contexts thus results in compounding injustice as the actions either move the past injustice into an entirely new sphere or worsen it in its present form.[61]

This duty attaches to all actors – including government actors – even where they were previously blameless and thus, the actions of the first wrongdoer become an obstacle for all subsequent actors.[62] Therefore, all actors are barred from proceeding with their actions in such situations unless there are other counteracting reasons for them to do so.[63]

ii. Indirect discrimination as inadequate consideration

According to Sophia Moreau, where an unbiased agent institutes a neutral policy that unevenly impacts an already disadvantaged group negatively, the agent is still morally culpable for the effects of the policy.[64] By rejecting the emphasis placed on the differences between direct and indirect discrimination, Moreau insists that actors in both instances are blameworthy for their failure to acknowledge others as persons of equal moral worth in their deliberation. This is especially evident in situations where decision-makers fail to consider seriously the vulnerability of certain groups and their historical oppression in their considerations.[65] In a similar vein, Shelagh Day and Gwen Brodsky attach moral culpability onto perpetrators of indirect discrimination by accusing them of intentionally seeking to maintain the *status quo* which entails disregarding the needs of those who are different from them.[66]

Moreau insists that contrary to the characterisation of a perpetrator of indirect discrimination as being a blameless actor, it is troubling for an actor to

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60 Hellman D, 'Big data and compounding injustice' Social Science Research Network, 2020, 5.

61 Hellman D, 'Big data and compounding injustice' Social Science Research Network, 2020, 5.

62 Hellman D, 'Sex, causation, and algorithms: How equal protection prohibits compounding prior injustice' 98(2) *Washington University Law Review,* 2020, 486.

63 Hellman D, 'Indirect discrimination and the duty to avoid compounding injustice', 114.

64 Moreau S, 'The moral seriousness of indirect discrimination', 125.

65 Moreau S, 'The moral seriousness of indirect discrimination', 131, 145.

66 Day S and Brodsky G, 'The duty to accommodate; Who will benefit?' 75(3) *Canadian Law Review,* 1996, 458.

continue acting in ways that disproportionately disadvantage groups that have been historically stigmatised.[67] She also posits that an actor need not be responsible for the underlying conditions leading to the group being disadvantaged to bear moral responsibility[68] while pointing out that these neutral practices are often a part of an entire system of policies and practices that entrench the disadvantage of such groups.[69] Ultimately, in treating all persons as having equal moral worth, decision-makers ought to take notice of the disadvantage suffered by protected groups and ensure that their decision reflects such deliberation. The decision-makers also must have considered all possible alternatives before reaching their decision.[70]

iii. Indirect discrimination as interference with deliberative freedoms

Moreau gives another account of indirect discrimination as an interference with the deliberative freedoms of its victims. She defines deliberative freedom as the "freedom to deliberate about one's life and decide what to do in light of those deliberations without having to treat certain personal traits as costs".[71] Consequently, having deliberative freedom is being free – as much as is reasonable – from the burden of certain assumptions and costs in decision-making.[72] It is the freedom to make choices without having to constantly consider the role of otherwise extraneous traits[73] in making choices about one's day-to-day activities. The adverse effects of a facially neutral measure impede the deliberative freedom of members of marginalised groups as they then have to consider characteristics that should not be relevant while making certain decisions.

As deliberative freedom impacts choices and because choices partially shape people, the denial of deliberative freedom due to irrelevant traits in certain contexts impedes one's ability to live an autonomous life.[74] Where these obstacles

67 Moreau S, 'The moral seriousness of indirect discrimination', 127.

68 Moreau S, 'The moral seriousness of indirect discrimination', 134.

69 Moreau S, 'The moral seriousness of indirect discrimination', 128.

70 Moreau S, 'The moral seriousness of indirect discrimination', 130.

71 Moreau S, 'What is discrimination?' 38(2) *Philosophy & Public Affairs,* 2010, 147.

72 Moreau S, 'What is discrimination?', 149.

73 According to Sophia Moreau, protected traits such as gender and race are extraneous when they have no bearing on the matter at hand and yet are factored in during decision-making such that they disadvantage members of protected groups. For example, when an employer unnecessarily factors in the gender of its applicants in its decision-making during the hiring process such as to prefer the cognate group over the protected group, then the employer disadvantages members of the protected group by considering that which is irrelevant to the performance of the job. *See* Moreau S, 'What is discrimination?', 149.

74 Moreau S, 'A right to deliberative freedom: Reply to Campbell and Smith' 67(3) *University of Toronto Law Journal*, 2017, 290.

are ever-present, they prevent the victims from becoming equal members of society thus further ostracising[75] and demeaning them.[76] In assessing whether an indirectly discriminatory act wrongs a person, the protected trait being used to produce such disparate impacts must be irrelevant in that context, and the entitlement of victims to such freedoms should be weighed against the interests of other parties,[77] thus discriminatory and morally wrongful.

III. Indirect Discrimination Law in Kenya

The concept of indirect discrimination looks at the consequences of purportedly neutral acts or policies unlike direct discrimination and therefore has enormous potential as a tool for eliminating entrenched prejudice and bias in society.[78] Depending on a country's 'vision of equality', this concept can eradicate systemic and structural discrimination in society through the judicial system.[79]

i. Interpretation by the Courts

The determination of whether a facially neutral act or policy is indirectly discriminatory is highly dependent on the legal and factual circumstances surrounding the case.[80] Throughout history, judges have applied 'judicial intuition' in ensuring that fairness prevails in different contexts.[81] Consequently, the judiciary is uniquely empowered to flesh out the concept of indirect discrimination through adjudication.[82] One of the earliest judicial decisions on indirect discrimination, *Griggs v Duke Power Co.,* originated from the United States Supreme Court. It observed that neutral practices and procedures which work to maintain the status quo brought about by prior discriminatory practices cannot be maintained despite the absence of such discriminatory intent by the employer.[83] The doctrine has since spread to other jurisdictions and has been useful in the pursuit of substantive equality.

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75 Moreau S, 'A right to deliberative freedom', 295.

76 Moreau S, 'In defence of a liberty-based account of discrimination' in Hellman and Moreau (eds) *Philosophical Foundations of Discrimination Law*, Oxford University Press, Oxford, 2013, 85.

77 Moreau S, 'In defence of a liberty-based account of discrimination', 82.

78 Heymann J, Sprague A and Raub A, *Advancing equality: How constitutional rights can make a difference worldwide,* University of California Press, California, 2020, 32.

79 Dupper O, 'Old wine in a new bottle: Indirect discrimination and its application in the South African workplace' 14(2) *South African Mercantile Law Journal,* 2002, 219.

80 Christa Tobler, *Limits and the potential of the concept of indirect discrimination,* September 2008, 30.

81 Wachter S, Mittelstadt B and Russel C, 'Why fairness cannot be automated: Bridging the gap between EU non-discrimination law and AI' 41 *Computer Law & Security Review,* 2021, 44.

82 Heymann *et al*, *Advancing equality,* 35; Loenen T, 'Indirect discrimination as a vehicle for change', 88.

83 *Griggs v Duke Power Company* (1971), The Supreme Court of the United States.

It is undeniable that in promulgating the 2010 Constitution,[84] Kenyans aimed for a new era of social justice and cohesion.[85] There is little contention that the Constitution has the potential to overcome the crippling past and present preoccupation with ethnicity in Kenya.[86] This paper argues that the development of the concept of indirect discrimination in Kenya is essential to the realisation of the aspirations of Kenyans with regards to equality and the broader enjoyment of human rights.[87] This section thus discusses how various Kenyan courts have dealt with this concept of indirect discrimination.

The *James Nyarangi* case is perhaps one of the earliest cases in Kenya to touch on indirect discrimination. The High Court in this case defined indirect discrimination as 'setting a condition or requirement which a smaller proportion of those with the attribute is able to comply with, without reasonable justification' citing *Griggs v Duke Power Co*.[88] Rather disappointingly, the Court did not go any further in its discussion of the concept itself and its applicability in the Kenyan context.[89] Other courts have since followed suit by giving a similar definition of indirect discrimination only to proceed to tackle the matter of 'direct' discrimination in their analyses. Even in instances where either the petitioners have alleged indirect discrimination such as in the *Law Society of Kenya* case,[90] or where the court deemed an action to be indirectly discriminatory such as in the *MAO v the Attorney General* case,[91] and the *Cradle v Nation Media* case.[92] Kenyan courts have hardly ever delved into substantive discussions on the concept. Nevertheless, there have been a few cases that have offered more insight into the contours of indirect discrimination law such as the *Samson Gwer v KeMRI* case, the *Mohamed Fugicha* case and the *Simon Gitau* case.

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84 Constitution of Kenya Review Commission, *The final report of the constitution of Kenya review commission,* 2005, 117.

85 Ghai Y and Ghai J, 'Introduction' in Ghai P and Ghai J (eds) *Ethnicity, nationhood and pluralism: Kenyan perspectives,* Global Centre for Pluralism, Ottawa, 2013, 8.

86 Ghai Y and Ghai J, 'Introduction' in Ghai P and Ghai J (eds) *Ethnicity, nationhood and pluralism: Kenyan perspectives,* Global Centre for Pluralism, Ottawa, 2013, 8.

87 Heymann *et al*, *Advancing equality'*, 35.

88 *James Nyasora Nyarangi & 3 others v Attorney General* (2008) eKLR, 6.

89 *James Nyasora Nyarangi & 3 others v Attorney General* (2008) eKLR, 11.

90 *Law Society of Kenya v Attorney General & another; National Commission for Human Rights & another (Interested parties)* (2020) eKLR, 21, para. 113.

91 *MAO & another v Attorney General & 4 others* (2015) eKLR, 34, para. 198.

92 *Cradle – The Children Foundation (suing through the trustee Geoffrey Maganya) v Nation Media Group Limited ex parte Cradle – The Children Foundation (suing through the trustee Geoffrey Maganya)* (2011) eKLR, 9.

a. Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others

Although the Supreme Court of Kenya disallowed this petition citing a failure by the Petitioners to provide sufficient evidence in their indirect discrimination allegations,[93] the case raised and answered relevant questions on indirect discrimination law in Kenya. The Petitioners in this case asked for the Court's determination on what amounted to indirect discrimination, who bore the burden of proof, when the burden shifted, and what amounted to a *prima facie* case of indirect discrimination.[94] In its ruling, the Supreme Court did not elaborate on what it considered to be indirect discrimination nor substantiate what type of evidence it deemed most appropriate in indirect discrimination suits. Nevertheless, in its criticism of the insufficiency of the evidence provided by the Petitioners,[95] the court declared that the burden of proof was borne by the Petitioners before it shifted to the Respondent and that the standard of proof in discrimination claims is higher than the balance of probabilities standard for civil claims.[96]

b. The Mohamed Fugicha Case

The most comprehensive and instructive decision in indirect discrimination jurisprudence in Kenya is the *Mohamed Fugicha* Court of Appeal decision.[97] In its determination, the court observed that in order to ensure justice, it is fundamental to enquire whether a 'rule, policy or action that appears neutral and inoffensive on the face of it becomes discriminatory in its operation'.[98] Therefore, in assessing whether the prohibition on the donning of the hijab by female Muslim students in a public school amounted to indirect discrimination, the Court relied on the four-step test set out by Justice Silber in the *Sarika* case;[99]

a. To identify the relevant provision, criterion or practice that is applicable.

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93 *Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others* (2020) eKLR, 10, para. 53.

94 *Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others* (2020) eKLR, 4, para. 9.

95 *Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others* (2020) eKLR, 10, para. 53.

96 *Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others* (2020) eKLR, 10, para. 48.

97 *Mohamed Fugicha v Methodist Church in Kenya (suing through its registered trustees) & 3 others* (2016) eKLR.

98 *Mohamed Fugicha v Methodist Church in Kenya (suing through its registered trustees) & 3 others* (2016) eKLR, 19.

99 *Watkins-Singh, R (on the application of) v The Governing Body of Aberdare Girls' High School & another* (2008), The United Kingdom Administrative Courts.

b. To determine the issue of disparate impact that entails identifying a pool for the purpose of making a comparison of the relevant disadvantages.

c. To ascertain if the provision, criterion or practice was disadvantageous to the claimant personally.

d. Whether this policy is objectively justified by a legitimate aim and if this is an appropriate means.

However, this decision was overruled by the Supreme Court due to procedural improprieties as the Court considered it improper that the Court of Appeal decision arose from issues raised in the cross-petition filed by Mr Fugicha who was not a party to the proceedings but only an interested party. Therefore, the Supreme Court found both the High Court and Court of Appeal decisions as being in violation of the appellant's right to be heard and declared Mr Fugicha's cross-petition defective and inconsistent with the Mutunga rules.[100] The Court nevertheless proceeded to observe that the matters addressed in the decision were of 'national importance' and would be adequately canvassed should they arrive at the Supreme Court appropriately.[101] In support of the Court of Appeal decision, Justice Ojwang' of the Supreme Court criticised the majority opinion as paying undue regard to procedural technicalities contrary to the 2010 constitutional dispensation in his dissenting opinion. He termed the Appellate court's decision as 'appositely pragmatic and rational and well reflects on the desirable judicial stand'.[102]

c. The Simon Gitau Case

This case finally brought before the Supreme Court the question of indirect discrimination originating from the summary dismissal of the Petitioner by his employer for gross incompetence.[103] The essence of the suit, however, revolved around the conduct of the Respondent leading up to the Petitioner's dismissal which the Supreme Court found to be a 'drastic, harsh and unwarranted' response.[104] In concluding that there had been indirect discrimination against the Petitioner, the Supreme Court, like the Court of Appeal in the *Mohamed Fugicha* case, relied on the four-part test given by Justice Silber in the *Sarika*

[100] *Methodist Church in Kenya v Mohamed Fugicha & 3 others* (2019) eKRL, 8, para. 55-60.

[101] *Methodist Church in Kenya v Mohamed Fugicha & 3 others* (2019) eKRL, 8, para. 59.

[102] *Methodist Church in Kenya v Mohamed Fugicha & 3 others* (2019) eKRL, 14, para. 91.

[103] *Simon Gitau Gichuru v Package Insurance Brokers* (2021) eKLR, 9, para. 9.

[104] *Simon Gitau Gichuru v Package Insurance Brokers* (2021) eKLR, 30, para. 59.

case.[105] Unfortunately, the Court did not provide an analysis as anticipated by the test itself, therefore, leaving the *Mohamed Fugicha* decision as the only decision offering a substantive discussion as to the contents of the test within Kenyan jurisprudence.

The highest court, however, offered guidance on factors to consider when evaluating the justification given by respondents in such claims. It found that the actions of the Respondent towards the Petitioner including conducting investigations solely targeting him and failing to employ any other alternative short of dismissal were proof of the Respondent's intent to get rid of the Petitioner and therefore amounted to indirect discrimination.[106] The decision also emphasised that the Respondent's failure to show that it would have incurred any 'undue hardship' in accommodating the Petitioner was in itself a violation of the non-discrimination principle.[107] This reference to the 'undue hardship' doctrine with reliance on jurisprudence emanating from South Africa and Canada is also a noteworthy contribution to the indirect discrimination jurisprudence in Kenya seemingly endorsing reliance on persuasive precedents from those jurisdictions.

ii. Establishing indirect discrimination

In claims of indirect discrimination, it is important to identify the cognate group against which the protected group stands in comparison with regard to the uneven discriminatory effect that they suffer.[108] A socially salient group that can be considered either as a protected or cognate group is one whose membership to it has an impact on how they interact with others in different social contexts.[109] Prohibited disparity arises when members of a protected group are treated in less favourable ways than members of their comparator group (cognate group) in the same situation.[110] Difficulties may arise when attempting to identify a protected group's cognate such as in the case of multiple-grounds discrimination. Multiple-grounds discrimination may occur because human beings cannot be sharply divided into binary categories due to their multiple identities and memberships to different social groups. Thus, certain classes of people experience discrimination with an intensity that cannot be solely attributed to their membership in just one

105 *Simon Gitau Gichuru v Package Insurance Brokers* (2021) eKLR, 27, para. 54.

106 *Simon Gitau Gichuru v Package Insurance Brokers* (2021) eKLR, 31, para. 61.

107 *Simon Gitau Gichuru v Package Insurance Brokers* (2021) eKLR, 33, para. 64.

108 Khaitan T, *A theory of discrimination law,* 157.

109 Lippert-Rasmussen K, 'The badness of discrimination' 9(2) *Ethical Theory and Moral Practice,* 2006, 169.

110 Wachter S, Mittelstadt B and Russel C, 'Why fairness cannot be automated', 21.

of the groups.[111] This inevitably makes it difficult to accurately compare them to distinct cognate groups.[112] Due to these and other difficulties, courts have acknowledged that at times, there may be no suitable comparators if any at all[113] and instead rely on hypothetical comparators.[114]

The establishment of disparate impact or disproportionate adverse effects is approached in several ways by courts. Featuring prominently has been the appreciation of statistical evidence in showing the disparity in effects even in the absence of motive.[115] However, critics have pointed out that law and statistics do not fit well together and that it would be inappropriate to deploy scientific standards into legal assessments.[116] Additionally, adopting such an approach would make indirect discrimination suits unnecessarily costly.[117] Consequently, where there is no need to prove a specific level of disparity, a demonstration that a disparity does exist suffices.[118] Other than statistical evidence, courts also rely on 'common sense assessment, situation testing, and inferences drawn from circumstantial evidence'.[119] In the end, what type of evidence to rely on is usually made apparent by the facts surrounding the case.[120]

Disparate impact can be assessed by looking at the nature of the harm, its severity, and how many members of the protected group are affected by it as opposed to those in a comparator group.[121] In certain cases, the disparities are so apparent that the need to establish the disproportionateness in the application of the effect is rendered unnecessary.[122] The apparentness of the disproportionate effect of a measure has been embraced by the Kenyan courts in their findings

111 Wachter S, Mittelstadt B and Russel C, 'Why fairness cannot be automated', 24.

112 Atrey S, 'On the central case methodology in discrimination law' 41(3) *Oxford Journal of Legal Studies,* 2021, 792-793.

113 Hannett S, 'Equality at the intersections: The legislative failure and judicial failure to tackle multiple discrimination' 23(1) *Oxford Journal of Legal Studies,* 2003, 83.

114 Wachter S, Mittelstadt B and Russel C, 'Why fairness cannot be automated', 24.

115 Gastwirth J, Miao W and Zheng G, 'Statistical issues arising in disparate impact cases and the use of the expectancy curve in assessing the validity of pre-employment tests' 71(3) *International Statistical Review,* 2003, 578.

116 Curtis W and Wilson L, 'The use of statistics and statisticians in the litigation process' 20(2) *Jurimetrics*, 1979, 480.

117 Khaitan T and Steele S, 'Wrongs, group disadvantage and the legitimacy of indirect discrimination law' in Collins H, Khaitan T (eds), *Foundations of indirect discrimination law,* Hart Publishing, Oxford, 2018, 206.

118 Christa Tobler, *Limits and the potential of the concept of indirect discrimination,* September 2008, 31.

119 Wachter S, Mittelstadt B and Russel C, 'Why fairness cannot be automated', 32.

120 Wachter S, Mittelstadt B and Russel C, 'Why fairness cannot be automated', 37.

121 Wachter S, Mittelstadt B and Russel C, 'Why fairness cannot be automated', 26.

122 Department of Justice, *Title VI manual,* 19.

of indirect discrimination.[123] This is a positive development because such assessments ensure the realisation of the purpose of the concept of indirect discrimination in areas where despite a lack of statistical evidence, the existence of discrimination is fairly obvious.[124]

It is nonetheless crucial that a petitioner in an indirect discrimination suit asserts that there is a substantial 'underrepresentation or harmful effect' on their group[125] to enable the court to make a determination as was stipulated in the *Samson Gwer* case.[126] This is important in eliminating frivolous claims and establishing a *prima facie* case which eliminates any question as to whether the disparity occurred by chance.[127] Moreover, the petitioner ought to show a causal link between the disparate impact and the challenged act or policy.[128] It is only after the petitioner establishes this that the burden may then shift to the respondent to justify the practice.[129] However, being required to prove that there is a disparate impact must not be misunderstood as being required to explain why the disparate impact occurs; the fact that the disparate impact is established suffices.[130]

iii. The principle of proportionality

The courts begin assessing the proportionality of a measure once the petitioner has established a *prima facie* case of indirect discrimination and the respondent has attempted to justify the impugned act or policy. The fact that indirect discrimination can be justified while direct discrimination is generally unjustifiable is a key distinction between the two types of discrimination.[131] Although its justifiability has been criticised as paving the way to the 'legitimisation of systemic discrimination',[132] its proponents have cautioned that

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123 *MAO & another v Attorney General & 4 others* (2015) eKLR; *Cradle – The Children Foundation (suing through the trustee Geoffrey Maganya) v Nation Media Group Limited ex parte Cradle – The Children Foundation (suing through the trustee Geoffrey Maganya)* (2011) eKLR; and *Mohamed Fugicha v Methodist Church in Kenya (suing through its registered trustees) & 3 others* (2016) eKLR.

124 Wachter S, Mittelstadt B and Russel C, 'Why fairness cannot be automated', 34.

125 Garaud M, 'Legal standards and statistical proof in Title VII litigation: In search of a coherent disparate impact model' 139(2) *University of Pennsylvania Law Review,* 1990, 459.

126 *Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others* (2020) eKLR, 10, para. 53.

127 Khaitan T and Steele S, 'Wrongs, group disadvantage and the legitimacy of indirect discrimination law', 206.

128 Department of Justice, *Title VI manual,* section vii, 27.

129 *Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others* (2020) eKLR, 10, para. 48.

130 Heymann *et al, Advancing equality*, 34.

131 Collins H, 'Justification of indirect discrimination' in in Collins H, Khaitan T (eds), *Foundations of indirect discrimination law,* Hart Publishing, Oxford, 2018, 253.

132 Moreau S, *Faces of inequality,* 188.

its removal would lead to disastrous consequences.[133] Its proponents argue that the importance of justification as an inherent part of indirect discrimination law lies in the need to protect the liberty of discriminators in decision making as well as preventing the complete subjugation of their rights in the protection of the victim's rights.[134] Therefore, in the assessment of whether there has been indirect discrimination, adjudicators are called to consider the rationality of measures adopted by the government which negatively impact protected groups.[135]

A respondent has a multiplicity of options to choose from when it comes to justifying their act or policy after its effects have been proven to have negative and disproportionate effects on members of a protected group. Firstly, they could disprove the existence of a causal link between the effects of the act or policy and the petitioner's protected trait, or they could accept the existence of a causal link between the differential results and protected characteristics but show that it was justified for pursuing a legitimate aim and that it passes the proportionality test.[136] Moreover, showing that reasonable steps had been taken to diminish chances of the incidence of disparate impact could also be relied on as justification[137] as was alluded to by the Supreme Court justices in the *Simon Gitau* case.[138]

However, reasons such as a respondent's pursuit of increased profits through anti-competitive practices,[139] or 'purely budgetary considerations' cannot be relied on as justifications for indirect discrimination.[140] For example, the High Court in the *Cradle v Nation Media* case declared costs as insufficient justification for violating the right to access to information of persons with hearing disabilities thereby discrediting the purely budgetary considerations justification in Kenya.[141] The decision is reflective of the consensus that the veracity of cost-based

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133 Alexander L, 'What makes wrongful discrimination wrong? Biases, preferences, stereotypes and proxies' 141(3) *University of Pennsylvania Law Review*, 1992, 212.

134 Collins H, 'Justification of indirect discrimination', 269.

135 Collins H, 'Justification of indirect discrimination', 276.

136 Wachter S, Mittelstadt B and Russel C, 'Why fairness cannot be automated', 42.

137 Christa Tobler, *Limits and the potential of the concept of indirect discrimination,* September 2008, 53; Fredman S, 'Substantive equality revisited', 735.

138 *Simon Gitau Gichuru v Package Insurance Brokers* (2021) eKLR, 33, para. 64.

139 Ayres I, 'Market power and inequality: A competitive conduct standard for assessing when disparate impacts are unjustified', 95(3) *California Law Review,* 2007, 717.

140 Christa Tobler, *Limits and the potential of the concept of indirect discrimination,* September 2008, 6.

141 *Cradle – The Children Foundation (suing through the trustee Geoffrey Maganya) v Nation Media Group Limited ex parte Cradle – The Children Foundation (suing through the trustee Geoffrey Maganya)* (2011) eKLR, 10. This decision was however overruled by the Court of Appeal after conducting a balancing test in *Nation Media Group Limited v Cradle – The Children Foundation (suing through the trustee Geoffrey Maganya)* (2016) eKLR, 3, para. 10.

justifications ought to be seriously appraised.[142] On the other hand, the arguments advanced by the Respondent on appeal highlighting the necessity of conducting a proportionality test to ascertain whether the burden of accommodation upon the Respondent exceeded the 'point of undue hardship'[143] is a clear demonstration of the arguments in favour of such justifications.[144]

The proportionality test ensures that measures which seek to achieve substantive equality do not annihilate the equal treatment principle.[145] This test entails three sub principles: adequacy, necessity, and reasonableness *stricto sensu.* An acceptable measure thus has to be suitable to achieve the purpose sought by the lawmaker in the least restrictive way[146] and strike a reasonable balance in its operation.[147] It must also not alter the content of the human right in question[148] and only restrict the right to an acceptable degree needed to realise the legitimate aims of the legislator.[149] Therefore, the court addresses itself to questions on purpose, reasonableness, and necessity before embarking on the task of balancing the competing interests. In this endeavour, the court attaches 'abstract weights' to the competing interests to enable it to make a determination on whether a measure is important enough to be pursued despite its impact on the rights of the petitioners.[150] In short, it asks whether the benefits outweigh the costs. These weights are assigned in comparison with other rights or with regard to the constitutional provisions on the matter;[151] hence, constitutionally backed interests or rights are generally weightier than those without such backing.[152]

Kenyan courts, in tackling the issue of proportionality in the restriction of human rights, have declared that a law or measure is justified only when it is proportionate.[153] Proportionality is established through a four-part test[154]

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142 Department of Justice, *Title VI manual,* section vii, 34.

143 Seiner J, 'Disentangling disparate impact and disparate treatment: Adapting the Canadian Approach' 25(1) *Yale Law & Policy Review*, 2006, 117.

144 *Nation Media Group Limited v Cradle – The Children Foundation (suing through the trustee Geoffrey Maganya)* (2016) eKLR, 3, para. 11.

145 Collins H, 'Discrimination, equality and social inclusion', 18.

146 Article 24(1)(e), *Constitution of Kenya* (2010).

147 Cianciardo J, 'The principle of proportionality: The challenges of human rights' 3(1), *Journal of Civil Law Studies*, 2010, 180.

148 Article 24(2)(c), *Constitution of Kenya* (2010).

149 Cianciardo J, 'The principle of proportionality', 184.

150 Klatt M and Meister M, 'Proportionality – a benefit to human rights?' 10(3) *International Journal of Constitutional Law,* 2012, 690.

151 Klatt M and Meister M, 'Proportionality – a benefit to human rights?' 690.

152 Klatt M and Meister M, 'Proportionality – a benefit to human rights?' 690.

153 *Kenya Human Rights Commission v Communications Authority of Kenya & 4 others* (2018), eKLR, para 71.

154 *R v Oakes* (1986), Supreme Court of Canada.

to determine whether there is a just balance between public interest and the infringed right: [155]

a. Does the government action establishing the right's limitation pursue a legitimate objective of sufficient importance to warrant limiting a right?
b. Are the means in service of the objective rationally connected (suitable) to the objective?
c. Are the means in service of the objective necessary, that is, minimally impairing of the limited right, taking into account alternative means of achieving the same objective?
d. Do the beneficial effects of the limitation on the right outweigh the deleterious effects of the limitation?

In asking these questions, the court also considers whether there were other less drastic means of accomplishing the goal set by the government. Additionally, the enabling law must have been adopted legally for the limitation to be constitutional as per Article 24.[156]

The first thing a respondent is expected to prove after a petitioner has proven that there is indirect discrimination is that the act or policy was pursuing a legitimate aim. A legitimate aim is an objective whose importance necessarily trumps the drawbacks associated with it.[157] This aim must be 'legal and unrelated to discrimination',[158] and specific enough to ensure certainty over what it entails.[159] It must also bear an unmistakable relationship to the challenged act or policy[160] and 'respond to a clearly established social need'.[161] Although this is scarcely a contentious matter, the legitimacy of an aim is usually canvassed in the determination of the suitability of the means chosen to achieve it. Public interest grounds such as national security and public health,[162] public order, public morality, and the interests of defence, are deemed legitimate in cases against the

[155] *Kenya Human Rights Commission v Communications Authority of Kenya & 4 others* (2018), eKLR, para 71 – 74.

[156] Article 24, *Constitution of Kenya* (2010).

[157] Bailey A, 'Anti-discrimination law, religious organizations, and justice' 95(1060) *New Blackfriars,* 2014, 729.

[158] Christa Tobler, *Limits and the potential of the concept of indirect discrimination,* September 2008, 32.

[159] *Deepak Chamanlal Kamani v Principal Immigration Officer & 2 others* (2007) eKLR, 18.

[160] Department of Justice, *Title VI manual,* section vii, 31.

[161] *Deepak Chamanlal Kamani v Principal Immigration Officer & 2 others* (2007) eKLR, 21.

[162] *Law Society of Kenya v Attorney General & another; National Commission for Human Rights & another (Interested parties)* (2020) eKLR, 22.

state or its actors.[163] Although it is useful to leave open the possibilities of what may be considered a legitimate aim, vigilance in assessing legitimacy remains important in safeguarding against the circumvention of direct discrimination prohibitions.[164]

After establishing the legitimacy of their aim, a respondent is expected to show that the means they chose were the least disruptive. These means ought to be as narrow as possible so as to only minimally infringe on the rights of those affected by the act or policy. Approaches that are over-broad and violate the fundamental principles of justice fail to meet the least restrictive means test[165] thus considered unsuitable and unnecessary.[166] The *Simon Gitau* decision also emphasised the need for a respondent to demonstrate that they explored all other possible alternatives before settling on the challenged act or policy in its prevailing form.[167]

IV. The Impact of the Huduma Namba on the Nubian Community

The legal threshold as spelt out in the *Mohamed Fugicha* Court of Appeal decision is the prevailing threshold in Kenyan jurisprudence mirroring much of that of the common law world. The courts have declared it important to interpret the Constitution in a manner that guarantees constitutionalism and non-discrimination as well as protects fundamental rights and freedoms.[168] In this endeavour, the court has called the test of proportionality fluid in its variance depending on a society's political organisation and socio-economic substructures.[169] Consequently, this paper will proceed on a step-by-step investigation of whether the interaction between the marginalised Nubian community in Kenya and the proposed Huduma Namba system will result in their victimisation through the aforementioned indirect discrimination test set out in the *Sarika* case and adopted in the Mohamed Fugicha case.

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163 *Deepak Chamanlal Kamani v Principal Immigration Officer & 2 others* (2007) eKLR, 21.

164 Christa Tobler, *Limits and the potential of the concept of indirect discrimination,* September 2008, 35.

165 *Aids Law Project v Attorney General & 3 others* (2015) eKLR, 11, para. 65, 88.

166 Cohen-Eliya M and Porat I, 'Proportionality: Constitutional rights and their limitations by Aharon Barak' 64(3) *The University of Toronto Law Journal,* 2014, 482.

167 *Simon Gitau Gichuru v Package Insurance Brokers* (2021) eKLR, 31, para. 61.

168 *Jacqueline Okuta & another v Attorney General 2 others* (2017) eKRL, 7.

169 *Jacqueline Okuta & another v Attorney General 2 others* (2017) eKRL, 10.

i. Identifying the relevant provision, criterion or practice

Section 2 of the Statute (Miscellaneous Amendment) Act is the enabling legislation for the deployment of the Huduma Namba.[170] The Section stipulates that 'there is established a National Integrated Identity Management System' whose functions include operating a national population register, assigning unique identification numbers to each registered person, harmonising information from other government databases, and verifying information on the identification of persons.

ii. Identifying the relevant groups and disparate impact

Members of a protected group are those who possess protected characteristics such as a certain ethnicity or religion under Article 27(4) of the 2010 Constitution. Even though originally there existed no ethnic community known as Nubis, the coming together communally of the descendants of the Sudanese ex-soldiers in Kenya has led to their acquisition of the distinct categorisation as the Nubian community.[171] Nubians are also predominantly Muslims.[172] Muslims in Kenya have long been on the receiving end of discriminatory treatment from the government and have felt that their rights have been trampled on and their values eroded.[173] The continuous denial of the Kenyan-ness of members of the Nubian community and their being predominantly Muslim has exposed them to multiple-ground discrimination such that they are harmed both because they are Nubians and simultaneously Muslims, resulting in a unique form of oppression.

Due to the fact that Nubians are discriminated against on multiple grounds, it might be challenging to determine their cognate group in a straightforward manner although it is likely that their cognate group in this context would be persons who are both non-Muslim and non-Nubian and who do not undergo the ID vetting process.[174] The relative ease of members of those groups in obtaining

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[170] Section 2, *Statute Law (Miscellaneous Amendments) Act* (Act No. 18 of 2018). Noteworthy, this statute was declared null and void (pending Court of Appeal decision) due to its enactment contravening constitutional stipulations in *Senate of the Republic of Kenya & 4 others v Speaker of the National Assembly & another* (2020), eKLR 27, para. 140.

[171] Adriaan de Smedt J, 'The Nubis of Kibera: A social history of the Nubians and Kibera slums' Published Doctoral Thesis, Leiden University, Netherlands, 2011, 142.

[172] Adriaan de Smedt J, 'The Nubis of Kibera: A social history of the Nubians and Kibera slums' Published Doctoral Thesis, Leiden University, Netherlands, 2011, 96.

[173] Constitution of Kenya Review Commission, *The final report of the Constitution of Kenya Review Commission,* 2005, 106.

[174] It is prudent to note that Kenyan Arabs and Somalis also experience the effects of the vetting process in a similar manner but are not the focus of this study as they are found in border regions

legal documentation and consequently their ease in enrolling for the Huduma Namba illustrates the disadvantaged position of the Nubian community relative to most other Kenyan ethnic communities.

Nubians in Kenya are not only vulnerable to harassment by police due to lack of documentation, but have also been denied title to their territory despite having occupied it for over a hundred years.[175] Their occupancy of the lowest levels in human development indices as well as their past categorisation as stateless persons makes the Nubian community especially vulnerable to any changes in the national registration system which are not geared towards addressing their challenges in accessing documentation. Moreover, even though Balaton-Chrimes observes that more and more Nubians currently have IDs, she also notes that they remain excluded from participating in society on an equal footing with other Kenyans.[176] As a result, the neutral requirement for all citizens in Kenya to enrol into the Huduma Namba system using their IDs is more likely to negatively impact a larger percentage of the Nubian community than other communities.

iii. Identifying whether the claimant was personally affected

Indirect discrimination claims involve the experience of harm for some members sharing protected characteristics at a disproportionate rate in comparison to members of a cognate group. Under the test adopted in the *Mohammed Fugicha* case, there is a need for the petitioner to illustrate the personal effect of the provision, criterion, or practice. In that case, the Petitioner's daughters were considered by the court as the claimants who were personally disadvantaged alongside other female Muslim students. In the *MAO v Attorney General* case, both Petitioners offered their experiences as evidence of the harm suffered by poor women after childbirth in Pumwani Hospital. However, the *Cradle* case brought a new perspective to this test in that the victims need not be directly identifiable. The Court accepted the claim by the Petitioner to be acting for all children with hearing disabilities with no specific identifiable victims as adequate.

in higher numbers than Nubians. Marginalised communities due to lack of recognition as Kenyans such as the Makonde and Pemba people are also excluded from this consideration due to significant differences between their struggles and those of the Nubians.

175 Minority Rights Group International, *Kenya at 50: Unrealised rights of minorities and indigenous peoples*, January 2012, 14.

176 Balaton-Chrimes S, 'Statelessness, identity cards and citizenship as status in the case of the Nubians in Kenya' 18(1) *Citizenship Studies*, 2014, 15.

Ethnicity in Kenya plays a great role in ordering social and political interactions in the country.[177] The denial of recognition as a Kenyan ethnic community and the experience of systemic discrimination in the hands of successive Kenyan governments due to their religion and ethnicity has made the Nubian community a vulnerable and marginalised community.[178] In an attempt to illustrate such personal impact, the Nubian Rights Forum as a petitioner in the *Huduma Namba* case presented a Mr Ahmed Khalil Kafe as its first witness who gave oral evidence to the court of his own challenges in enrolling into the system.[179] His personal experience, as seen in reports on the plight of the Nubian community, could easily be corroborated by a number of Nubians in Kenya.[180]

iv. Proportionality of the use of the Huduma Namba System

To assess the proportionality of a measure, the court embarks on a four-part test that looks into the legitimacy of the aim sought, the suitability and necessity of the means, and consequently whether the benefits meaningfully outweigh the costs associated with the impugned measure or act.[181] An objective aim is one that the enacting body is empowered to pursue. In the present matter, the government seeks to harmonise all registration systems for ease of provision of government services. The aim is statute-backed and neither too broad nor vague. Furthermore, as the government is in charge of identification systems in the country and provides several services for Kenyans, the aim set out by the enabling provision is noticeably legitimate. A similar conclusion was reached in the *Huduma Namba* decision.[182] However, as the legitimacy of an aim is insufficient to justify accompanying disparate impacts, this paper assesses the proportionality

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177 Abubakar Z, 'Memory, identity and pluralism in Kenya's constitution building process', 34.

178 See The Equal Rights Trust, *In the spirit of harambee: Addressing discrimination and inequality in Kenya,* 1 February 2012; Minority Rights Group International, *Kenya at 50: Unrealised rights of minorities and indigenous peoples*, January 2012; National Gender and Equality Commission, *Status of equality and inclusion in Kenya,* 2016.

179 *Nubian Rights Forum & 2 others v Attorney General & 6 others* (2020) eKLR para73. From 1965 to 1972, Mr Kafe worked with the Kenya Police Force as a police officer and later in the Presidential escort in 1968. Shortly after, in a theft case, he lost all his identification documents—his ID, driving license and police work card. Despite filing an abstract (which become dilapidated) making an application (only to find his credentials like fingerprints unavailable in the national records) and filing an affidavit to facilitate replacement, he was unsuccessful in obtaining the documents. This goes to show that even a public officer, given his time of service as a law enforcer, faces difficulty in obtaining identification in Kenya by virtue of their being Nubian.

180 See Kenya National Commission on Human Rights, *Out of the shadows towards ensuring the rights of stateless persons and persons at risk of statelessness in Kenya,* July 2010, 24, 33.

181 *Kenya Human Rights Commission v Communications Authority of Kenya & 4 others* (2018) eKLR, para 71 – 74.

182 *Nubian Rights Forum & 2 others v Attorney General & 6 others* (2020) eKLR.

of the mandatory operationalisation of the Huduma Namba system by relying on the four-part test discussed earlier.[183]

With the emergence and popularity of digital ID systems globally, the experiences of countries such as Estonia[184] demonstrate the suitability of such systems to enhance service provision and to make the government both efficient and effective in its role as a service provider in different spheres. The Respondents in the *Huduma Namba* case also insisted on the suitability of using digital ID systems to improve public service delivery.[185] Indeed these systems promise to eliminate the problems associated with traditional registration systems while improving service delivery and pushing the economy forward.[186] The African Union has also lauded the use of digital ID systems as supporting the realisation of the Sustainable Development Goals and Agenda 2063.[187]

On the other hand, the experiences of countries such as India have exposed the unsuitability of such systems in jurisdictions with large and very diverse populations both socially and economically. The experience of India is also instrumental to countries with insufficient resources to ensure the proper adoption of such systems and those lacking a robust data protection system such as Kenya.[188] Unsurprisingly, experts have advised states to eliminate existing obstacles to documentation and acquisition of citizenship before implementing digital ID systems. This is because digital ID systems cannot be used to rectify underlying problems with systems of registration and may even exacerbate them through digitising and automating them.[189]

The aim of the establishment of the Huduma Namba system is to harmonise all national identification systems in order to enhance the provision of government services. As this aim is specific, legal, and demonstrably connected to the means employed, it is sufficiently legitimate. Still, the means chosen by the government must infringe the rights of others only as minimally as possible in

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183 *Kenya Human Rights Commission v Communications Authority of Kenya & 4 others* (2018) eKLR, para 71 – 74.

184 Goede M, 'E-Estonia: The e-government cases of Estonia, Singapore, and Curacao' 7(2) *Archives of Business Research*, 2019.

185 *Nubian Rights Forum & 2 others v Attorney General & 6 others* (2020) eKLR, para. 310.

186 CYRILLA, *Analysing the impact of digital ID frameworks on marginalized groups in sub-saharan Africa,* 8 February 2021, 2.

187 African Union, *The draft digital transformation strategy for Africa 2020-2030,*18 May 2020, 36.

188 *Nubian Rights Forum & 2 others v Attorney General & 6 others* (2020) eKLR, para. 13.

189 Mutung'u G and Rutenberg I, 'Digital ID and risk of statelessness' 2 (2) *Statelessness and Citizenship Review*, 2020, 354; Caribou Digital, *Kenya's identity ecosystem*, 2019, 33-34; CYRILLA, *Analysing the impact of digital ID frameworks on marginalized groups in sub-saharan Africa,* 8 February 2021, 28, 33.

their operation.[190] Effectively, this means that if there are other ways to reach the same goal and they are less detrimental than the one taken by the government, then the measure is disproportionate.

Whether the means employed are the least restrictive is highly contextual. In the *Law Society of Kenya* case, for example, the Court considered the requirement for all persons in COVID-19 'hotbed areas' to wear masks without mandating specific types of masks as being minimally restrictive given the circumstances. The Court highlighted the usefulness of masks in the fight against the spread of COVID-19, medical consensus on the same, and the fact that the government mandated any type of face covering, in its finding of the rule as being minimally restrictive.[191] In the *Mohamed Fugicha* case, on the other hand, it was the Court's opinion that even though the pursuit of uniformity in schools was legitimate, it was not done in the least restrictive way because uniformity could be maintained even after the school expanded its dress code to include the option for hijabs. It declared that the inflexibility of the school's means rendered the aim an unfair, disproportionate, and irrational basis for discrimination.[192]

The inevitability of the eventual replacement of manual registration systems with digital ones is apparent in a world that is fast becoming digital.[193] Digital governance, and with it digital ID systems, has been lauded for its ability to promote the realisation of sustainable development goals and other economic goals for countries.[194] In Kenya, the need to harmonise identity data and streamline service delivery is a commendable aim. Nonetheless, the implementation of digital ID systems poses great risks of exclusion of marginalised communities, ultimately worsening their position in society.[195] As such, they ought only to be implemented where there is a robust framework safeguarding against exclusion and the violation of privacy rights.[196] As revealed in the recent High Court decision declaring the roll-out as ultra vires, the system does not only pose a grave threat of exclusion[197] and statelessness for undocumented Kenyans but also places in jeopardy the data of all those enrolled on its system as data protection safeguards have been

190 *Jacqueline Okuta & another v Attorney General 2 others* (2017) eKLR.

191 *Law Society of Kenya v Attorney General & another; National Commission for Human Rights & another (Interested parties)* (2020) eKLR.

192 *Mohamed Fugicha v Methodist Church in Kenya (suing through its registered trustees) & 3 others* (2016) eKLR, 26.

193 Brewer M, Cisse H, Menzies N and Schott J, 'Mitigating governance risks in identification systems' 7 *World Bank Legal Review,* 2016, 107.

194 Ilves T, *#Tech2021: Ideas for digital democracy,* 2020, 11.

195 Brewer *et al,* 'Mitigating governance risks in identification systems', 104.

196 Brewer *et al,* 'Mitigating governance risks in identification systems', 119-120.

197 *Nubian Rights Forum & 2 others v Attorney General & 6 others* (2020) eKLR, para. 1044.

deemed subpar.[198] The system was also implemented without a comprehensive framework for its operationalisation,[199] therefore, lacks any redress mechanisms or prior impact assessment considerations. Finally, the lack of evidence of any attempts made by the state to mitigate against the risk of exclusion of groups such as the Nubians or to address the underlying problems with Kenya's identification systems shows the government's failure to consider alternative and less sweeping approaches to solving the problem of multiple registries and poor service delivery. The inadequate consideration of the effects of the mandatory operationalisation of the Huduma Namba on marginalised communities such as the Nubian community also highlights the moral wrongfulness of the acts of the Kenyan government. This culpability is further compounded by the fact that the same government is responsible for the rampant lack of documentation in the Nubian community.

Effectively, although the use of digital ID systems is inevitable, there are innumerable steps the state could have taken prior to implementing the Huduma Namba system to ensure that its operationalisation only minimally infringed on the rights of Kenyans, if at all. Requiring enrolment in the system so as to gain access to basic entitlements is also an illustration of the government's lack of consideration of the effects of such a system on parts of its population. The Huduma Namba system presents an opportunity for improvements in service provision, yet its sweeping exclusion of members of the Nubian community due to underlying problems with Kenya's registration systems renders it too restrictive a means to be permissible.

a. Proportionality stricto sensu

In the event that the Huduma Namba system is considered the least restrictive means, the court is called to look not only at the impact of the restriction of a right on an individual but also at how it affects the public in general by weighing the right being restricted against the end sought.[200] Here the court embarks on testing the measure's proportionality *stricto sensu.* In this assessment, the right to equality and freedom from discrimination of the members of the Nubian community is pitted against the government's aim to streamline service provisions for all persons living in Kenya.

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198 *R v Joe Mucheru – Cabinet Secretary Ministry of Information, Communication and Technology & 2 others; Ex Parte Katiba Institute & another* (2021), eKLR, 17.

199 *Nubian Rights Forum & 2 others v Attorney General & 6 others* (2020) eKLR, para. 1047.

200 *Bloggers Association of Kenya v Attorney General & 3 others* (2020) eKLR, para. 40 – 41.

Freedom from indirect discrimination is guaranteed in the 2010 Constitution under Article 27(4).[201] The 2010 Constitution has been praised for its protectiveness over the rights of all persons in Kenya after decades of heinous human rights abuses and inadequate protection of such rights by the courts. Kenyans had raised such serious concerns over the arbitrary denial of citizenship for persons from certain communities prompting the recommendation by the committee of experts that the draft constitution guarantees the right of every citizen to an ID and passport.[202] Although this recommendation never came to fruition, the commitment of Kenyans to protecting the wellbeing of the individuals and communities in Kenya is nowhere more evident than in the Constitution's preamble and the persistent calls to end discrimination in access to IDs by Kenyans.[203]

On the other hand, the government is also tasked with the responsibility of respecting, protecting, and promoting human rights. This includes the right to education,[204] the right to adequate housing,[205] and the right to the highest attainable standard of health.[206] The Huduma Namba system is set to facilitate the delivery of services connected to these rights by aiding in the determination of the beneficiaries of certain initiatives.[207] Yet, its operationalisation is set to significantly interfere with the rights of Nubians to equality by completely preventing them from enrolling or incorrectly enrolling them as Kenyan citizens. The government's reliance on the system is therefore set to entrench the marginalisation of Nubians as they would miss out on the developmental projects the government hopes to initiate based on the information on the Huduma Namba system.

Nubians currently report an at least eighteen-week long wait to collect their IDs which is pointedly longer than the ordinary waiting period[208] meaning that they still lag in acquiring documentation that would prove their belonging. One cannot afford to belittle the right to citizenship[209] or underplay the importance of

201 Article 27(4), *Constitution of Kenya* (2010).

202 Constitution of Kenya Review Commission, *The final report of the constitution of Kenya review commission,* 2005, 83.

203 Constitution of Kenya Review Commission, *The final report of the constitution of Kenya review commission,* 2005, 82.

204 Article 53(1), *Constitution of Kenya* (2010).

205 Article 43(1)(b), *Constitution of Kenya* (2010).

206 Article 43(1)(a), *Constitution of Kenya* (2010).

207 -< https://www.hudumanamba.go.ke/the-big-4/ > on 23 October 2021.

208 Open Society Foundations, *Legal identity in the 2030 agenda for sustainable development: Lessons from Kibera, Kenya*, October 2015, 12.

209 *Muslims for Human Rights on behalf of 40 others v Minister for Immigration & 5 others* (2017) eKLR, para. 45.

having proper documentation which is associated with more years of education,[210] and better access to formal employment and political participation.[211] The lack of nationality or proof thereof limits people's access to services and ability to enjoy the benefits tied to citizenship keeping them shackled to a less than ideal existence. It not only erodes their sense of self and belonging but also fuels resentment which correspondingly undermines Kenya's progress towards its vision of equality.

Generally, constitutional rights or values are weightier than other considerations and can only be trumped by other constitutional rights or values.[212] The court would therefore weigh the right of members of the Nubian community to equality and their freedom from discrimination against the government's desire to promote other rights through better service provision. The establishment of the Huduma Namba was effected through an Omnibus Act and without a proper framework accompanying it. Additionally, it is set to have a gravely detrimental impact on the rights and lives of Nubians now and in generations to come. The African Committee of Experts on the Rights and Welfare of the Child (ACERWC) too concluded that the impact of the discriminatory practices associated with obtaining documentation on Nubian children's education and healthcare was neither proportional nor absolutely necessary.[213] Evidently, the risk of further marginalisation through discriminatory exclusion and the risk of permanent statelessness for some members of the Nubian community is too high a price to pay for the streamlining of government services in pursuit of a political legacy. The focus should be on increasing efforts to greatly improve the standard of living for every Kenyan.

V. Recommendations and Concluding Remarks

i. Recommendations

Although it is undeniable that the future of identification systems, like most systems in the world, is a digital one, the government ought to take adequate measures to mitigate if not eliminate the risks associated with the implementation

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210 Open Society Foundations, *Legal identity in the 2030 agenda for sustainable development: Lessons from Kibera, Kenya*, October 2015, 5.

211 The Equal Rights Trust, *In the spirit of harambee: Addressing discrimination and inequality in Kenya,* February 2012, 87.

212 Klatt M and Meister M, 'Proportionality – a benefit to human rights?' 690.

213 *Institute for Human Rights and Development in Africa et al (on behalf of children of Nubian descent in Kenya) v Kenya,* ACERWC Comm. 002/2009, 11 para. 56.

of such systems. Firstly, the government ought to conduct a human rights impact assessment alongside the data protection impact assessments to develop a holistic approach to addressing these problems. In taking these preliminary steps, it would be prudent for the government to adhere to the World Bank Principles on Identification for Sustainable Development.[214] The first two principles call for universal access, the guarantee of non-discrimination in both policy and practice as well as in design, and the removal of barriers to the access and use of digital ID systems.[215] The principles declare that such digital ID systems should never be deployed to the disadvantage of individual or group rights or where they may reinforce or exacerbate contemporary inequalities.[216] Therefore, digital ID systems ought to be inclusive and only put to use after addressing or mitigating the 'legal, procedural, social and economic barriers' faced by certain groups. Finally, the tenth principle calls for the establishment of an independent authority to receive and address complaints arising from the use of digital ID systems in a fast and efficient manner without additional barriers as a further safeguard against the exclusion and discrimination of certain vulnerable communities in society.[217]

Secondly, the benefits of the Huduma Namba system should not be limited to only those with digital ID so as to avoid further marginalising members of groups such as the Nubian community. Lastly, the Kenyan government must give the Nubian community due recognition and either eliminate the discriminatory vetting processes or regulate them such that they are narrow enough to only address the state's concerns over non-Kenyans acquiring Kenyan citizenship in border regions. In consultation with key stakeholders, the Kenyan government ought to statutorily regulate such vetting processes such that their purpose, scope, procedures, and the constitution of the committees are clear. Additionally, such processes ought to adhere to constitutional values; especially inclusivity and non-discrimination and reflect cognizance of the pervasive problems with the current processes. Finally, there should be an accessible, fast and effective independent office established to specifically address complaints arising from the decisions of vetting committees and especially where there is a threat of statelessness.

214 World Bank, *Principles on identification for sustainable development,* 1 February 2021.

215 World Bank, *Principles on identification for sustainable development,* 1 February 2021, 12 - 13.

216 World Bank, *Principles on identification for sustainable development,* 1 February 2021, 13.

217 World Bank, *Principles on identification for sustainable development,* 1 February 2021, 20; CYRILLA, *Analysing the impact of digital ID frameworks on marginalized groups in sub-Saharan Africa,* 8 February 2021, 35.

ii. Conclusion

This paper has discussed the challenges faced by members of the Nubian community and other ethnic minorities in accessing citizenship in Kenya and put forward three theories on the moral wrongfulness of indirect discrimination.

After providing an overview of the architecture of indirect discrimination law in Kenya, this paper went on to analyse the position occupied by the Nubian community in Kenya and their interaction with the Huduma Namba system before arguing that the mandatory operationalisation of the Huduma Namba system passes the indirect discrimination test while failing the proportionality test. The roll-out passes the indirect discrimination test as it is set to disproportionately exclude members of the already marginalised Nubian community from enrolment even though the empowering provision is facially neutral. It thereafter fails the proportionality test in light of inadequate evidence that it is either the least restrictive means or that government sought to accommodate members of the Nubian community up to the point of undue hardship. Most importantly, the negative effects of the mandatory operationalisation of the system on the Nubian community and other similarly situated communities far outweigh the proposed benefits, therefore, rendering it disproportionate *stricto sensu*.

In conclusion, members of the Nubian community have been and continue to be victims of systemic discrimination by the Kenyan government. They are overrepresented in the lowest levels of development socially, politically, and economically due to their lack of recognition as Kenyans which leaves an overwhelming number of them without IDs and other key identification documentation. Consequently, the Kenyan government ought to refrain from, or at least rethink, the deployment of unique digital identification systems such as the Huduma Namba system because under the prevailing circumstances in Kenya, their mandatory operationalisation is both morally and legally condemnable.