

NIDS & THE CONSTITUTION

KATHRYN A. WILLIAMS

The National Identification and Registration Act ('NIDS') has been garnering a lot of attention in the media since the Bill was first tabled in September of last year. NIDS is expected to replace all forms of identification with a single identification card and a nine-digit number. This will be required for all Jamaicans and persons ordinarily resident in Jamaica to access certain public services including health and water services.

Once a person meets the criteria of a registrable individual, that is that they are citizens of Jamaica and ordinarily resident here, they have a duty to apply to be enrolled in the NIDS Database. If they refuse or fail to do so, without a reasonable excuse, then they are liable on conviction to a fine not exceeding \$100,000.00. The NIDS Database is maintained by the National Identification and Registration Authority, which is established by the Act.

The NIDS Database will contain the identity and demographic information regarding registrable individuals and must include an individual's:

1. name and alias;
2. date time and place of birth;
3. sex;
4. height;
5. principal and alternative places of residence;
6. mailing address;
7. nationality and period of residence in Jamaica if the individual is not Jamaican;
and
8. marital status.

An individual's biometric information must also be included in the NIDS Database. The biometric information required include the individual's:

1. photograph or other facial image;
2. fingerprint;
3. eye colour; and
4. signature (if the individual is 18 years old and above).

An individual's email address, retina or iris scan, vein pattern, foot, toe or palm print and blood type may be included in the database and individuals can also voluntarily provide certain demographic information such as their employment status, race, religion, education, profession, occupation, telephone number and address of their matrimonial home.

The main concern expressed in the public about NIDS is the fact that it is mandatory to be enrolled in the database and to provide certain biometric information. This, some say, is a violation of the right to privacy. In fact, just recently, the opposition People's National Party has threatened to bring a constitutional action against the Government regarding the law. The question pressing on everyone's mind then is: does the mandatory obligation to provide certain biometric information infringe on a person's right to privacy and if it does, is this infringement justified?

Section 13 (3) (j) of our Charter of Fundamental Rights and Freedoms gives every person the right to respect for and protection of private family life, and privacy of the house and protection of privacy of other property and communication. Section 13 (2) (b) goes on to provide that this right may be limited where it is demonstrably justified in a free and democratic society. Therefore, an individual's right to a privacy can be limited by legislation where it is justified.

To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be of sufficient importance to warrant overriding a constitutionally protected right or freedom. Second, once a sufficiently significant objective is recognized, it must be shown that the means chosen are reasonable and demonstrably justified. This involves a form of 'proportionality test' in that the measures adopted must be carefully designed to achieve the objective in question and must not be arbitrary, unfair or based on irrational considerations and the measure should impair as 'little as possible', the right or freedom in question. There must therefore be proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of 'sufficient importance' - the more severe the deleterious effects of a measure, the more important the objective must be (see: **R v Oakes [1986] 1 SCR 103**).

Therefore, the methodology for determining whether an abrogation or restriction of a fundamental right is permissible in a democratic state involves the consideration of the following questions:

- Is the legislative objective sufficiently important to justify limiting a fundamental right?
- If so, are the measures designed to meet the legislative objective rationally connected to it and are not arbitrary, unfair or based on unreasonable considerations? and
- Are the means used to impair the right or freedom no more than is necessary to accomplish such objective?

Case law emanating from Europe on the circumstances under which an individual's right to privacy may be abrogated by legislation can be instructive on the approach a Jamaican court may take in determining whether NIDS violates this right. Article 8(1) of the European Convention on Human Rights is similar, but not identical to section 13 (3) (j) of the Jamaican Constitution as it provides that: "*everyone has the right to respect for his private and family life, his home and his correspondence.*" Article 8 (2) goes on to provide that there shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

In cases such as **Niemetz v Germany (1993) 16 EHRR 97** and **Halford V UK (199) 24 EHRR 52**, the European Court of Human Rights has construed information relating to private life broadly as a concept which can include any information relating to an identified or identifiable individual. In **S and Marper v the United Kingdom [2008] ECHR 30562/04**, the Court specifically held that the indefinite retention of both fingerprint and DNA profiles of an individual in an electronic database violated their right to private life under Article 8 of the Convention in circumstances where they had not been convicted of a criminal offence. The Court was of the view that the concept of 'private life' was a broad term not susceptible to exhaustive definition. It covered the physical and psychological integrity of a person and could therefore embrace multiple aspects of the person's physical and social identity. Elements such as, for example, gender identification, name and sexual orientation and sexual life fell within the personal sphere protected by art 8. Therefore, the mere storing of data relating to the private life of an individual amounted to an interference within the meaning of art 8.

Although the Court in **S and Marper** recognized that the retention of fingerprint and DNA information pursued the legitimate purpose of the detection, and therefore, prevention of crime, it nevertheless went on to hold that the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences failed to strike a fair balance between the competing public and private interests. Therefore, the retention constituted a disproportionate interference with the applicants' right to respect for private life and could not be regarded as necessary in a democratic society.

On the other hand, in **Madhewoo v State of Mauritius and another [2016] UKPC 30**, one of the issues to be determined was whether the provisions of the National Identity Card Act 1985 in Mauritius which required that a person's fingerprints and other biometric information be registered on a chip, violated a citizen's constitutional right of protection of their person and property against a search except with his consent. The Supreme Court of Mauritius held that the taking of fingerprints fell within the scope of that protection, and that the provisions of the 1985 Act which enforced the compulsory taking and recording of fingerprints disclosed an interference with the appellant's rights under the Constitution. However, the Supreme Court went on to find that this interference was justified in the interests of public order, and that it had not been shown that the provisions were not reasonably justifiable in a democratic society.

The Privy Council upheld the Supreme Court's decision as they were of the view that the legal framework of the Act pursued the legitimate purpose of establishing a sound and secure identity protection system for Mauritius and thus answered a pressing social need affording indispensable protection against identity fraud. Such a purpose was vital for proper law enforcement in Mauritius.

From the above, it is clear that the mandatory provision of biometric information can be considered an interference with an individual's private life; however, what is not as clear is whether a Jamaican court would be of the view that this right should be limited by NIDS. The court would have to balance the competing public and private interests and answer the three (3) critical questions: Is the legislative objective of NIDS sufficiently important to justify limiting a fundamental right? Does the provision of biometric information meet the legislative objective or is it arbitrary, unfair or based on unreasonable considerations? Lastly, is the provision and storage of biometric information no more than is necessary to accomplish the legislative objective?

The white paper on the NIDS policy indicates that the policy is to provide a reliable means of efficiently verifying the identity of every citizen through a single and authoritative source of trusted identity. It also avers to issues arising from the non-existence of a national identification system including, *inter alia*, social exclusion of the poorest due to lack of basic legal identity documents, fraud within social benefit programmes, identity theft and that there are also errors in some official records (incorrect and misspelled names, wrong addresses and missing data fields). The objectives of the Act also include providing a primary source of verification of the identity information of individuals. It is the writer's view that these may not be considered sufficiently important objectives so as to justify the mandatory provision and storage of an individual's biometric information. If these are truly the legislative objectives, then why not make enrolment in the database discretionary?

However, there are other provisions in the legislation, including authorizing the disclosure of information for the prevention or detection of a crime, which suggest that another legislative objective is to assist with law enforcement. If this is the true objective of NIDS, then the court could very well find that the mandatory provision of biometric information is proportionate to this aim. It is therefore difficult at this stage to determine in what direction the balancing exercise might swing. It is up to the court to decide whether the legislation goes too far in achieving its objectives.

It will be interesting to see whether there is a constitutional challenge to NIDS and if so, whether it will survive such a challenge. Until then, the debate as to its constitutionality continues. The pilot project for NIDS is to begin in January 2019, focussing on civil servants, and a national rollout is slated to begin in September 2019 over a period of three to four years.