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Declaration

I, ANISA ABDULRASHID, hereby declare that this research is my original work and that, to the best of my knowledge, information and belief, a degree or diploma has not been submitted previously, in whole or in part, to any other university. Other works cited or referred to are acknowledged accordingly.

Signed: ANISA ABDULRASHID

Date:30th JULY 2021

This dissertation has been submitted for examination with my approval as University.

Supervisor.

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List of Cases

1. *Anarita Karimi Njeru Case v Republic* [1979] eKLR.
2. *Mumo Matemu v Trusted Society for Human Rights Alliance & 5 others* [2013] eKLR
3. *Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 9 others*, [2020] eKLR.
4. *Kenya National Commission on Human Rights & another v Attorney General & 3 others* [2017] eKLR.
5. *Mohamed Fugicha v Methodist church in Kenya (suing through its registered trustees) & 3 others* [2016] eKLR.
6. *Charles Omanga & Another v The Independent Electoral & Boundaries Commission & 2 Others*.
7. *Texas Dept of Community Affairs v Burdine*.
8. *Minister of Home Affairs vs. Fourie* [2005] ZACC 19;60.
9. *Nubian Rights Forum & 2 others v Attorney-General & 6 others; Child Welfare Society & 8 others (Interested Parties); Centre For Intellectual Property & Information Technology (Proposed Amicus Curiae)* [2019] eKLR.
10. *Juma Nyamawi Ndungo & 5 others v Attorney General; Mombasa Law Society (Interested Party)* [2019], eKLR,
- Mohammed Abduba Dida v Debate Media Limited & another* [2018] eKLR.
11. *Joseph Karisa Mwarandu v & 2 others v Scorpio Villas* [2020] eKLR.
12. *Mohamed Mire v Attorney General & another* [2016] eKLR.
13. *Coalition for Reform and Democracy (CORD) & another v Republic of Kenya & another* [2015] eKLR.

Abstract

Before the enactment of section 8(1)(A) of the Registrations of Persons Act in 2014, vetting of specified communities was a common practice done. This practice now given power under statute was supposed to be agreeing for a country which had suffered many terrorist attacks during that decade. However, this practice though was proving fruitful had so many challenges. The challenges are that the Registration of Persons Act does not specify what proof of citizenship documentation is to be produced and the practice varies quite widely. Even when applying for an identity card with a birth certificate identifying a parent and the identity card of that parent, people living in areas where vetting is applicable must produce additional documentation. Section 8 empowers registration officials to require an individual to provide any information provided with "documentary or other evidence of the truth." Vetting committees are established to verify citizenship before issuing an ID card in border regions (including the coast of the Indian Ocean) or in neighborhoods known to host foreign origins, such as Kibera in Nairobi (serving the Nubian community) or communities on both sides of one of the borders of Kenya. The paper aims to show that section 8(1)(A) of the Registration of Persons Act is discriminatory. This statement is made without being blind to the argument of national security as a major concern of the country and instead tries to give solutions that will still have the same objective without necessarily engaging in discrimination.

CHAPTER ONE

1.0. Background

*'Citizenship law is not criminal law. It is not a national security law either. It should also not be rigged to function as a trap door that forces citizens to immigration law.'*¹

When dealing with threats to security, rights, and freedoms, borders define the state as the principal actor.² In 1894, Kenya's borders were demarcated which arbitrarily brought together more than forty previously autonomous communities into a single territorial entity with diverse communities who now make up the border area's inhabitants.³

After the 'permanent' artificial boundaries were put in place, a system was established by the colonialist where physical records, certificates, identification numbers or similar credentials would be used as evidence of an individual's legal identity. This activity continued even after independence.⁴

Prior to the enactment of the 2010 Kenyan constitution, vetting committees were established in border districts to screen applications for identification cards submitted in those regions, where it was apprehended that the same ethnic group spilled over into the neighboring region.⁵

¹ Waas L, S Jaghai-Bajulaiye, 'All citizens are created equal, but some are more equal than others', *Netherlands International Law Review*, 2018, 65, 3,413–430, www.researchgate.net, on 27 January 2021.

² Marenin O, 'Challenges for Integrated Border Management in the European Union', Geneva Centre for the Democratic Control of Armed Forces (DCAF), Occasional Paper, 2010, 17, www.dcaf.ch, 27 January 2021.

³ Ndege P O, 'Colonialism and its Legacies in Kenya', Moi University, 2009, 3,

<http://africanphilanthropy.issuelab.org>

⁴ Open Society Foundations (OSF), *A Community-Based Practitioner's Guide: Documenting Citizenship and Other Forms of Legal Identity*, June 2018, www.refworld.org, 27 January 2021.

⁵ Report by Kenya National Commission on Human Rights, *Out of the shadows into the towards ensuring the rights of stateless persons and persons at risk of statelessness*, July 2010, 14.

Currently, even with various human rights studies claiming that this practice is discriminatory, in all counties, such as Nairobi and Kisumu, vetting committees are still present to scrutinize border, Nubian and Muslim applications. Notably, these committees were not formed prior to 2014 by law. Rather, the institution arose because of security concerns, particularly about individuals coming from Somalia, as a result of government administrative interventions first introduced into the application process in 1988. The committee was set up to review requests submitted by ethnic Muslim Somalis to ensure that only genuine (Kenyan) individuals, particularly by birth and descent, received identification cards.⁶

In addition, on December 19, 2014, a controversial Security Laws (Amendment) Bill 2014 was signed into law. The President justified the law as a move to improve Kenya's ability to "detect, deter, and disrupt any threats to national security." It was proposed in the wake of successive terrorist attacks on civilian targets and increased public pressure to curtail these attacks. Section 8 of the Registration of Persons Act was one of those altered under the Security Laws. They added subsection (1A), which states that the director may set up identification committees or appoint persons to assist in the authentication of parent or guardian information as identifying agents.⁷

In 2019, a case against the Kenyan government was brought by the Nubian community regarding the controversial Huduma Number System. The aggrieved pointed to the issue of additional vetting processes that are carried out when obtaining both their citizenship and passports against certain groups of society, i.e., those of the border communities and the Muslim community. The petitioners lost the case.⁸ In its determination, which is a crucial argument in this paper, the court stated that..... *'the petitioners are obligated to explain how the right to equality and nondiscrimination has been abused by the state. This will include testimony from members of groups that are alleged to be discriminated against to prove how the vetting process is carried out in a manner that violates their rights under section 8(1)(A) of the Registration of Persons Act.'*⁹

⁶ Report by Kenya National Commission on Human Rights, *Out of the shadows into the towards ensuring the rights of stateless persons and persons at risk of statelessness*, July 2010, 20.

⁷ Kenya: Security Laws (Amendment) Bill Enacted, <https://www.loc.gov/>, on 27 January 2021.

⁸ *Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 9 others*, (2020) eKLR.

⁹ *Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 9 others*, (2020), eKLR, 996.

The court asked for proof which will show that an administrative body is using a procedure that is discriminatory to a certain people however, the fact is section 8(1)(A) of the Registration of persons Act grants officers discretionary powers to ask for additional information during the citizenship registration process. It also enables the Director of National Registration where necessary during the citizenship registration process, to form vetting committees both at county and national level and in practice also when acquiring passports from Muslim individuals.⁹ Discretionary powers need to be exercised responsibly and in good faith. However, once we consider the public administration's peculiar manner of operation, the problems of finding evidence get much deeper. This is because we understand that it is a system whose individual cogs are almost impervious to an external observer.¹⁰

Additionally, it comes as no surprise that Kenya has porous borders and a refugee crisis in the east. The nation is also making a critical effort to use various effective border surveillance strategies in Kenya and Somalia to control transnational terrorism with this in mind.¹¹ Under international law and the national law of many States, a legitimate exemption from national security must be balanced against the public interest inherent in the protection of fundamental rights. "Nevertheless, in most parts of the world, national security remains an excessively wide area of restriction, public oversight is also necessary to ensure reasonable policy and decision-making in general, but also in particular with regard to national security in particular: according to Mendel, "The issue of the 'national security state' is not so much a violation of rights, although it does just that but that it can lead to irrational decisions being repeated."¹²

Article 20(2) of the 2010 Kenyan Constitution provides that, to the maximum extent consistent with the nature of the right to fundamental freedom, everyone is entitled to enjoy the rights and fundamental freedoms contained in the Bill of Rights. In Article 27, the principle of equality and

⁹ Section 8(1)(A), Registrations of persons Act, (Act No.11 of 1979).

¹⁰ Parchomiuk J, 'Abuse of Discretionary Powers in Administrative Law.... Evolution of the Judicial Review Models: from "Administrative Morality" to the Principle of Proportionality', Journal for legal science and practice, 2018, 3, 55, www.journals.muni.cz, on 27 January 2021.

¹¹ Chumba C, Okoth P G, Were E, 'Effectiveness of Border Surveillance Strategies in the Management of Transnational Terrorism in Kenya and Somalia', International Journal of Political Science (IJPS),2, 2, 2016, 39, www.arcjournals.org, on 27 January 2021.

¹² Mendel T, 'National Security vs. Openness: An Overview and Status Report on the Johannesburg Principles', 2003, 6, www.maxwell.syr.edu, on 27 January 2021.

freedom from discrimination is laid down. Article 27(1) and (2) states that every individual is equal before the law and is entitled under the law to equal protection and equal benefit. And that equality requires the full and equal enjoyment of all rights and fundamental freedoms. Article 27(4) also provides that no person shall be discriminated against by the State, directly or indirectly, on any ground whatsoever, including race, sex, pregnancy, marital status, state of health, ethnic or social origin, color, age, disability, religion, conscience, belief, culture, dress, language, or birth.¹³ Furthermore, it is quite clear from Article 24(1) of the Constitution that a right or fundamental freedom cannot be restricted except by law, and only to the extent that such a limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom, taking into account all relevant factors. Accordingly, a provision in legislation restricting the right or fundamental freedom is invalid unless the intention to restrict the right, the nature and the extent of the limitation are expressly stated in the legislation. This is in line with the provisions of Article 24(2)(a) of the Constitution.¹⁴

1.1. Statement of the problem

Members of the border community, migrant descendants, and others living in geographically isolated areas experience relatively greater difficulties than other Kenyans in processing their registration as citizens. They undergo multiple vetting procedures to ascertain their citizenship and even after obtaining these identification cards, groups such as the Muslims undergo extra vetting to acquire passport documents. Interestingly, corruption is increasingly being blamed for failing to provide citizenship documents to some Kenyans in border communities.¹⁴ Thus, the problems of citizenship are expressed in different ways. Those in border communities have the challenge of proving their identity in the formal process of registering as citizens. It is also difficult for them to consolidate their right to belong at the local level, especially if their group is considered 'outsiders'. In these communities, there are several ways in which discrimination in the issuance of citizenship documents disadvantages individuals. The right to vote and to engage in public affairs will be denied to an individual without an identity card or passport. This official discrimination at the national level is essentially reflected in popular and official conduct at the local level, thereby

¹³ Article 27, *Constitution of Kenya* (2010).

¹⁴ Article 24, *Constitution of Kenya* (2010).

¹⁴ UN High Commissioner for Refugees (UNHCR), *Statelessness and Citizenship in the East African Community*, September 2018, www.refworld.org, on 27 January 2021.

increasing the fragmentation of communities. With the introduction of county governments, this is likely to be strengthened at the county level, especially in multi-ethnic counties.¹⁵ This study will focus on the border communities and Muslim communities like the Somalis as we examine whether section 8(1)(A) of the Registration of persons is discriminatory while giving detailed recommendations to the vetting procedure.

1.2. Hypothesis

The paper aims to demonstrate that vetting is very problematic and entirely discriminatory. This research argues that if there is an enactment of subsidiary rules to lay down a standard criteria applicable during the vetting process, it will undergo a much needed urgent change that will be advantageous to the affected groups who under normal circumstances go through targeted vetting.

Additionally, if there is an enacted statutory provision that establishes a digital data record system to be used by the vetting committees, which will require compulsory record keeping, showing who will be vetted, it will strengthen the evidentiary process for claimants who need this evidence to be able to use the data and bring it to court to make any claims they may have. Not only that, but this will also allow the institution to maintain its integrity and enable transparency and accountability, since the data will be accessible if necessary, i.e., they can get it when a citizen wants that information. These practices will ensure that effective measures have been established to reveal this discretionary process by the vetting communities that would have otherwise been disproportionate. In addition to amplifying the right to information and allowing statistical evidence to be used in court as evidence, having such a system with such controversial changes will also be a step towards a much-needed change for all of these communities for the better.

1.3. Justification

The study is policy driven to find a reasonable measure in legislation, to ensure that all individuals across the country are all clearly and consistently applied to the procedures for the registration of citizenship provided for in the Registration of Persons Act with little to no exception. In terms of policy, ethnicity-based vetting procedures should also be abolished, and this study attempts to demonstrate that many of these claims can be reconciled using a different alternative, i.e., a solution. This study is a driving force for our Parliament to revisit the concept of citizenship and

¹⁵ UN High Commissioner for Refugees (UNHCR), *Statelessness and Citizenship in the East African Community*, September 2018, www.refworld.org, on 27 January 2021.

nationality and to facilitate the development of a citizenship and nationality policy in line with democratic standards of equality, which is why Kenya has always had unequal citizens.

1.4. Theoretical Framework

This work will be founded under two philosophical scholars. Ben Eidelson and Tarunabh Khaitan who both write on discrimination.

In his book, *A Theory of Discrimination*, Khaitan seeks to explain the legal model for regulating discrimination before justifying why it is necessary. Khaitan seeks to define the legal concept of discrimination and to justify why discrimination should be regulated by recognizing that there is great disagreement about the scope and content of the law on discrimination (particularly because it has a different meaning to how the law conceptualizes as opposed to when discrimination is used by a layperson). He makes it clear that his inquiry concerns the practice of discrimination law, that is, the rules that structure discrimination law.¹⁶

There are three interrelated questions considered, who is entitled to the protection of the laws of discrimination, who is entitled to the duty, and what is the nature and scope of the duty imposed by the law of discrimination. When looking at the duties imposed by discrimination law, Khaitan considers what is used in each of the comparator jurisdictions (namely, direct discrimination, indirect discrimination, reasonable accommodation, discriminatory harassment, and affirmative action) and identifies the shared features in each jurisdiction and finding that there are many common features.¹⁷

Khaitan identifies that in order to have a good life there are four basic goods that an individual needs and requires access to. They include; goods to adequately meet a person's biological needs such as food, shelter, clothing; freedom from the unjustified interference of other people, such as from the government; a range of valuable opportunities; and self-respect i.e., being seen as an individual worthy of value without being treated as inferior. He argues that the aim of discrimination law is to promote the well-being of individuals by ensuring that those who do not have such access due to their affiliation with protected groups have access to basic goods. The purpose of the discrimination law, in other words, is to eliminate the relative group disadvantage an example is where a group such as Africans experiencing a relative higher risk of discrimination

¹⁶ Khaitan T, '*A theory of Discrimination*', Oxford University Press, London, 2015, 2-10.

¹⁷ Khaitan T, '*A theory of Discrimination*', Oxford University Press, London, 2015, 3-7.

due to their race. Khaitan considers what the discrimination law seeks to do, not what the discrimination law, which has concerned many others, actually does. His question is an important theoretical one, what is the point and justification of the law of discrimination for this purpose?¹⁸ The exceptional idea of Eidelson in his book, *Discrimination and Disrespect*, is that he offers an account of what discrimination is. It notes that X discriminates against Y if and only if, in certain respects, the following two conditions are fulfilled: (a) X treats Y less favorably than Z, (b) and there is a difference in the way X treats Y and Z with respect to a particular property, P, and that difference appears in the differential treatment explanation. In his view, not all forms of discrimination are wrong, because, after all, there is such a thing as 'positive discrimination'.¹⁹

Eidelson claims that there is no such thing as indirect discrimination. He argues convincingly that we see many cases normally discussed as cases of indirect discrimination that are actually cases of, or at least involve, direct discrimination. He claims that there is one paradigmatic instance of wrong that is central to his understanding of the wrongfulness of discrimination, the wrong of disrespect basically can be where an individual is treated with disrespect and not considered as individuals who are worthy of equal value and are then treated as inferior which seems to be ironical because we are all humans the only difference is that we are seeking different ends.²⁰

Eidelson goes on to give an elaborate account of this wrong. In his view, one disrespects someone as an individual if one does not recognize and give the appropriate deliberate weight to either of the following two characteristics: that individuals are of value in themselves (i.e., they are worthy), and equally so that individuals are autonomous, in that they have a power of self-control through which they can make their lives, significantly, their own without unnecessary interference.²¹

In conclusion, although Eidelson believes that sometimes racial profiling can be justified, he also believes that it is not an isolated issue and many types of racial profiling can involve serious harm to those profiled people, as well as to all members of the groups to which the profiled individuals

¹⁸ Khaitan T, *A theory of Discrimination*, Oxford University Press, London, 2015, 20.

¹⁹ Khaitan T, *A theory of Discrimination*, Oxford University Press, London, 2015, 14, 24.

²⁰ Eidelson B, *Discrimination and Disrespect*, Oxford University Press, 2015, 7-16.

²¹ Eidelson B, *Discrimination and Disrespect*, Oxford University Press, 2015, 139- 153.

belong. Usually, these harms outweigh any goods that may result from profiling, such as crime prevention.²²

1.5. Literature Review

Political freedom, human rights and the removal of discrimination are central objectives of the concept of democratic governance, according to Harbitz and Boekle. Therefore, the idea of democratic governance then becomes a central element when it comes to linking legal identity to citizenship and state institutions. The system of civil registration as a promoter of a public service, should consist of three basic elements of good governance; an institution that is transparent, democratic, and capable; two, an institution that has a clear and multilaterally accepted regulatory framework; and, finally, an institution that has an effective political process when achieving a certain level of implementation, including negotiation and communication.²³

In addition to these three concepts above, two other elements may be considered relevant when defining democratic governance in civil registration matters. They include having public trust in institutions and respect for inclusive citizenship.²⁴

According to Zedner, citizenship can only under the institutional context of a democratic state, prosper as a meaningful political practice, when it controls its borders, establishes restrictive immigration policies, and excludes those nonmembers who threaten its citizenship. The state can then fairly claim the right to protect its integrity and the security of its citizenship.²⁵

In general, given the impact that terrorism has on human rights, security, and the functioning of different aspects of international and domestic societies, there is no doubt that countering international terrorism is an important objective which, in principle, can enable certain rights to be restricted. The imposition of such a limitation must, however, satisfy different requirements in order to be justifiable. A specific counter-terrorism objective must be achieved, assuming that the

²² Eidelson B, *'Discrimination and Disrespect'*, Oxford University Press, 2015, 163- 169.

²³ Harbitz, M and Boekle-Giuffrida, *'Democratic Governance, Citizenship, and Legal Identity: Linking Theoretical Discussion and Operational Reality'*, Inter-American Development Bank Working Paper, Washington, USA, 5-25, www.publications.iadb.org on 27 January 21.

²⁴ Harbitz, M and Boekle-Giuffrida, *'Democratic Governance, Citizenship, and Legal Identity: Linking Theoretical Discussion and Operational Reality'*, Inter-American Development Bank Working Paper,2009, Washington, USA, 5-25, www.publications.iadb.org on 27 January 2021.

²⁵ Zedner L, *'Security, the State, and the Citizen: The Changing Architecture of Crime Control'*, University of California Press, 2010, 379-403.

right is capable of restriction and that the limiting measure is imposed within the limits of certain procedural requirements. In order for it to be necessary, there must be a rational link between the limiting measure and the pursuit of the specific objective. If the measure logically promotes the objective, the existence of a rational link will normally be accepted, although more evidence of this connection may be necessary if such a link is not clearly evident.²⁶

The principles of equality and non-discrimination are fundamental to human rights law and are recognized as norms for jus cogens. Although these principles exist, the concept of probationary citizenship is still extended to all those who doubt their full citizenship status and with this citizenship is used as a means of policing and as a tool for criminal law. The rationale for these measures that can be seen as preemptive, exclusionary, and are indifferent to procedural property is the assertion of the duty of the state to provide bona fide citizens with security. In order to enjoy full citizenship, they create a caste of aliens and outlaws whose status makes them wary of any wrongdoing, whose interests most of the time are compromised in the name of public protection, and who need to be requalified. Legal identity then is about being a citizen as much as it is about a sense of belonging and having the ability to exercise one's rights and obligations.²⁷

In addition, according to Legomsky, 'profiling' is described as specific targeting of individuals who have identifiable attributes that are believed to be a positive statistical correlation to specific types of misconduct such as, involvement in terrorism. He gives the example that when investigating incidents like serial rapes and serial killing, the police are often found to use profiles. As long as we live in a world where law enforcement and experts have good reason to believe that certain criminal behaviors tend to be disproportionately present in a discrete identifiable group, then profiling it seems would be rational.²⁸

According to Fact Sheet No. 32 of the High Commissioner for Human Rights, profiling is, in general, a filtering process which involves a single indicator or a cluster of indicators presenting, when grouped together stipulates to characteristics of a high-risk person, a passenger or a

²⁶ Office of the United Nations High Commissioner for Human Rights Fact sheet No 32, *Human Rights, Terrorism and Counter-terrorism*, 2008.

²⁷ Waas L, S Jaghai-Bajulaiye, 'All citizens are created equal, but some are more equal than others', *Netherlands International Law Review*, 2018, 65, 3,413–430, www.researchgate.net, on 27 January 2021.

²⁸ Legomsky S, 'The Ethnic and Religious Profiling of noncitizens: National Security and International Human Rights', 2005, 15-25, www.lawdigitalcommons.bc.edu, on 27 January 2021.

consignment. Such practices can have a disproportionate interference with human rights when law enforcement officers use these broad profiles reflecting unexamined generalizations, including for counter-terrorism purposes. In particular, if one of the indicators on which profiling is based is the ethnic or national origin of a person, the question arises as to whether profiling conforms to the principle of nondiscrimination.²⁹

According to Harbitz and Boekle-Giuffrida, unequal deprivation measures influences society as a whole and undermines important democratic values. Citizenship enables social cohesion as it creates a feeling of belonging and equality. When only specific groups of citizens are made conditional, effort towards social cohesion is disrupted.³⁰

The UN Special Rapporteur on contemporary forms of racism and xenophobia wrote:

When states use a citizenship stripping approach, they rarely discriminate explicitly on the basis of race, ethnicity, or national origin. However, having broad policies rooted under alleged concerns of national security, permits such activities like arbitrary enforcement, including arbitrary deprivation of citizenship, which as we see in practice has a disproportionate impact on marginalized racial, national, and religious groups. If there are laws, policies, and practices which disproportionately exclude or adversely affect a particular racial, ethnic, or national group, they should also be regarded as an infringement of the prohibition against racial discrimination. This is true even in the absence of de jure or deliberate discrimination.³¹

The scale of migration and increased porous national borders, make the placement of the legal status of citizenship within a sovereign state a profound challenge. On the other hand, taking protecting of the right to nationality seriously and reaffirming the equality of citizenship for all citizens is, in fact, a legitimate way for states to strengthen their society's security and integrity, an ideal that is consistent with liberal democracy.³²

²⁹ Human Rights, Terrorism and Counter-terrorism Fact Sheet No. 32.

³⁰ Harbitz, M and Boekle-Giuffrida, '*Democratic Governance, Citizenship, and Legal Identity: Linking Theoretical Discussion and Operational Reality*', Inter-American Development Bank Working Paper, Washington, USA, 10-20, www.publications.iadb.org on 27 January 2021.

³¹ Waas L, S Jaghai-Bajulaiye, 'All citizens are created equal, but some are more equal than others', *Netherlands International Law Review*, 2018, 65, 3,413–430, www.researchgate.net, on 27 January 2021.

³² Waas L, S Jaghai-Bajulaiye, 'All citizens are created equal, but some are more equal than others', *Netherlands International Law Review*, 2018, 65, 3,413–430, www.researchgate.net, on 27 January 2021.

1.6. Objectives

1. To examine whether that the process of vetting of border communities and Muslim citizens done presently is discriminatory even with it being regulated in law.
2. To examine whether the process of vetting is justifiable and why there is need for another extra vetting for the Muslim citizens who have acquired citizenship when getting their passports.
3. To find out how national security is a justification for the vetting process done to both parties involved.
4. To find out whether discretionary powers given under the statute is justifiable and why this was the only approach taken by the government in continuing this vetting process even after many reports condemned this system before it was legislated.

1.7. Research Questions

1. Is the action of establishing vetting committees presently under section 8(1)(A) of the Registration of persons act seen as discriminatory?
2. Is the vetting process in statute done by the National registration agency justifiable under the constitution?
4. With national security being a recognized justification to limiting a right under the constitution, is the vetting process established under Section 8(1)(A) of the Registrations of persons Act arbitrary?
5. Is there a means to make the vetting process less arbitrary?

1.8. Chapter Breakdown

Chapter 1

This Chapter will deal with the introduction of the dissertation. It will deal with of the vetting process under the Registration of Persons act and the discriminatory aspect of this vetting process as against the constitution before the enactment of the 2010 constitution and after its enactment. It will also deal with how the specific section of section 8(1)(A) of the act that came into force, how it came into force and why it came into force. This chapter will introduce the two angles to be

considered when the vetting process is involved, the first being vetting border communities who are acquiring their identification cards and the other angle will be Muslim citizens who already have identification cards undergoing extra vetting to get passports.

Chapter 2

This Chapter will deal with what we have presently in section 8(1)(A) of the Act. Going by two angles here the first being the border communities who are acquiring their IDs and the other angle will be Muslim citizens who have identification cards undergoing extra vetting to get passports.

We will find out if the vetting process is discriminatory in law, that is in the Kenyan constitution and also whether it is discriminatory in philosophy, that is we review what scholars like Khaitan and Eidelson say when it comes to discrimination and discrimination law. We will either use the theory of Khaitan on discrimination that aims to provide a conceptual account of the law of discrimination. In order to provide a normative justification for this body of law and to concentrate on the duties it imposes, on whom it imposes and for whose benefit, this will be done by looking at the characteristics of the discrimination law and identifying the aim and purpose of the discrimination law. Or We will concentrate on what discrimination is and not the law of discrimination required by Eidelson.

Chapter 3

This Chapter will deal with the issue of justification of national security as an acknowledged limitation in the constitution of Kenya. Here we will look at the principle of proportionality and when national security itself can and cannot be considered a legitimate aim of limiting a right. Here, we will not only be looking at national security but the tension between national security and human rights.

Chapter 4

This chapter will deal with arbitrariness of the vetting process and whether section 8(1)(A) of the Registration of persons act allows for too much discretion. Additionally, we will talk about the proposed digitized record system and all issues regarding this system including matters of privacy.

Chapter 5

This chapter will be the recommendation and the conclusion. The recommendations being dealt here will be the following; establishing new provisions introduced in the Act which will provide detailed records done towards this vetting process, proper guidelines to be issued when dealing with the vetting process of these border communities, the act should provide a time limit on when and how long one should stay while the process is taking place and also request of the vetting committee data can be at the inquirer's expense. Finally, it will also include a conclusion.

CHAPTER TWO

2.0. Introduction

The consequence of discrimination is the starting point of any analysis of a violation of civil rights, not merely the motive.³³ The approach taken by our Kenyan courts is that discrimination jurisprudence cannot be satisfied fully and satisfactorily on the test of direct discrimination alone. When determining constitutionality, the inclusion of both direct and indirect discrimination is relevant. Our constitution recognizes that acts that appear neutral and non-discriminatory may lead to discrimination.³⁵

Going by the premise introduced in chapter one, we will be discussing two groups of people who are somewhat different, but all consolidate under one statute, section 8(1)(A) of the Registration of Persons Act. We will argue that this section is target oriented and discriminatory (directly or indirectly).

The first group is the border communities that are expected to undergo an ambiguous vetting process to acquire citizenship identification cards due to their locality. The second group are the Muslim citizens who carry a 'potential terrorist' threat title with them purely because of them being Muslims and are forced to undergo extra vetting when acquiring passports. The problem for both groups, to be discussed in chapter three, is not that they are subject to a vetting process, but what is concerning is that the process is not a specified process with a procedure provided by law that

³³ *Mohamed Fugicha v Methodist church in Kenya (suing through its registered trustees) & 3 others* (2016) eKLR.

³⁵ *Mohamed Fugicha v Methodist church in Kenya (suing through its registered trustees) & 3 others* (2016) eKLR.

³⁷ Report by Kenya National Commission on Human Rights, '*Out of the shadows into the towards ensuring the rights of stateless persons and persons at risk of statelessness*', July 2010, 20.

cuts across everyone, it lies in the realm of discretionary powers and is susceptible to discriminatory actions without a proper, impartial standard, with open supervision.³⁷

Our disputed question then becomes, is the vetting process by the Kenyan government discriminatory to these two groups? Keeping in mind they are the only two groups who undergo this vetting process? We will look at the what the law says and the position of the courts vis-à-vis the position of philosophical writings.

2.1. According to Philosophy

According to many scholars, we practice discrimination on a daily basis. When we entertain a next door neighbor in our homes, but not the man across the street. When we employ the college graduate for the newly initiated position of the company and turn away the experienced performer without an academic degree. When we give a loan to a well-heeled businessman and turn down the indigent applicant, etc.³⁴

When Muslim citizens undergo extra vetting while acquiring passports, can this be considered discriminatory? Is it considered discriminatory (both direct and indirect), what vetting processes both communities are involved in as they apply for identification cards?

What is discrimination? According to Eidelson, discrimination is not based solely upon whimsicality and is not necessarily differential treatment. To him, it applies to some of the differential characteristics of the 'discriminatees.' His definition of discrimination focuses on the molarity of discrimination and argues that discrimination can often be a severe moral wrong.³⁵

Discrimination is not based solely upon whimsicality. According to Eidelson, X discriminates in dimension W (dimension of treatment, for example when it comes to recruiting staff) against Y (groups or individuals) on the basis of P (can be a trait) if and only if and only if;

³⁴ Sengstock F, Sengstock M, 'Discrimination: A Constitutional Dilemma', William & Mary Law Review, 1988, 15, www.scholarship.law.wm.edu, 27 January 2021.

³⁵ Eidelson B, 'Discrimination and Disrespect', Oxford University Press, 2015, 17.

“X treats Y less favorably with respect to W than X treats some real counterfactual others, Z with respect to W and a difference in how X regards Y P-wise and how X considers or would consider Z P-wise features in explaining these differential treatments.”³⁶

It means that, using his example, in a situation where X is an agency that recruits two people. X disapproves of applicants with African American names that are stereotypical. An immigrant Y (also has an African American name on their resume) and Z (a person without any differential details or characteristics, i.e., a white person with a basic name on his resume) decide to take up and apply for a position, Z is hired, and Y is not, it could be viewed as discrimination based on race. Eidelson explains that he does not look at the differential condition, i.e., the fact that Y is different from Z, and that X automatically discriminates against Y as such, but that we will not tell who is discriminated against by using that rationale. He writes that one looks at which of his (X's) perceptions is actually attributable to the factual explanation for discrimination, i.e., X discriminates against Y because Y is an immigrant whose name in the resume is African American.³⁷

Both the border communities and the Muslim community are facing direct discrimination. Eidelson claims that there is no such thing as indirect discrimination. First, he argues convincingly that many cases that are normally discussed as cases of indirect discrimination really are cases of, or at least involves, direct discrimination on his definition. Suppose, for instance, that certain rules of admission to university disadvantage members of some minority group. There is no intention to bring about this advantage. However, had the rules similarly disadvantaged members of the majority group, the rules would have been changed. In this case, there is (direct) discrimination in Eidelson's sense in the selection of admission rules. In the same way the powers under section 8 (1)(A) of the Registration of Persons Act is supposed to be used to vet every individual in Kenya applying for an identification card, however, the groups that are actually vetted and the most disadvantaged are the minority while those who are advantaged are the majority.³⁸

³⁶ Eidelson B, *'Discrimination and Disrespect'*, Oxford University Press, 2015, 18.

³⁷ Eidelson B, *'Discrimination and Disrespect'*, Oxford University Press, 2015, 17.

³⁸ Report by Kenya National Commission on Human Rights, *'Out of the shadows into the towards ensuring the rights of stateless persons and persons at risk of statelessness'*, July 2010, 20.

Muslims are perceived as a potential terrorist threat in Kenya and around the world. Wherever they go they are tied down to this perception of a 'dangerous' religion and this is almost always used as a reason to ensure that extra vetting is performed as a precaution when they get their passports or identification cards. Coincidentally, when vetting border communities as they acquire their citizenship, the government uses the same rationale. Since the Kenyan border is volatile, vetting is done to such individuals when they acquire their citizenship. These instances sensitive to the country due to the numerous terrorist attacks both at the borders and within the country, coupled with wide discretionary powers given under Section 8 of the Registration of Persons Act, that gives no abstract vetting process or a standard process that will pass the test of transparency or accountability is vulnerable to wrongful discrimination especially without proper supervision.³⁹ Going on from the above paragraph, according to Khaitan, we can never be free, if certain intolerable forms of relative disadvantage are suffered by our groups. The purpose of discriminatory laws should be to promote a successful life. For one to have a successful life (measured in the well-being of a person), they need to have certain basic goods to be able to pursue personal goals and be able to live virtuously. In order to make a good life possible, these basic goods guarantee everyone certain freedoms. A good life is certain that an individual should not only have access to these goods but should also be free from a reasonable fear of losing access to those goods. Vetting procedures under statute are mandated to acquire identification documents, however, although the purpose of vetting is to promote national security, it seems as though only specific groups are fearful of losing access to social goods. These basic goods that Khaitan states, include; one, a set of goods that adequately meet one's biological needs i.e., meeting needs such as food, shelter, health; two, negative freedom, i.e., freedom from unjustified interference by others in one's own individuals, projects, possessions, relationships, and affairs; and three an adequate range of valuable choices. The last remaining fundamental good is internal to a person, although it can be influenced by external factors: an appropriate level of self-respect.⁴⁰

The government is in a position of dominance in the vetting process. This system is not a fair system in its entirety. In a way described by Kaz as written by Khaitan, it is manipulative and coercive. In this case, the government has the power to enact this legislation and to state that all

³⁹ . Report by Kenya National Commission on Human Rights, *'Out of the shadows into the towards ensuring the rights of stateless persons and persons at risk of statelessness'*, July 2010, 20.

⁴⁰ Khaitan T, *'A theory of Discrimination'*, Oxford University Press, London, 2015, 95-100.

border communities and Muslim citizens are undergoing a vague vetting process which will not only adversely affect their access to good life, i.e., the inability to acquire social goods and any other personal objectives related to that circumstance. Coincidentally, the acquisition of these identification documents presents a number of challenges, such as corruption, delays, making it very difficult for them to have alternatives to these challenges. They may denounce their faith, but how can an individual denounce their ethnicity? This is a violation of their negative freedom.

Additionally, arguments made on government 'legitimate' reasoning, Khaitan explains that any interference by the state is more likely to be justified if it is not arbitrary, concerns harmful activity, does not ignore the legitimate interests of the person being interfered with, serves an appropriate weighty objective proportionately, does not infringe one's moral rights or facilitates its enjoyment by ensuring that others do not infringe it.⁴¹

According to Eidelson, we need to look at the contingent effect of finding the evil of discrimination. This he called the harm-based approach. These contingent effects include not only harm or a decrease in someone's well-being, but also the overall level of injustice in the social distribution of resources and opportunities. In our case, both border communities and Muslim citizens, without such documents, i.e., passports and identity cards, will face challenges in obtaining social goods. Without identification papers it will be legitimately hard to find a job in Kenya and without a job an individual will not be able to fulfil their biological needs and will lack in their basic goods.⁴²

In this chapter on the role of disrespect, Eidelson explains that discrimination is inherently wrong when and because it manifests a lack of discrimination against the respect that is due to it as an individual. Capturing the essence of wrongful discrimination, he believes that discrimination is often morally objectionable, not because of what it causes, but because of how it manifests itself. Not only do they show a lack of respect for an individual, but they also show a lack of respect that is, in itself, discriminatory.⁴³

We can all have a reason to discriminate, but the commonality is with the virtue of disrespect. A key consideration when contemplating the morality of discrimination should be the recognition of

⁴¹ Khaitan T, *'A theory of Discrimination'*, Oxford University Press, London, 2015, 99-100.

⁴² Kenya Human Rights Commission (KHRC), *'Foreigners At Home. The Dilemma of Citizenship in Northern Kenya'*, 2009, 7.

⁴³ Eidelson B, *'Discrimination and Disrespect'*, Oxford University Press, 2015, 99.

respect for people as people. It is not a matter of weighing the good and bad consequences of an action or whether an act falls under a prohibited criterion, such as murder or robbery, but rather of the fact that an agent's commission of an act is often morally reprehensible because it requires and results in a failure to consider an act.⁴⁴

The point of the requirement of respect is to insist on the need to justify partiality on any given basis. Human beings, as beings of equal value, are presumptively entitled to equal consideration.

Based on disrespect, the theory of wrongful discrimination treats a person as less important. People have a moral right to be regarded as individuals, out of respect for their autonomy. This is one paradigm of wrongful discrimination where certain persons are wrongly taken to be less significant or of equal importance than others. In our case, the very fact that both parties converge on national security threat justification suggests that they should not be handled less than others.⁴⁵

Khaitan expressly opposes the theories of the law of discrimination that derive either formal or substantive concepts of equality from their underlying theory. His point is that the general purpose of the law of discrimination is not equality, not social inclusion, both of which are the usual justifications for these laws put forward by politicians, but rather the pursuit of a notion of freedom or autonomy which states that the law of discrimination contributes to the achievement of freedom, access to valuable opportunities and self-esteem.⁴⁶

2.2. The law and analysis

The commitment to equality is at the heart of Kenya's constitution. The preamble recognizes the aspirations of all Kenyans for a government based on fundamental human rights, equality, freedom, democracy, social justice, and the rule of law.⁴⁷

The right to equality and freedom from discrimination is enshrined in Article 27 of the constitution.

There are two subsections in the article that are important for the discussion of this chapter.

Subsection (4) which provides that, for any reason, including race....ethnic or social origin,.. religion, the state shall not discriminate directly or indirectly against any person. Subsection (5)

⁴⁴ Eidelson B, '*Discrimination and Disrespect*', Oxford University Press, 2015, 102-103.

⁴⁵ Eidelson B, '*Discrimination and Disrespect*', Oxford University Press, 2015, 103.

⁴⁶ Khaitan T, '*A theory of Discrimination*', Oxford University Press, London, 2015, 70.

⁴⁷ Preamble, *Constitution of Kenya* (2010).

provides that a person shall not discriminate against another person, directly or indirectly, on any of the grounds specified or provided for in that clause (4).⁴⁸

According to the courts, we live in a diverse society, lawmakers understand and appreciate the needs of their own people, and the laws enacted address experienced issues and that their discrimination is based on adequate grounds.⁴⁹(in our case the argument of national security).

Direct discrimination occurs when a policy, law or rule intentionally seeks to treat another person or persons less favorably than others because of the protected ground or specific features of that person referred to in Article 27(4) of the 2010 Constitution. On the other hand, indirect discrimination occurs when a person, policy, measure, or criterion, although neutral, nevertheless puts another person at a disadvantage on the basis of their distinctive or protected grounds compared to others. The catch is that to succeed in a claim of indirect discrimination, there is need for proof i.e., a proof pattern, that a perfect decision or policy nevertheless has negative impact or consequences on a claimant because of his protected ground. Only then would the violator be required to then show that the decision was actuated by a legitimate aim.⁵⁰

From this we see that the underlying idea behind neutral laws is that its greatest and most persuasive argument is that it is generally used by those concerned and is therefore inherently reinforcing the principle of equality. However, equality means equal concern and respect for differences. It does not imply, therefore, the leveling or homogenization of conduct or the exaltation of one form as supreme and another as inferior, but the recognition and acceptance of difference. At the very least, it argues that the basis of exclusion, marginalization and stigma should not be the difference.”⁵¹

The right to equality before the law is, in a substantial sense, the most fundamental of human rights. It occupies the first place in most written constitutions, and it is the starting point for all other freedoms, but, as we have seen, equality is not uniformity or homogenization. Our first dilemma with regard to the allegation of equality is that, prior to the enactment of Section 8(1)(a) of the Registration of Persons Act, many critics, such as human rights organizations, have pointed out

⁴⁸ Article 27, *Constitution of Kenya*, (2010).

⁴⁹ *Charles Omanga & another v Independent Electoral & Boundaries Commission & another & another* (2012) eKLR.

⁵⁰ "Texas Department of Community Affairs v. Burdine." Oyez, www.oyez.org, 27 Jan. 2021.

⁵¹ *Minister of Home Affairs vs. Fourie* (2005) ZACC 19;60.

that the practice of validating citizenship and passports is very specific to the border, the Muslim and Nubian communities, not much has been done for this claim, then the section became part of law establishing vetting committees and courts stated that this section could now not be used to discriminate the said groups, since it was to be used all across Kenyan communities generally, and it did not seem to be targeting one group due to the general context of its wording.⁵² Why then should we consider the argument of discrimination?

Discrimination gives different treatment to different persons, wholly or principally attributable to their descriptions, whereby the persons of one of those descriptions are subject to restrictions which do not apply to persons of another description or to privileges or benefits which are not granted to persons of another description. It also means unfair treatment or denial of normal privileges to individuals on the grounds of race, age, sex, failure to treat all individuals equally where there is no reasonable distinction between those favored and those not favored.⁵⁵³

The law does not prohibit discrimination, but rather discrimination which is unfair. Unfair legal discrimination treats people differently in a way that undermines their fundamental dignity as human beings who are inherently equal in their dignity. Illegal or unfair discrimination may be direct or subtle. Direct discrimination involves treating someone who is less advantageous compared to someone without that attribute in the same circumstances due to their possession of attributes such as race, sex, or religion. These justifications are listed in article 24 of the Constitution, which sets out the rights of others and the legitimate needs of society. They include public order, security, health, and democratic values and justify the imposition of restrictions on the exercise of fundamental rights.⁵⁴

When tackling indirect discrimination our Kenyan courts have applied steps used to judge claims of indirect discrimination. An example is one by the Court of Appeal on the *Fungicha* case. We can use this as a guide to find out whether the vetting process seems discriminatory.

⁵² *Nubian Rights Forum & 2 others v Attorney-General & 6 others; Child Welfare Society & 8 others (Interested Parties); Centre For Intellectual Property & Information Technology (Proposed Amicus Curiae)* (2019) eKLR. ⁵⁵
Juma Nyamawi Ndungo & 5 others v Attorney General; Mombasa Law Society (Interested Party) (2019) eKLR,
⁵³.

⁵⁴ *Sollo Nzuki v Salaries and Remuneration Commission & 2 others*, [2019], eKLR, 79.

The first and second steps are concerned with the comparison, a comparator group, whether that rule or the law which is applicable is detrimental to a specific group as opposed to another group. We can see that statistically, the verification process is more likely to be delayed longer or more corrupt, or to ask for a lot of information that others outside these two groups do not need to present or pass through to obtain citizenship or passports. Moreover, the vetting rule is neutral, but its enactment and existence is very detrimental to the border community and the Muslim community than any other community in Kenya. Although the vetting committees are there to identify anomalies and to ensure that the right people are able to obtain identification documents and passports, the other groups that do not fall within the two groups (i.e., the comparators) are better treated and have fewer challenges, and their compliance with this rule has not been subject to any disadvantages or burden them in any way that they will not be able to seek redress in court. In addition, we do not hear complaints from any other groups that are treated differently by this section, except for the two groups and the Nubian community.⁵⁵

In the third step, we see that the applicant has to prove that this provision puts them at a disadvantage. This is a challenge that we see and will be discussed in the fourth chapter. (The problem of discretion and the fact that a record showing the disproportion that occurs during this vetting process is not easy to obtain). Where are we going to get the proof from? The committees do not have to produce records of the people they vet every year on the basis of the discretion conferred on them by the statute. It will therefore be difficult to see where their rights are being compromised.⁵⁶

Finally, the issue of proportionality and justification. The Constitution of Kenya has stated that there are rights that will be limited and will be exercised in accordance with Article 24 of the Constitution, but that the principle of proportionality must be considered. When limiting a right, it will be disproportional if there is a less restrictive method available and the reason behind the limitation must be justified, i.e., a legitimate goal. It could appear that national security is a legitimate goal. That we do not deny. There have been many terrorist attacks in this country and

⁵⁵ Report by Kenya National Commission on Human Rights, *'Out of the shadows into the towards ensuring the rights of stateless persons and persons at risk of statelessness'*, July 2010, 20.

⁵⁶ *Mohamed Fugicha v Methodist church in Kenya (suing through its registered trustees) & 3 other* (2016) eKLR.

its borders are not secure and a lot of cross-border interactions are taking place.⁵⁷ What we want is a more accommodating addition compelling the national registration system to have an efficient record system that can be used as evidence whenever a claim is brought regarding this issue.

Additionally, in the case of *Mohammed Abduba Dida v Debate Media Limited & another*, the court used a three step enquiry to determine whether unfair discrimination had occurred⁵⁸; The court determines whether the law which differentiates between groups on the basis of personal characteristics has failed to take into account the already disadvantaged position of the applicant within that society, resulting in a substantial difference in treatment between the applicant and others on the basis of one or more personal characteristics. Consequently, the position of the border and Muslim communities in society with regard to their personal characteristics, i.e., that of ethnicity and religion, is already a disadvantage for them.

In addition, the court also considered whether the plaintiff is subject to differential treatment on one or more of the enumerated and analogous grounds and whether differential treatment discriminates by imposing a burden on the plaintiff or by withholding a benefit in a manner that reflects the stereotypical application of the presumed group or personal characteristics or that otherwise has an effect on the claimant of perpetuating or promoting the view that the person as a human being or as a member of that society is less able or worthy of recognition or value, equally deserving of concern, respect and consideration.⁵⁹ We see that the vetting process application although is to be used across all communities is burdensome on specific groups in the society and its application on these specific groups is based on specific grounds those of which are religion and ethnicity provided for under article 27(4) of the constitution.

According to another case of *Joseph Karisa Mwarandu & 2 others v Scorpio Villas*, the following considerations were used to determine unfair discrimination. The court determinations whether the provision in question differentiated between individuals or categories of people, i.e., vis-à-vis the rest of the communities, the border, and the Muslim community. If they are differentiated, does the differentiation bear a rational link to a legitimate purpose? If it does not, then it is in breach of

⁵⁷ Jackson, Vicki C, 'Being Proportional About Proportionality. Book Review Of: *The Ultimate Rule of Law*. by David M. Beatty', (2004), Constitutional Commentary, 824, www.scholarship.law.umn.edu/, 27 January 2021.

⁵⁸ *Mohammed Abduba Dida v Debate Media Limited & another* (2018) eKLR.

⁵⁹ *Mohammed Abduba Dida v Debate Media Limited & another* (2018) eKLR.

the constitution. Even if it has a rational connection, discrimination can still be discriminatory.⁶⁰ We see that the two groups are differentiated not only on the basis of religion, but also on the basis of their location. However, based on the last part of the first step, even with a rational argument, it could still be considered discriminatory. The rational argument provided by the government is that of national security.

Secondly, the court determines whether unfair discrimination amounts to differentiation. This involves a two-stage analysis: First, does the differentiation amount to 'discrimination'? Where there is a specified ground; discrimination will have been established. Ethnicity and religion are the specified reasons linking the two groups, the border, and the Muslim community, all provided for in Article 27(4) of the Constitution. However, if there is no specified ground, then whether or not discrimination exists will depend on whether the ground is objectively based on characteristics and attributes that are capable of impairing or adversely affecting the fundamental human dignity of persons as human beings in a comparably serious manner.⁶¹ If the distinction amounts to 'unfair discrimination' does it amount to 'discrimination'? If it has been found to have been on a specified ground, then the unfairness will be presumed. If there is an unspecified ground, the complainant will have to establish unfairness. The unfairness test focuses primarily on the impact on the complainant and others of discrimination in his or her situation. If the differentiation at the end of this stage of the enquiry is found not to be unfair, then there will be no violation. If the discrimination is found to be unfair, then it will have to be determined whether the clause on constitutional limitations can justify the provision.⁶⁶

2.3. Conclusion

Some discrimination is disrespectful, not because it does not treat her as being of equal value, but because it does not treat her as an independent person. This argument is used on the basis of the generalization of social groups as an essential distinction in satisfying discrimination. Eidelson writes, according to Alexander, that irrational discrimination based on generalizations is morally troublesome because it imposes unnecessary social costs. It also fails to recognize people as autonomous individuals. For some people, generalization is based on disrespect itself.⁶²

⁶⁰ *Joseph Karisa Mwarandu v & 2 others v Scorpio Villas* (2020) eKLR.

⁶¹ *Joseph Karisa Mwarandu v & 2 others v Scorpio Villas* (2020) eKLR. ⁶⁶ Joseph Karisa Mwarandu v & 2 others v Scorpio Villas (2020) eKLR.

⁶² B Eidelson, *'Discrimination and Disrespect'*, Oxford University Press, 2015, 108-109.

Discriminatory action, procedurally as it were, can be wrong because the agent has not taken the necessary steps to find and attend to the information relevant to making a correct decision. Many human rights groups considered the vetting process carried out before the amendment of section 8 discriminatory and instead of proper regulation in accordance with the constitutional principles, it was given a new identity under statute and gifted the power of discretion.⁶³

CHAPTER THREE

3.0. Introduction

Citizenship and security as a state concept are interdependent and are linked to each other. Security is one of the aims behind the creation of the state, whereas citizenship demonstrates the idea of belonging to that state. Though interdependent, one is superior to the other. Citizenship in today's world does not provide individuals with equal safeguards. Often, those who rely on state support are marginalized, and that state security is defined as the protection of the dominant majority. Citizenship was meant to not only provide protection against victimization, but it also meant social security, that is a community will guarantee every citizen the means to become a citizen, including pensions and family benefits, as well as health, disability, and unemployment insurance coverage. An individual is not able to enjoy such social benefits and other economic and political rights without the identification that citizenship brings.⁶⁴

In this chapter we will be looking at national security, the law and the consequences faced by individuals who are seeking their right to nationality while fighting this seemingly unchallengeable government right.

3.1 National Security and Human Rights in Kenya

Improving national security and ensuring territorial integrity are some of the fundamental obligations that every government worldwide owes to its people. Article 238(1) of the 2010

⁶³ B Eidelson, *'Discrimination and Disrespect'*, Oxford University Press, 2015, 109-111.

⁶⁴ Pitch T, *'The Good, the Bad, and the Ugly Side of Citizenship'*, www.greeneuropeanjournal.eu, 27 January 2021.

⁷⁰ Article 238, *Constitution of Kenya* 2010.

Kenyan constitution provides that nationality security is the protection against internal and external threats to the territorial integrity and sovereignty of Kenya, its people, its rights, freedoms, property, peace, stability and prosperity, and other national interests. Article 238(2) of the constitution states that this national security shall only be pursued, promoted, and guaranteed if it is in accordance with the principles laid down, in accordance with the law and with the utmost respect for the rule of law, human rights, democracy, and fundamental freedoms.⁷⁰

Over the past four decades, Kenya has been at the forefront of incidents of mass terrorism that have profoundly impacted Kenya's national psyche and sense of security. The attack on 7 August 1998, which took place in the U.S. Embassy in Kenya.⁶⁵This and later acts compelled the executive to establish citizenship as a status that needed to be earned. Additionally, this rethinking of Kenyan government membership and membership took place while immigration and asylum were rephrased as security issues, an ideology that had a major impact on the 21st century Muslim community.⁶⁶

These tragedies forced the government's move with what can only be perceived as an iron fist to fight terrorism. In 2007 and 2008, citizenship deprivation became a measure of enhancing national security against terrorism, and many Muslims of Somali descent were stripped of their citizenship and repatriated to other countries.⁶⁷

Now that the 2010 constitution has been enacted and Kenya is a democratic state, all government actions must be justifiable. There is a delicate balance between national security, government rights and the safeguards on fundamental human rights. We must simply remember that the constitution requires adequate justification of all acts by the state, including acts under national security. The declaration that the fight against terrorism while respecting human rights, the rule of law and, where applicable, international humanitarian law, is not only possible, but is absolutely necessary

⁶⁵ Orina M, 'Fighting terror within the law; Challenges and prospects of Kenya's counter terrorism measures', ResearchGate, 15.

⁶⁶ Mantu S '*Terrorist' citizens and the human right to nationality*', Journal of Contemporary European Studies, 2018, 26, 1, 10, www.tandfonline.com, 27 January 2021.

⁶⁷ *Mohamed Mire v Attorney General & another* (2016) eKLR.

and it seems to be the cornerstone of the abolishment of a lot of unconstitutional provisions designed to threaten freedoms.⁶⁸.

The rampant terrorist incidents in Kenya forced the Parliament to adopt the 2012 Legislation on the Prevention of Terrorism. Unlike the 2003 Bill, this was to be a better version, as it came under the auspices of the newly enacted 2010 Constitution. The act sought to strike a balance between the enforcement of civil liberties and the war on terror.⁷⁵

The Security Laws Amendment Act 2014 was enacted, prompted by the increased incidence of terrorism. At that time, the executive was of the opinion that the act was to restrict and tighten the noose. Unlike the Anti-Terrorism Act, the Amending Act has aligned all legislation to ensure cooperation in investigating, combating and prosecuting terrorism.⁶⁹

The Security laws (such as section 8(1)(a) of the Registration of Persons Act) was criticized due to the fact that when special laws are enacted that deal with security circumstances, they tend to create an environment in which obvious violations of fundamental rights are tolerated and often facilitated in the name of the common good. They were seen as granting unfettered discretion to the executive and law enforcement agencies.⁷³

3.1.1 Understanding security as a “state” concept

In its broadest scope, the concept of ‘national security’ is virtually unlimited. It embraces every aspect of the nation's general welfare. Its meaning essentially has no firm edges and threats to national security, however well established, places significant strains on our system of constitutional freedoms.⁷⁰

Although strongly criticized as inaccurate and reductive by scholars, the orthodox interpretation of counter-terrorism law is that the state restricts the practice of human rights and civil liberties while at the same time seeking to protect national security and community security. As individuals, we

⁶⁸ *Coalition for Reform and Democracy (CORD) & another v Republic of Kenya & another* (2015) eKLR. ⁷⁵

Orina M, ‘Fighting terror within the law; Challenges and prospects of Kenya’s counter terrorism measures’, ResearchGate 13.

⁶⁹ Orina M, ‘Fighting terror within the law; Challenges and prospects of Kenya’s counter terrorism measures’, ResearchGate,14. ⁷³ Orina M, ‘Fighting terror within the law; Challenges and prospects of Kenya’s counter terrorism measures’, ResearchGate, 20.

⁷⁰ Emerson TO, ‘*National Security And Civil Liberties*’, Yale journal of international law, 9, (1982),16, www.yale.edu, 27 January 2021.

are giving a measure of our rights and freedoms to the state to protect the common good. Thus, in this utilitarian interpretation of counter-terrorism law, the interests of national security and the protection of human rights are set at the opposite ends of this conceptual spectrum, with the aim of any counter-terrorism law being, in political terms, to reconcile diametrically opposed interests, to achieve one without compromising the other.⁷¹

The legitimate interest by states in national security is that interest which has a genuine purpose and a primary impact, consistent with international and national law, which is to protect national security. National security interests by states are not legitimate if their real purpose or primary impact is to protect national security related interests, such as the protection of government or officials from embarrassment or exposure to misconduct, the concealment of information on human rights violations, and any other infringement under the law.⁷⁶

3.1.2. National security and its consequences to Kenyan nationality

Now, in our case, when we look at the implementation of our security policies, we see a distinction between "real" citizens and "ambiguous" citizens or non-citizens. These people are either 'worthy' or 'unworthy.' The first group can be considered as worthy of state resources, while the second is be considered dangerous and bad, and therefore to be controlled and repressed. Security, especially at national and local level, is justified in the name of protecting all individuals in a community, or those of us who are considered 'good citizens,' from potential victims. All citizen laws have always had both an inclusive and an exclusionary meaning and purpose. It distinguishes citizens from noncitizens. It is a status that can be extended or limited, and almost always the insiders are separated from outsiders. Does our government know who our outsiders are or are they just creating chaos in our society at the moment?⁷²

From what we have seen so far, contextualizing Kenya's setting and understanding the impact of counter-terrorism legislation on the Kenyan border and on the Muslim community today, we note

⁷¹ Golder B, Williams G, 'Balancing national security and human rights: Assessing the legal response of common law nations to the threat of terrorism', *Journal of comparative policy analysis*, 2006, ResearchGate,29. ⁷⁶

Lumumba P O, '*National Security in the Kenyan legal system*', University of Nairobi Law, 25, www.erepository.uonbi.ac.ke, 27 January 2021.

⁷² Pitch T, 'The Good, the Bad, and the Ugly Side of Citizenship', www.greeneuropeanjournal.eu, 21 January 2021.

⁷⁸ Allhoff F, 'Liberty and Security: A balanced Approach', *University of Pennsylvania Journal of law and Public Affairs*, 3, (2018), 70.

aspects of the legal and policy framework that contribute to the treatment of its members as 'suspects' and therefore the disproportionate focus of anti-terrorism legislation and policies on members of a single common community.⁷⁸

We see that the practice set out in section 8(1)(a) of the Registration of Persons Act was carried out even before the act was established and was used to ensure that the state had control over who became a citizen of the country when it came to the two groups of people who posed the greatest threat to society in terms of the threat to national security. This justification is not at issue. A state must ensure its sovereignty is intact by ensuring that the security of its citizens is protected, promoted, and fulfilled. The challenge arises from the lack of arbitrariness of the system of registration of citizenship. The vetting committees are set up under this section on the basis of an amendment to determine whether or not one can be a citizen. At the moment, only specific groups, i.e., the Muslim community, and the border communities, (and a few more) are the only communities challenged by the decisions of these committees.⁷³

What we see is that national security has been used as a justification to cover up the mess that is in the vetting process. The objective of the verification process is to ensure that only those with appropriate documents are able to register for citizenship identity cards. But this practice has been filled with so much corruption and prejudice. It fails as a proportionate means of limiting the right to nationality. When we look at proportionality, using the case of *Kenya National Commission on Human Rights & another v Attorney General & 3 others*, the court has, in its determination, stated that a common way of determining whether a law or decision limiting rights is justified is by asking whether the law is proportionate. Quoting the former President of the Supreme Court of Israel, Aharon Barak, the court noted that proportionality can be defined as a collection of rules that specifically determine the necessary and sufficient conditions for the right to be protected by law that is constitutionally protected.⁷⁴

The court went on and stated that, it will be constitutionally permissible to restrict a constitutional right if, it is intended for a proper purpose in our case the purpose is that of national security, after the purpose is established, are the measures taken by the state to impose such a limitation rationally

⁷³ Section 8(1)(A), Registrations of persons Act, (Act No.11 of 1979).

⁷⁴ *Kenya National Commission on Human Rights & another v Attorney General & 3 others* (2017) eKLR.

linked to the achievement of that objective; the vetting committees are established to ensure that only those qualified are able to acquire the identification papers; continuing on this analysis, are the measures taken by the state necessary in the absence of alternative measures which are equally capable of achieving the same objective with a lesser degree of restriction? Before the section was put in force the procedure existed outside of the law and only when a lot of criticism was reported did the government decided to legitimize this illegal procedure taking place. Could there be an assumption that the government was being close minded and was adamant on establishing only one procedure that now had a backing in statute without searching for suitable alternatives? Finally, a proper relationship ("proportionality stricto sensu" or "balancing") must be established between the importance of achieving the right purpose and the particular importance of preventing the restriction of constitutional law. The vetting procedure seems to absolutely constrict fundamental rights and without an alternative to compliment the system is there a proper relationship between the two.⁷⁵

The analysis of proportionality also calls any justification by the state to be advanced in terms of consistency with fundamental constitutional commitments in a free and democratic society, and the state should participate in a reasoning process that sustains values that inform the rights protecting instrument, thus addressing concerns that balance the social interest in protecting individual rights. Civil and social rights are interconnected so much so that the contractual basis for social rights is civil rights. No social rights can be granted without civil rights and without legal identity, the provision of social services is then hindered.⁷⁶

In the Muslim community (using the example of the Somali community), Kenyan Somalis are drawn back and forth between an emphasis on their 'Somali' ethnicity and their belonging in Kenya They share their socialization and acculturation with other fellow Kenyans but are treated as if they were not entirely part of Kenya. The term 'ambiguous citizens' tends to best capture it and is often referred to as 'second class citizens'. The idea of uncertainty and the undetermined and emotional side of citizenship goes beyond a purely legal meaning. The term 'ambiguous citizenship'

⁷⁵ Kenya National Commission on Human Rights & another v Attorney General & 3 others (2017), eKLR.

⁷⁶ Jackson, Vicki C, 'Being Proportional About Proportionality. Book Review Of: The Ultimate Rule of Law. by David M. Beatty', (2004), Constitutional Commentary, 810-816, www.scholarship.law.umn.edu/, 27 January 2021.

⁸⁷ Scharre T, *Ambiguous citizens: Kenyan Somalis and the question of belonging*, Journal of Eastern African Studies, 2018, 12, 20, www.tandfonline.com, 27 January 2021.

encapsulates different aspects of citizenship, while in some of them, people may be viewed as ‘belonging,’ and are not generally categorized as citizens in others. Kenyan Somalis have become a stronger part of both the Kenyan political sphere and the Kenyan economy, but they remain marginalized in terms of legal recognition of their citizenship.⁸⁷

Prior to the enactment of the 2016 Registration of Persons Act, Kenyan Somalis were the only ethnic group routinely required to produce two forms of identity when applying for citizenship, according to a 2006 report by the *Minorities at Risk group*. In 2008, *Refugees International* also reported that Kenyan Somalis were subjected to vetting before obtaining proof of citizenship and that bribes were often needed to complete the process. Because of this system, individuals had to leave specific northern towns by 6 pm in the evening in order to avoid police harassment because they did not have identification cards. Those detained without identity documents were then detained for short periods of time by police officers who only released them upon payment of a bribe.⁷⁷

The situation of Somali Kenyans though genuine, is greatly complicated by the presence of a very large Somali refugee population in the country and the security risks generated by the Al-Shabaab militant Islamist group based in Somalia.⁷⁸ There has been regular calls made like in 2016, to expel Somalis who are illegally staying in Kenya (that is, without refugee registration). Because of this Somali Kenyans have then been generally caught up in such enhanced security measures.⁷⁹

Many people in the border zones who are entitled to Kenyan citizenship remain without national identity cards. Those subject to this vetting do not understand why they must go through additional vetting even if they have all the official documents normally required, or why vetting applies only to individuals who fall under specific profiles rather than to anyone who does not have existing documents acknowledging citizenship or providing evidence of the relevant facts. The concern is that the standards used differ across the country, since there are no set criteria for what constitutes

⁷⁷ Scharre T, *Ambiguous citizens: Kenyan Somalis and the question of belonging*, Journal of Eastern African Studies, 2018, 12, 20, www.tandfonline.com, 27 January 2021.

⁷⁸ Scharre T, *Ambiguous citizens: Kenyan Somalis and the question of belonging*, Journal of Eastern African Studies, 2018, 12, 20, www.tandfonline.com, 27 January 2021.

⁷⁹ Scharre T, *Ambiguous citizens: Kenyan Somalis and the question of belonging*, Journal of Eastern African Studies, 2018, 12, 20, www.tandfonline.com, 27 January 2021.

as acceptable proof of citizenship, a vagueness that also allows the law to be discriminatory in practice.⁸⁰

3.2. Conclusion

In conclusion we see that internationally, there are debates about whether there is a need for a separate counter-terrorism regime which highlights that there is need for specificity in the separate laws on terrorism. This change should be in terms of intent and means. Instead of being a catchall piece of legislation that can be used for several reasons that are not explicitly specified in the law, the legislation drawn up for these purposes should be clearly and specifically aimed at tackling terrorism. This gives the executive a broad power that can be exploited. Legislation should instead be carefully set out in narrow terms to ensure that human rights and international law are not violated. Counter terrorism laws must be drawn up in a way that balances the conflicting rights of the state and its citizens.⁸¹

The presence of national security interests does not excuse the suspension, modification, or abandonment of fundamental rights. Identity and belonging policies are a requirement for any security action, and it is not surprising that nationality law has become one of the places where citizens are remodeled due to its clear ties to identity, i.e., making it possible to get out of its 'terrorist' citizens' midst.⁸²

The prohibition of statelessness should serve as a cornerstone of security in both national policy and international law.⁸⁹ The implementation of anti-terrorism policies has unfolded without a strong human rights dimension. Increasingly, States are adopting broad definitions of what constitutes a terrorist act, increasing the form of conduct that could result in a loss of nationality.

⁸⁰ Kenya National Commission on Human Rights, *'An Identity Crisis? A Study on the Issuance of National Identity Cards in Kenya'*, 2007, www.knchr.org, 27 January 2021.

⁸¹ Sarkin, J, 'Balancing National Security and Human Rights: International and Domestic Standards Applying to Terrorism and Freedom of Speech. In Goal 16 of the Sustainable Development Goals: Perspectives from Jungles and Lawyers in Southern Africa on Promoting Rule of Law and Equal Access to Justice', 2016, Southern African Litigation Centre, 107.

⁸² Mantu S *'Terrorist' citizens and the human right to nationality'*, Journal of Contemporary European Studies, 2018, 26, 1, 14, www.tandfonline.com, 27 January 2021. ⁸⁹ Mantu S *'Terrorist' citizens and the human right to nationality'*, Journal of Contemporary European Studies, 2018, 26, 1, 10, www.tandfonline.com, 27 January 2021. ⁹⁰ Mantu S *'Terrorist' citizens and the human right to nationality'*, Journal of Contemporary European Studies, 2018, 26, 1, 10, www.tandfonline.com, 27 January 2021.

States must be reminded of their responsibilities as regards nationality and statelessness, as the external limits of their ability to undo citizenship.⁹⁰

CHAPTER FOUR

4.0. Introduction

The power that comes with discretion varies with each purpose. There is no one specific justification for discretion. In most cases, the legislature has a mandate to achieve a specified objective. It is a power that is always attached at all times or almost always to some level of duty. Not only is it a legal relationship of power-liability, but it is also clear that the holder of it may be bound by a duty as soon as the limits of discretion are reached, making it so that the subject of responsibility to have a right.⁸³

Furthermore, all actions taken by public bodies should inherently be justified by positive law.⁸⁴ In this chapter we will be focusing on discretion as an issue when it comes to the vetting process and also give recommendations on what other alternatives there are to ensure that the process is in line with our constitutional principles.

4.1. The problem of Discretion in the vetting process

The vetting process is a procedure established in statute. However, since there is no procedure given in law, there is an almost absolute freedom of decision-making accompany the different stages of the vetting process. The law grants the national registration agency a flexibility in

⁸³ Vitanski D, 'Discretionary powers of the administration,' Journal of Process Management New Technologies, International Vol. 3, No.2, 2015. 27.

⁸⁴ *Gregory Kitonga Wambua & 2 others v County Government of Kiambu* (2019) eKLR

applying the law, and deliberately leaves it with a certain degree of decision-making power.⁸⁵ This is doing more harm than good to specific groups, and this process is producing challenging long term consequences like delays, corruption and being unable to enjoy social rights due to lack of identification documents.⁸⁶

A statute confers discretion on an official to use his authority for beliefs, expectations, or tendencies, instead of facts. There is no clear line between discretionary issues on the one hand and, on the other, the question of reality. This is because the discretion allows for situations in which the administrative determination is legitimately left to the determination of fact.⁸⁷ This can lead to abuse of power. Which can easily happen especially since there are no defined stages of the vetting process and this process is determined and among the committees and the National Registrar and can easily change depending on the individual applying for registration.⁸⁸

While judicial review is used to regulate the boundaries of administrative power and is firmly based on the legal principle of the rule of law, we do not want just the review of a discretionary decision undertaken by the National Registration agency, which will go well in all other situations, but what we need is an additional system that will ensure that this vetting process will be conducted efficiently and transparently placing the burden on the registration agency completely as a warning and ensure that this system will be used not only across all communities but will allow for easy detection of discriminatory practices within the administration. This is because for many years international institutions such as the African Commission on Human and People's Rights, the United Nations Committee on the Elimination of Racial Discrimination, and national bodies such as the Truth, Justice and Reconciliation Commission, the Ethics and Anti-Corruption Commission and the Commission on the Administration of Justice have harshly criticized the Kenyan civil

⁸⁵ Szot A, 'Discretionary powers of the public administration in law application processes and its judicial control', ResearchGate, 9.

⁸⁶ Report by Kenya National Commission on Human Rights, '*Out of the shadows into the towards ensuring the rights of stateless persons and persons at risk of statelessness*', July 2010, 20.

⁸⁷ Parchomiuk J, '*Abuse of Discretionary Powers in Administrative Law.... Evolution of the Judicial Review Models: from "Administrative Morality" to the Principle of Proportionality*', Journal for legal science and practice, 2018, 3, 457, www.journals.muni.cz, on 27 January 2021.

⁸⁸ *Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 9 others (Interested Parties)* (2020) eKLR.

registration system for being discriminatory. Hence an effective system enacted be used to wipe the 'slate clean' as a form of reparation.⁸⁹

Looking at its history and reason for enactment, adding to it the vulnerable communities affected by this statute would demand a different approach. Hence the need for a compulsory record keeping of the national registration system to ensure transparency and ease of access to documents for evidence review. We observe that the due to this push for an 'open' system i.e., for the public to have access to this information that the vetting committees have recorded, our interests clash with the statute's objective of discretionary power hence will it not be better to do away with this power? Transparency is one of the basic values and principles governing public administration.

The Constitution requires that transparency "must be fostered by providing timely, accessible and accurate information to the public" to the extent of any inconsistency, the law on access to information should prevail over other legislation. Exceptions shall apply only if there is a risk of substantial damage to the protected interest and if such damage exceeds the general public interest in accessing the information. Furthermore, the public authority seeking to deny access would be responsible for showing that the information falls within the scope of the exception system.⁹⁰

As for the affected groups by the vetting process, reasonable accommodation is most appropriate, as in this case, because discrimination by the government institutions stems from a neutral rule or practice intended to serve a valuable purpose, but which nevertheless has a marginalizing impact on certain groups of society. Second, in specific localized contexts, such as individual workplaces or schools, where a fair balance can be accomplished more easily between competing interests, this concept of reasonable accommodation is especially suitable. At its heart is the idea that, whether it is the state, an employer, or a school, the society must often take constructive action and may incur additional difficulty or costs in order to encourage all individuals to participate and enjoy all their rights equally.⁹¹

Will this guarantee that individuals are not banished to society's margins because they do not comply with those social standards or not? It is yet to be done in Kenya to fathom a critique. This

⁸⁹ *Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 9 others (Interested Parties)* (2020) eKLR

⁹⁰ *Katiba Institute v Presidents Delivery Unit & 3 others* (2017) eKLR.

⁹¹ *Katiba Institute v Presidents Delivery Unit & 3 others* (2017) eKLR.

is because the government is and has always argued that national security interest is at the top of its list and will always trump any constitutional right. However, one important aspect to justify limiting a right is whether the limit is commensurate with the aim sought. While the objective is significant enough and the measures concerned are rational, due to its severe impact on individuals or groups, the limitation may not be justified.⁹²

In the case of *Jacqueline Okuta & another v Attorney General & 2 others* the court used the 1986 Canadian Supreme Court Case *R v Oakes*, which had a classical discussion of the proportionality principle. The case concerned a statute called the Narcotic Control Act which placed an accused's legal burden of proof and thus undermined the human being's right to be considered innocent until he/she is proven guilty in the Canadian Charter of Rights and Freedoms. Section 1 of the Canadian Charter guarantees the rights and freedoms of the Charter 'only subject to the limits laid down by law that are demonstrably justifiable by a free and democratic society.' Two key conditions must be met, according to Dickson CJ, to prove that a limit is fair and demonstrably justified in a free and democratic society.⁹³

The first criterion is the significance of the law's goal; in this case the government's goal is to carefully provide citizenship to those who correctly applied for it. However, the goal of the measures that limit a fundamental right or freedom must be "of sufficient importance to justify overriding a constitutionally protected right or freedom." The bar must be set high to guarantee that objectives that are trivial or incompatible with the principles that underpin a free and democratic society are not protected. Before an objective to be described as sufficiently important, it must, at the very least, connect to pressing and substantial problems in a free and democratic society.^{94,95}

Second, the law's means must be "reasonable and demonstrably justified," which requires a "kind of proportionality test" with three elements: First and foremost, the actions taken must be carefully developed to accomplish the desired outcome. They can't be arbitrary, unfair, or based on unreasonable factors. In other words, they must be reasonably linked to the goal; the government

⁹² *Katiba Institute v Presidents Delivery Unit & 3 others* (2017) eKLR.

⁹³ *Jacqueline Okuta & another v Attorney General & 2 others* [2017] eKLR.

⁹⁴ *Jacqueline Okuta & another v Attorney General & 2 others* [2017] eKLR.

⁹⁵ *Jacqueline Okuta & another v Attorney General & 2 others* [2017] eKLR.

means to reduce the threat to security but instead of vetting everyone across the country, the extra vetting is done only to specific communities reducing the high chances of effective security in the country. Second, the means, even if rationally connected to the goal in the first sense, should hinder the right or freedom in question as little as feasible, however, the vetting done is damaging the freedom of these communities. Third, there must be a proportionality between the impacts of the measures that limit the right or freedom and the purpose that has been established as "sufficiently important." What the vetting is doing does not seem to meet this criterion because if the purpose of the vetting is to increase the high chances of maintaining excellent security, this vetting today seems to reduce the chances of this happening as it only targets specific communities giving room to many other openings for the threat to take place. ¹⁰⁸

4.2. Proportional means to the vetting process⁹⁶

As we have already said, having the Registration of Persons Act enact a rule compelling the National Registration Institution to establish a digitalized record system will be an effective method to reduce the corruption and delays that has been a very big issue for the affected groups. This digital record keeping system is a great step forward in making it easy to search, find, and retrieve data when in court. It also enhances security and ensures transparency, as it is much simpler to restrict access to digital data. To determine when data is retrieved or altered, data holding records can be examined. All in all, this digitalized process can, to ensure absolute efficacy be supervised by a representative of the Kenya human rights commission, an independent party to this arm of government.

We recommend an enactment of subsidiary rules to provide standard rules applicable during the vetting process. This is because as we have seen in other chapters the vetting process is different for different individuals hence this will ensure equal application across all communities. A subsidiary rule could be, for example, a subsidiary rule that an individualized enhanced scrutiny procedure by the officials in the vetting committees, can only be triggered by consistently applied, objective and reasonable criteria, such as an apparent lack of birth documents or lack of evidence

⁹⁶ *Open Society Justice Initiative*, 'Committee on the Elimination of Racial Discrimination: Submission for Review of Kenya,' 2011.

of permanent residence. Furthermore, from this due consideration must be given to the fact that people from certain regions of Kenya or certain ethnic groups may have been historically discriminated against in granting government issued documents.

In addition, in order to prevent effective denial of citizenship in cases of increased scrutiny, it will be advantageous to set time limits for administrative actions at any request and to identify consequences in cases of non-compliance with these time limits, e.g.: a presumption that the concerned individual who brought the claim is a Kenyan national, or that there will be a civil suit available against the specific officer responsible for deciding not to comply with the administrative deadline in his/her individual capacity, and finally that there will be an automatic right to a temporary status, which will allow citizenship rights to be enjoyed until a final citizenship determination is made.

Finally, in order to safeguard against discrimination in the application of the law, an independent body to be set up that will listen to claims about specific nationality issues arising from the section 8(1)A citizenship registration system. The reason for this is because having an independent body will most likely speed up the process of the claims brought reduce backlogs that would most likely be found in courts. This as we have seen will promote expediency and reduce the time frame to receive an identity card for those who are eligible for one.

4.3. Conclusion

In conclusion, while the purpose of vetting is to counteract the acquisition of fraudulent documents, we assume that the same controls are not extended to other ethnic groups. We find that this has resulted in many individuals remaining without national identification cards in the targeted communities. There are different vetting procedures. By enacting section 8(1)(A) of the Registration of Persons Act, the issues of discrimination in the vetting process have not been resolved. Who belongs to those committees? In their documentation demands, the targeted groups face extreme delays, and/or go without documentation. The delays lead to missed opportunities for employment, education, and other opportunities. This profiling is only detrimental to specific

communities. And all of this falls within the power of discretion. It definitely demonstrates that an urgent change is needed.⁹⁷

CHAPTER FIVE

5.0. Recommendation

Going by the previous chapter the most important recommendation is that a digitalized record system should be established by the National Registration Institution, to improve the ease of access to information by the claimants and by courts where a proof pattern is to be established or any form of evidence is required to prove a violation of an individual's right.

Furthermore, instead of having an ad hoc basis, having an additional enactment of subsidiary rules which gives standard provisions for dealing with specified documents in the vetting process would be effective. Additionally, if the temporary pass is established, it will ensure that rights are not compromised during delays whether long term or short term. In contrast to current practice, rules enacted such as automatic citizenship should also be extended by the state to all children within its borders (0-17 years) (0-8 years).

5.1. Conclusion

In conclusion, we see that when identity cards are issued by the national agencies, there is a strong institutionalized link between citizenship and ethnicity. The registration system applies different and stricter rules with regard to groups such as Kenyan Nubians, Kenyan Somalis, and Kenyan

⁹⁷ *Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 9 others (Interested Parties)* [2020] eKLR.

Arabs, as opposed to other Kenyan ethnic groups. This approach offends the principles of equal treatment in a pluralistic and democratic society and should have no place in our society. Not only is it discriminatory to deny specific ethnic groups identity cards, but it also further marginalizes these communities.⁹⁸

Kenya's national registration system is absolutely opaque without sufficient safeguards to promote accountability and good governance within the National Registration Bureau. The state's concerns on the issue of national security raised during the registration of persons cannot be ignored. However, the government's measures against the registration of foreigners, such as vetting without proper structures and guidelines, have resulted in unnecessary obstacles for only specific communities in their search for national identity cards.⁹⁹

⁹⁸ Submitted by the Open Society Justice Initiative for Consideration by the United Nations Human Rights Council at its Eighth Session, on the occasion of its Universal Periodic Review of Kenya, '*Citizenship Discrimination and the Right to Nationality in Kenya Statement*'.

⁹⁹ Submitted by the Open Society Justice Initiative for Consideration by the United Nations Human Rights Council at its Eighth Session, on the occasion of its Universal Periodic Review of Kenya, '*Citizenship Discrimination and the Right to Nationality in Kenya Statement*'.