[2019] JMFC Full 04

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

FULL COURT

CLAIM NO. 2018HCV01788

THE HONOURABLE MR JUSTICE BRYAN SYKES, CHIEF JUSTICE
THE HONOURABLE MR JUSTICE DAVID BATTS
THE HONOURABLE MRS JUSTICE LISA PALMER HAMILTON (Ag)

BETWEEN	**JULIAN J ROBINSON**	**CLAIMANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**DEFENDANT**

IN OPEN COURT

Michael Hylton QC, Donna Scott-Mottley, Jennifer Housen and Sophia Frazer-Binns instructed by Paulwell Frazer-Binns & Co for the claimant

Marlene Malahoo-Forte QC, Attorney General of Jamaica, Althea Jarrett, Deputy Attorney General, Marlene Aldred, Deputy Attorney General, Carla Thomas, Assistant Attorney General, Donia Fuller-Barrett, Crown Counsel, Andre Bascoe, Crown Counsel, and Jeffrey Foreman, Crown Counsel for the defendant

Constitutional Law - Test of constitutionality – Burden of proof- Presumption of constitutionality – Whether Oakes Test applicable – Whether court can consider matters not pleaded - Charter of fundamental rights and freedoms – Sections 13 (1), (2), (3) (a), (g), (h), (i) (ii), (j) (i), (ii) (iii), (m), (n), (o), (q), (r) - National Identification and Registration Act – Sections 2, 4, 6, 15, 20, 23, 27 (1), 30, 36 (4), 39, 40, 41, 43,45 and 60 and the Third and Sixth Schedules Of that Act – Whether offending provisions severable – Consideration of decision of the Indian

Supreme court in relation to the Aadhaar project –Consideration of Canadian Charter Of Rights and Freedoms and the decisions of Canadian courts in that regard.

HEARD:

October 22nd, 23rd, 24th 2018 and April 12th, 2019.

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Palmer Hamilton J (Ag)

SYKES CJ

> *Dissent has a troubled history. The word 'dissident' has often been a pejorative term. Dissenters have rarely been welcomed, and are frequently viewed with suspicion not only by the dominant power but also by majoritarian opinion. And yet in a democracy, dissent is essential. It is indispensable to our freedom. In fact, it is one of the authentic voices of our freedom, particularly in times of exception; in wars, declared and undeclared; when the freedom of the citizen is at stake; and particularly when the state itself seeks to curtail fundamental freedoms in the name of national security [or economic development or whatever other perceived end worth pursuing].* [1]

THE BEGINNING

[1] The issue in this case is whether some provisions of the National Identification and Registration Act ('NIRA') are likely to violate rights of Mr Julian Robinson under the Jamaican Charter of Fundamental Rights and Freedoms ('the Charter') which are entrenched in the Constitution of Jamaica. The issue is not whether a national identification system in and of itself violates the Charter but whether the provisions challenged are in violation of the Charter.

[2] Mr Julian J Robinson alleges that sections 4, 6 (1) (e), 15, 20, 23, 27 (1), 30, 36 (4), 39, 41, 41 (1), 43 (1), 60 and the Third Schedule of NIRA are likely to violate his rights and freedoms under the Charter.

[3] NIRA has been passed by the legislature and became law on December 8, 2017 when His Excellency, the Governor General, assented to the statute. It has not yet been brought into force. According to the learned Attorney General this was to enable the complete legal framework including a data protection law to be developed. This

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[1] Dias, Dexter QC, *Silence of the Laws: Dissent and Democracy*, in *Cases That Changed Our Lives*, Vol 2, (LexisNexis) 2014, Ian McDougal (ed), 91.

includes, said the learned Attorney General, a statute to protect data. Regulations and protocols are to be developed under NIRA. The challenge, according to the learned Attorney General, is premature, and if not premature, NIRA does not nor is likely to violate any constitutional right of any person including those rights and freedoms of Mr Julian Robinson. But who is Mr Julian Robinson?

[4] Mr Julian Jay Robinson describes himself as a citizen of Jamaica, a Member of Parliament and General Secretary of the People's National Party which forms the opposition in the Jamaican Parliament.

A clause: 'naked politics dressed up in the form of a right'

[5] The learned Attorney General invited the court to dismiss aspects of Mr Robinson's claim on the basis that it was 'naked politics dressed up in the form of a right.' [2] This expression is to be found in the judgment of Parnell J in the case of **Banton and others v Alcoa Minerals of Jamaica** (1971) 17 WIR 275, 305. That expression was used by the learned judge to refer to a constitutional claim brought by Mr Banton and others in circumstances where the claimants were saying that the refusal of Alcoa Minerals to recognise the trade union of their choice was a violation of their right to freedom of association under the then Bill of Rights of the Jamaican Constitution. No definition of 'naked politics' was offered by either the learned Attorney General or stated by Parnell J. It is not clear whether it was the fact of the politics being naked that made it non-justiciable. Maybe a bit of clothing may have assisted.

[6] Section 19 (1) of the new Charter permits any person to apply to the Supreme Court for constitutional remedies if he or she is of the view that 'any of the provisions of this Chapter has been, is being or **is likely to be contravened in relation to him**' (emphasis added). This means, that Mr Robinson, like any other citizen regardless of

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[2] See paras 181 – 182 of submissions of the learned Attorney General, dated October 3, 2018.

'race, place of origin, social class' or political opinion who alleges that his or her 'constitutional rights have been, are being or are likely to be infringed' may bring a claim before the Supreme Court. Judges, properly engaged in their judicial function, do not delve into trying to find out what is 'naked politics.' This is not a principle known to law. No legitimate legal test was devised or indeed articulated by Parnell J to make such a determination possible. Judges, properly engaged in their judicial function, only know of justiciable issues and make determinations based on the merits of the claim in light of the substantive and procedural law, evidence, and legal submissions. What is important, and what all courts must do, is to focus on the legal and factual issues raised and determine them according to law rather than seek to engage in the impossible task of trying to characterise a claim brought by a litigant as 'naked politics dressed up in the form of a right.' I cannot, therefore, accede to the learned Attorney General's invitation.

[7] It is common ground that Mr Robinson and the defendant agree on the benefits of a national identification system. Mr Robinson in paragraphs 3 and 4 of his second affidavit dated July 31, 2018 stated the following:

> *3. In paragraph 5, the Lynch-Stewart Affidavit states "**the policy behind the Act has been in the making for over 40 years**". (sic) As an Opposition Member of Parliament and an Officer of the People's National Party, I am aware and confirm that the idea of a national identification system commenced under the PNP Administration through its then leader and Prime Minister, the Most Hon. Michael Manley.*
>
> *4. The Opposition supports a national identification system for the undisputed benefits it provides However, for the reasons contained in my previous affidavit, we are unable to support the existing Act and the proposed system.* (emphasis in original)

[8] Mr Robinson's acceptance of the policy is also reflected in the written submissions made on his behalf. The submissions state at paragraph 5:

> *The Claimant and the political party/members he represents do not oppose the establishment of a national identification system, and these proceedings do not challenge the Act. Instead, the Claimant*

> *contends that specific provisions ("the Unconstitutional Provisions") of the Act breach fundamental rights guaranteed under the Constitution of Jamaica ("the Relevant Fundamental Rights") as follows: …*

[9] Assuming that Mr Robinson is correct that the objective of the law is a proper (meaning constitutional one), there is always a distinction between enacting a law for a proper purpose and using the proper means via the enacted law to achieve that purpose. The mere fact of a law being beneficial does not in and of itself mean that the law, either in its text or effect, actual or anticipated, is constitutional. In the context of a constitutional democracy it is quite possible for a court to hold that a law was not passed for a proper purpose. It is also quite possible to hold that the objective of the law is constitutional but the means to achieve the objective are unconstitutional. Until the law is declared to be unconstitutional then all persons are entitled to treat the law as constitutional and in that sense there is a presumption of constitutionality. As will be explained later in this judgment, under the new Jamaican Charter of Fundamental Rights and Freedoms the proper test for constitutionality is that of proportionality. The presumption of constitutionality referred to by the learned Attorney General does not function in the new Charter in the way that it did under the old Bill of Rights. The old approach, manifested in the pre-Charter cases, is no longer of great value in this new dispensation. However, before all that is dealt with, a detailed examination of the NIRA is necessary.

The National Identification and Registration Act (NIRA)

[10] The long title to NIRA is this:

> *AN ACT to Establish a body to be called the National Identification and Registration Authority for the promotion, establishment and regulation of a National Identification System that facilitates the enrolment of all citizens of Jamaica and individuals who are ordinarily resident in Jamaica and the verification of identity information and the authentication of a National Identity Number and a National Identification Card; to provide for the establishment, maintenance and operation of a databank to be called the National*

Civil and Identification Database; for the assignment of a National Identification Number to each individual whose particulars are included in the Database; for the issue of National Identification Cards and certain certificates to individuals whose particulars are included in the Database; to facilitate the collection, compilation, analysis, abstraction and publication of statistical information relating to the commercial, industrial, social, economic and general activities and condition of the citizens of Jamaica and individuals who are ordinarily resident in Jamaica; and for connected matters.

[11] The long title contains a number of purposes and at the heart of the legislation is the establishment of a national identification system. If each semi-colon demarks a purpose, then four of the six purposes in the long title have to do with the establishment of an identification system.

[12] The objects of NIRA are found in section 3 which states:

The objects of this Act are inter alia, to-

(a) establish a body to be called the National Identification and Registration Authority for the promotion, establishment and regulation of a National Identification System that facilitates the enrolment of all citizens of Jamaica and individuals who are ordinarily resident in Jamaica;

(b) establish and develop the National Identification System;

(c) facilitate the collection and compilation analysis, abstraction and publication of statistical information relating to the commercial, industrial, social, economic and general activities and condition of citizens of Jamaica and individuals who are ordinarily resident in Jamaica; and

(d) provide a primary source for the verification of identity information and the authentication of a National Identification Number and a National Identification Card.

[13] Of the four objects stated in this provision three are centred on identification. By section 4 (1) the statute applies to all citizens of Jamaica and individuals ordinarily resident in Jamaica. Section 4 reads as follows:

(2) This Act applies to-

(a) all citizens of Jamaica; and

(b) individuals who are ordinarily resident in Jamaica.

(3) This Act shall not apply to persons who are entitled to immunities and privileges under the Diplomatic Immunities and Privileges Act.

[14] Section 2 defines the expression 'ordinarily resident in Jamaica' as legally residing in Jamaica for at least six months in a calendar year immediately preceding he date of enrolment. Section 4 (2) excludes persons 'entitled to immunities and privileges under the Diplomatic Immunities and Privileges Act.'

[15] A body known as the National Identification and Registration Authority ('the Authority') is established to administer the statute (section 5 (1)). The Authority has a statutory duty to 'take such steps as may be necessary to enrol all registrable individuals in the Database' (section 20 (2)). The Authority is also under a duty to take necessary steps to verify the accuracy of information provided by the registrable individual, it is not to enter any identity information in the Database unless the information is verified (section 20 (6)).

[16] The registration of births and deaths shall now take place within the Authority (section 11 (1) (b)).

[17] The functions of the Authority are set out in section 6:

(4) The functions of the Authority shall be to –

(a) administer the National Identification System as provided under this Act;

(b) establish, maintain and operate the database;

(c) establish and maintain an improved and modernized system of civil registration and keep public records through appropriate means;

(d) develop appropriate systems and protocols for the security, secrecy and necessary safeguards for the protection and confidentiality of identity information and demographic information in the Database;

(e) develop policies, procedures and protocols for the collection, processing, use and sharing of information contained in the Database consistent with data protection best practices;

(f) provide information or advice, or make proposals, to the Minister on matters relating to the Authority;

(g) develop public education programmes, monitor and promote compliance with this Act and the regulations;

(h) perform such other functions as may be assigned to the Authority by the Minister by or under this Act or any other enactment.

(5) In performing the functions specified in subsection (1), the Authority may –

(a) institute measures for the promotion of compliance with this Act;

(b) design and develop systems and procedures which allow for ease and convenience in the enrolment of individuals;

(c) introduce cost recovery measures for services provided by or on behalf of the Authority;

(d) establish procedures and develop, implement and monitor plans and programmes relating to the administration of the National Identification System;

(e) conduct seminars and provide appropriate training programmes and consulting services and gather and disseminate information relating to the National Identification System; and

(f) do anything or enter into any arrangement which, in the opinion of the Authority, is necessary to ensure the proper performance of its functions.

[18] Section 15 indicates the following:

The Authority shall establish, maintain and operate in accordance with this Act, a consolidated national databank to be known as the National Civil and Identification Database for the collection and collation of identity information and demographic information regarding registrable individuals.

[19] Thus the information captured is to be stored in what is called the National Civil and Identification Database ('NCID'). Section 15 uses important terms which are defined in section 2. These definitions are set out in this judgment.

[20] The purposes of the NCID are stated in section 16 which reads:

The purposes of the Database are to –

(g) provide a convenient method for individuals to prove identity information about themselves to others who reasonably require proof of that information;

(h) provide a secure and reliable facility for ascertaining, recording, maintaining and preserving identity information and demographic information relating to individuals as is required to be entered into it;

(i) facilitate the generation and issuance of National Identification Cards and such other forms of identity documents, as required;

(j) enable the processing of information to facilitate the verification of identity information and authentication of the National Identification Number and National Identification Card;

(k) enable the generation of statistical information as may be required by the Statistical Institute of Jamaica established under the Statistics Act and the Planning Institute of Jamaica established under the Planning Institute of Jamaica Act; and

(l) enable the reproduction of identity information and demographic information in legible form as may be required from time to time.

[21] The uses to which the NCID can be put are stated in section 17 which says:

The Authority may use the information in the Database solely for the following purposes —

(m) to enable the use of identity information as unique and unambiguous features of identifying registrable individuals;

(n) to enable the use of the information contained in the Database to generate and issue the National Identification Card with a National Identification Number to registrable individuals;

(o) for compiling and reporting statistical information derived from analysing the information stored in the Database;

(p) to provide a medium for the verification of the identity information and authentication of the National Identification Number and National Identification Card; and

(q) to facilitate the provision of a secure and reliable method for ascertaining, obtaining, maintaining and preserving information on registered individuals.

[22] Then there is section 20 which compels registration and criminalises those who don't wish to be registered:

(6) Every registrable individual shall apply to the Authority for enrolment in the Database.

(7) The Authority shall take such steps as may be necessary to enrol all registrable individuals in the Database.

(8) The Authority may collaborate with public and private sector entities as may be necessary to establish enrolment centres and to ensure ease of access by the registrable individuals to the enrolment centres.

(9) The form and manner of the application, the information to be collected and the procedures to be adopted for the conduct of enrolment shall be as specified in the regulations.

(10) The Authority shall, at the time of enrolment, inform the registrable individual of the following details in such manner as may be specified in the regulations, namely —

(a) the reason why the information is being collected;

(b) the purpose for which the information will be used;

(c) the fact that, and the manner in which, the information will be verified;

(d) the right of the individual to access the information in the future;

(e) the right to request the correction of inaccurate information registered in the Database;

(f) to whom and under what circumstances information included in the Database may be disclosed; and

(g) the right to appeal decisions taken by the Authority.

(11) The Authority shall take such steps as may be necessary to satisfy itself as to the accuracy of the identity information provided by a registerable individual.

(12) No identity information about a registrable individual shall be entered into the Database unless the information has been verified by the Authority.

(13) All information provided under this section, which constitutes registrable particulars that are required to be included in the Database by virtue of the provisions of the Third Schedule, shall be included in the Database.

(14) Subject to subsection (7), information provided under this section, which constitutes registrable particulars that may be included in the Database by virtue of the provisions of the Third Schedule, may be included in the Database if the Authority considers the inclusion appropriate having regard to the purposes of the Database in relation to the particular registrable individual.

(15) The Authority shall provide to each individual a copy of the information that was given to the Authority by the individual at the time of enrolment, in such form and manner as the Authority considers appropriate.

(16) Every person who refuses or fails, without reasonable excuse to apply to the Authority for enrolment in the Database in accordance with this section commits an offence and shall be liable on conviction to the penalty specified in relation to that offence in the Fourth Schedule.

(17) A contravention of this section shall not form a part of the criminal record of the offender.

(18) The Authority may use any lawful means available to it to obtain any registrable particulars of a registrable individual that are required to be included in the Database if the registrable individual fails to provide the information to the Authority within the time specified by the Authority.

(19) A Parish Court before which a person is convicted of an offence under subsection (11) shall instead of sentencing the person to imprisonment for the non-payment of a fine imposed in respect of the offence, deal with the person in any other way in which a Court may deal with an offender under section 3 of the Criminal Justice (reform) Act (other punishment in lieu of imprisonment).

[23] Here we see the ultimate coercive power of the state being enlisted to ensure compliance – the risk of imprisonment even if the risk is reduced. The learned Attorney General contended that when you have a system of compulsory registration then there has to be a means of enforcement. That may be an effective method of ensuring compliance. The policy choice, it was said, was to use the criminal law. This response by the learned Attorney General suggests that persuasion was not thought to be a reasonable option. A seemingly remarkable conclusion in a democracy where the exercise of executive power rests upon the consent of the governed.

[24] Then there is the National Identification Number (NIN) issued under section 23. This is a unique identification number that is never replicated and is assigned to only one person. Section 23 reads:

The Authority shall, after entering an individual's identity information and demographic information in the Database, assign to that

individual a unique national identification number to be called the National Identification Number.

[25] There is the National Identification Card (NIC) issued under section 25 after the individual is enrolled in the NCID. Section 25 states:

> *(1) An individual is eligible for the issue of a National Identification Card if the Authority is satisfied that the individual has been enrolled in the Database.*
>
> *(2) No fee shall be payable by a registered individual for the first issue, or any renewal, of a National Identification Card to the registered individual by the Authority.*

[26] Then after the NIN is issued, if a NIC is issued then the NIC must have the NIN displayed on it. This is stated in section 27 which reads:

> *(1) A National Identification Card shall display the identity information pertaining to the individual to whom it has been issued as specified in the regulation.*
>
> *(2) A National Identification Card, in the absence of evidence to the contrary, shall be prima facie proof of the particulars contained in it.*
>
> *(3) The Authority shall determine the size, description, content and other physical features of a National Identification Card as may be specified in the regulations.*

[27] The NIC remains the property of the Authority. This is so stated in section 30 which provides:

> *A National Identification Card remains the property of the Authority.*

[28] There are other provisions relating to the NIC such as being valid for specified periods unless cancelled (section 29); not being granted retrospectively (section 31); not transferable (section 32); that the Authority is required to keep a record of every NIC issued (section 33) and the NIC must be returned to the Authority if the NIC holder dies,

ceases to be a citizen of Jamaica or ceases to be ordinarily resident in Jamaica (section 36 (4)).

[29] I pause at this stage to summarise the main provisions of NIRA. The legislature enacted NIRA to provide for a system of data collection on all Jamaican citizens and those who live here for at least six months of a calendar year. These persons are collectively called registrable individuals. Under this law, they must apply for registration and if they don't they are at risk of a criminal conviction unless they have a reasonable excuse. On registration they are given a NIN thereby becoming eligible for a NIC. They can only get a NIC if they are registered in the NCID which means they must have a NIN.

[30] From what has been said so far NCID is more than a means of identifying persons who are registered. It is to become the repository of virtually all biographical information on the entire Jamaican population and ordinary residents. All this is to be in one place and as we shall see the provisions make it plain that the registration number is to be embedded in such a manner that, over time, all government databases will be linked to each other by way of this number. When we get to an examination of section 41 it will be seen that the structure of the legislation enables profiling and electronic surveillance by possibly tracking the use of the registration number. This is not to say that this is the intention of the framers of the law though that cannot be ruled out. The point is that the law as framed creates this possibility and it is not remote. History has taught us that once the power is available and there is no constraint, governments will use that power. Indeed, the risk of abuse of power is the very raison d'être for entrenching fundamental rights and freedoms. The law in and of itself does not restrain but it sets standards by which persons should act and where they fall short they are held accountable.

[31] NIRA makes a clear distinction between the NIN and the NIC. There is no power in the NIRA to revoke a NIN once issued but there is power to cancel a NIC. This provision reinforces the point that the NIN is lifelong and cannot be assigned to anyone

else even after the death of the person to whom the number was assigned. Section 24 deals with this by stating:

> *(20) A National Identification Number shall be a random number that bears no relation to the attributes or identity of the individual to whom the National Identification Number is assigned.*
>
> *(21) A National Identification Number that is assigned to an individual —*
>
> *(a) shall be assigned permanently to the individual; and*
>
> *(b) shall not be assigned or re-assigned to, or re-used by, any other individual during the lifetime, or after the death, of the individual.*
>
> *(22) A National Identification Number shall provide no information in respect of a person other than that an entry in the Database has been made and that the entry has been given that number.*

[32] NIRA has provisions for authentication and verification. These are found at sections 38, 39 and 40 which are set out below.

[33] Section 38 says:

> *(23) The Authority may authenticate the validity of National Identification Numbers and National Identification Cards, in such form and manner, subject to such conditions and on payment of such fees, as may be specified in the regulations.*
>
> *(24) The Authority may verify identity information of a registered individual, in such form and manner, subject to such conditions and on payment of such fees, as may be specified in the regulations.*

[34] Section 39 indicates:

> *(1) A requesting entity may apply in writing to the Authority requesting that the Authority verify identification and the Authority may grant the request but shall not disclose core biometric information of the individual.*

(2) A requesting entity shall ensure that any identity information of an individual that was obtained through its access to the Database is only used for verification purposes.

(3) A requesting entity shall provide the individual submitting his identity information and demographic information to that requesting entity for verification, with the following details, namely –

(a) that the requesting entity may seek to verify the information submitted by the individual by using the verification services provided by the Authority; and

(b) the uses to which the information received through its access to the Database may be put by the requesting entity.

(4) A requesting entity that contravenes subsection (2) commits an offence and is liable to the penalty specified in relation to the offence in the Fourth Schedule.

[35] Section 40 provides:

(1) The Authority shall maintain records of the access provided to a requesting entity for verification purposes in such manner and for such period as may be specified in the regulations.

(2) Every registered individual shall be entitled to obtain from the Authority, in such form and manner as may be specified in the regulations –

(a) the individual's information contained in the Database; and

(b) a record of requests made to the Authority under subsection (1).

[36] NIRA imposes a legal obligation on every public body to require the NIN or NIC and the person is obliged to produce it. This is said, according to the learned Attorney General, to be necessary in order to facilitate the delivery of goods or services provided by the public body. This is found in section 41 which states:

(25) A public body shall require that a registered individual submit the National Identification Number assigned to him or the National Identification Card issued to him to facilitate the delivery to him of goods or services provided by the public body; and the registered individual shall comply with the request.

(26) A private sector entity may require that a registered individual submit the National Identification Number assigned to him or the National Identification Card issued to him to facilitate the delivery to him of goods or services provided by the private sector entity.

(27) This section does not apply during a period of public disaster or public emergency as defined in section 20 of the Constitution of Jamaica or in any other situation that poses a threat to health or life.

[37] A private entity may require the citizen to produce the NIN or the NIC.

[38] NIRA establishes a disclosure regime in sections 43 to 45. Section 43 states:

(28) The Authority shall not disclose identity information stored in the Database about any individual except where the identity information is disclosed-

(a) pursuant to a request of the individual whose information is being disclosed;

(b) to facilitate the identification of bodies of unknown deceased persons;

(c) to facilitate the finding or identification of missing persons;

(d) subject to subsection (2), pursuant to an order of the Court; or

(e) where the Act authorises disclosure.

(29) The Court may, on an ex parte application by the Authority to a Judge in Chambers, grant an order for disclosure of the identity information of an individual of the grounds that the disclosure is necessary-

(a) for the prevention or detection of a crime;

(b) in the interest of national security;

(c) where there is a public emergency; or

(d) to facilitate an investigation under the Proceeds of Crime Act.

(30) The Authority may disclose demographic information to enable the generation of statistical information as may be required by the Statistical Institute of Jamaica established under the Statistics Act and the Planning Institute of Jamaica established under the Planning Institute of Jamaica Act.

[39] Section 44 is as follows:

(1) Subject to subsection (2), the identity information collected under this Act may be disclosed only in accordance with the provisions of this Act and in such manner as may be specified in the regulations.

(2) Core biometric information that is collected or created under this Act shall not be disclosed by the Authority, except under a court order or with the authorisation of the registered individual.

[40] Section 45 enacts the following:

(31) Subject to subsection (2), where access to core biometric information in the Database is reasonably required for the purpose of a criminal investigation or criminal proceedings, an officer not below the rank of Senior Superintendent of Police may apply to the Supreme Court for an order authorizing the Authority to disclose the core biometric information to the officer.

(32) An application for an order under subsection (1) shall be made ex parte to a Judge in Chambers.

(33) A Judge shall not make the order under this section unless he is satisfied that

(a) it is necessary in the interests of national security or for the investigation of a criminal offence;

(b) other investigative procedures-

(i) have not been or are unlikely to be successful in attaining the information sought to be acquired;

(ii) are too dangerous to adopt in the circumstances;

(iii) having regard to the urgency of the case, are impracticable or;

(c) it would be in the best interest in the administration of justice to make such an order.

(34) An application for an order under this section shall be in writing and be accompanied by an affidavit deponing to the following matters-

(a) the name and rank of the police officer and the division to which the police officer is assigned;

(b) the facts or allegations giving rise to the application;

(c) such other information as is necessary for the Judge to make the order

(35) Biometric information acquired by means of an order under this section shall be dealt with in accordance with section 4A and 4B of the Fingerprints Act.

[41] Section 60 makes consequential amendments to other legislation. It states:

(1) The enactment specified in the first column of the Sixth Schedule are amended in the manner specified respectively in relation to them in the second column of the Sixth Schedule.

(2) Each amendment shall be construed as one with the enactment specified in relation to the amendment.

[42] The Third Schedule of NIRA indicates the information that the Authority must collect (Parts A, B1 and D) and may collect (Parts B2, C, and D).

THIRD SCHEDULE *(Section 2, 15)*

Contents of Database

The following is a list of registrable particulars in relation to an individual that shall be included or, as the case may be, are includable in the Database for the identification of individuals and the generation of statistical information:

Part A

Biographic Information

A1. The following biographic information shall be included in the Database: -

1. *The full names, including any name by which the individual is or has been known and any name changed by deed poll.*

2. *Where available, the date and time of birth of the individual.*

3. *The place of birth of the individual.*

4. *Where available, the full names of the mother and father of the individual.*

5. *Whether the individual is male or female.*

6. *The height of the individual.*

7. *The principal place of residence and any alternative places of residence of the individual.*

8. *The mailing address of the individual.*

9. *The nationality of the individual.*

10. *In the case of an individual who is not a citizen of Jamaica, the period of residence of the individual in Jamaica.*

11. *The marital status of the individual and the full names of the spouse of the individual within the meaning of the Property (Rights of Spouses) Act.*

12. *If the individual is married, the date and place of marriage of the individual.*

13. *If the individual is divorced, the date of grant of decree absolute of the individual.*

14. *If the individual is deceased –*

    (a) the date of death and age of the individual at the date of death; and

    (b) the place of death of the individual.

A2. The following biographic information may be included in the Database: -

The e-mail address of the individual.

Part B

Biometric Information

Core Biometric Information

B1. The following core biometric information shall be included in the Database –

1. *The photograph or other facial image of the individual.*

2. *Subject to Subpart B2, the finger print of the individual.*

3. *The eye colour of the individual.*

4. *The manual signature of the individual, if the individual is over the age of 18 years.*

B2. Any of the following categories of core biometric information may be taken and included in the Database –

1. *The retina or iris scan of the individual.*

2. *The vein pattern of the individual.*

3. *If it is not possible to take any of the information specified in Item 1 or 2 any two of the following –*

    (a) the foot print of the individual.

    (b) the toe print of the individual; and

    (c) the palm prints of the individual.

Other Biometric Information

B3. The following information may be included in the Database –

1. *Any distinguishing feature, including physical feature of the individual.*

2. *The blood type of the individual*

PART C

Demographic Information

The following information provided voluntarily by an individual may be included in the Database –

1. *The employment status of the individual.*

2. *The race of the individual.*

3. *The religion of the individual.*

4. *The education of the individual.*

5. *The profession of the individual.*

6. *The occupation of the individual.*

7. *The address of matrimonial home of the individual.*

8. *The telephone number at which the individual can be reached.*

9. *Whether the individual is male or female.*

PART D

Reference numbers

D1. Where available, the following information shall be included in the Database –

1. *The taxpayer Registration Number of the individual.*
2. *The driver's licence number of the individual.*
3. *The passport number of the individual.*
4. *The national insurance number of the individual.*
5. *The birth entry number of the individual.*
6. *The PATH registration number of the individual.*
7. *The National Identification Number of the individual.*
8. *The Elector Identification Number of the individual.*
9. *The particulars of the certification of registration issued to an individual under section 13 of the Disabilities Act.*
10. *The National Health Fund number of the individual.*

D2. The following information may be included in the Database –

Student Unique Identification Number.

PART E

Registration History

E. The following information shall be included in the Database –

1. *Particulars of each National Identification Card issued.*

2. *Particulars of each cancelled National Identification Card.*

3. *Particulars of National Identification Card returned due to renunciation or termination of Jamaican citizenship.*

4. *Particulars of the disclosure of any identification information about a registered individual to a requesting entity and the purpose for which the information was requested.*

Important definitions in NIRA

[43] I now refer to other parts of the NIRA. In section 2 there are important definitions. These are the relevant ones.

> *"authentication" means the process by which the National Identification Number and a National Identification Card of an individual are proved;*
>
> *"Authority" means the National Identification and Registration Authority established by section 5;*
>
> *"biographic information" in relation to an individual, means the information specified in Part A of the Third Schedule;*
>
> *"biometric information", in relation to an individual, means the information specified in sub-parts B1, B2 and B 3 of the Third Schedule but does not include the DNA of the individual;*
>
> *"core biometric information", in relation to an individual, means the information specified in sub-parts B1 and B2 of the Third Schedule but does not include the DNA of the individual;*
>
> *"Database" means the National Civil and Identification Database established by section 15:*
>
> *"DNA" has the meaning assigned to it by the DNA Evidence Act;*

"document" means, in addition to a document inn writing, anything or manner in which information of any description is recorded or stored;

"enrolled individual" means any person who is enrolled under Part IV;

"enrolment" means the process of collecting identity information and demographic information from individuals for the purpose of the Database;

"identify information" means the biographic information and biometric information of an individual;

"Minister" means the Prime Minister;

"National Identification System" includes-

(a) the Database;

(b) the National Identification Number;

(c) the National Identification Card; and

(d) the processes, automated retrieval and storage, procedures, plans, networks, services, measures and interconnected and other associated elements for the enrolment of all citizens of Jamaica and individuals who are ordinarily resident in Jamaica and the verification and the authentication of their identity.

"requesting entity" means a public body or private entity that, or person who, submits the National Identification Number and identity information, of an individual to the Database for authentication.

"verification" means the process by which the accuracy of identity information is established.

[44] From what has been said the legislature has enacted a law that places great faith in biometric information (some mandatory and some optional) combined with

biographical (mandatorily collected) and demographic (optionally collected) information as a means of identification. It is also plain that it is not just about identification but also about data collection in order to facilitate extraction and analysis of the data that enables the government to speak to the industrial, social, economic and general activities and condition of Jamaica.

[45] I need to explain in some detail, the nature of biometric systems and why, as shall be shown, the jurisprudence in this area insists that failure to provide adequate protection for the data is an exceptionally serious matter that rises to the level of a constitutional violation of the right to privacy. For this explanation I rely greatly on the helpful book by Nancy Yue Liu. [3] She explained that biometrics 'is a technique that uses biometric features to verify the identity of, or to identify human beings.' [4] It is based on the idea that biometric features have five qualities that make them desirable to be used for identification and authentication. These qualities are (a) robustness; (b) distinctiveness; (c) availability; (d) accessibility, and (e) acceptability. [5]

[46] Robustness refers to the extent that the characteristic changes over time. It is felt that biometric features, unlike, for example, a signature, remain the same for a long period of time. Distinctiveness refers to the extent to which a characteristic is present in a particular population. The higher the level of distinctiveness the more effective that characteristic ought to be in the identification or authentication process. For example, it is said that an iris or retina is very distinctive. Availability refers to the extent to which a biometric characteristic is available in a population. For example, finger prints while common are not always available because some occupations destroy the ridges and

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[3] Liu, Yue Nancy, *Bio-Privacy: Privacy Regulation and the Challenge of Biometrics* (2012) (Routledge).

[4] Liu (n 3) at p 30.

[5] Liu (n 3) at p 30.

grooves on a finger that are the corner stone of finger print identification. Irises and retinas can alter over time. Hence, some biometric systems prefer to collect DNA samples rather than finger prints. Accessibility refers to the extent to which the particular biometric characteristic can be presented to the devices that is capturing that feature either for initial enrolment or verification/identification. Acceptability refers to the degree to which the biometric capturing process is agreeable to a particular population.[6]

[47] Biometric systems have only two fundamental uses: identification or authentication/verification. In this discussion I have ignored the technical distinction between identification on the one hand and verification/authentication on the other hand.[7] The premise of both uses is as follows. A database is established in which the biometric characteristics of the data subject are placed. That standard becomes the master standard and biometric in relation to that data subject. The database is established and, at some point after the master standard is established, a biometric characteristic is presented to the database. A search of the database is then triggered by some means and this search is to find the master standard in the database that matches the biometric characteristic that is presented to it.

[48] The problem however is that depending on the size of the database the search may take a long time in relative terms of course and as shall be seen may yield a false positive, that is, saying there is a match when there is none, or a false negative, saying that there is no match when the correct answer should be that there is a match. To reduce this, the biometric master standard is tied to some other data such as a unique number. To reduce the risk of false negatives or positives even further other data such as biographical, demographic, and other numbers can be tied to the unique number. From this it can be said that the strength of the system rests on the ability of ‘a

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[6] Liu (n 3) p 30.

[7] Liu (n 3) pp 31 – 32.

computer system to uniquely distinguish an individual from a larger set of individual biometric records.'[8] The system cannot work unless there is a master biometric standard that is captured and stored in a database. This explains the need for registration. Put another way, the more extensive the data that is collected the less likely there is to be an error when the biometric characteristic is presented to the database.

[49] In short, biometric systems, whether for identification or verification/authentication 'depend on comparing a new measure [the characteristic between presented to the database] against a previously captured measure [the master biometric standard].'[9] In a word, it is matching the presented to the stored.

[50] Immediately from this the question of access and protection looms large which explains why the issue of whether there is sufficient protection for that kind of data is so important and why it is an inescapable component of privacy. When such vast amounts of data are collected and placed either in one place or several places, the consequences of a data breach are far reaching. In the digital age, once there is a breach, the proverbial genie is out of the bottle and can never ever be put back in.

[51] In addition, no biometric system is absolutely correct because the decision that arises from the matching process is really the outcome of a series of processes that have at their base a probability factor. That is to say, matching only says that the data item presented bears such a degree of similarity between the master biometric standard and the data item that the answer given is that the data item presented is what it purports to be. The database is programmed to arrive at a predetermined score for determining whether there is a match or not. Thus a score above the threshold says

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[8] Liu (n 3) p 32.

[9] Liu (n 3) p 32.

'Yes, there is a match' and a score below says 'No match.' Thus depending on the threshold set, there can be false negatives and false positives. This explains why there is a statutory duty on the Authority under NIRA to ensure that what it collects is accurate.

[52] Since the biometric system depends on matching then obviously what is presented to be matched is important.

[53] The sensitivity of the device doing the data capture either initially or subsequently for comparison purposes is another variable that effects the reliability of biometric systems. It is entirely possible that the initial biometric capture was done with equipment that was less than ideal. This means that the master biometric in the database will never be as refined and detailed as any subsequent data presented for matching, if the data presented for matching was captured by superior equipment.[10] This increases the risk of false positives and false negatives.

[54] Since the biometric system is computer based it follows that it is vulnerable to attack. It is said, for example, that Trojan Horse programmes can replace data in the master biometric. It is also said that biometric systems are vulnerable to spoofing. Spoofing occurs where a fraudulent communication signal is sent to the legitimate data source and the legitimate data source believes that the communication is coming from a legitimate source and consequently responds as if the signal had come from a genuine source. [11] If successful, spoofing secures information by making the holder of the data 'think' that the signal is coming from a legitimate source and so will surrender the information requested.

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[10] Liu (n 3) pp 36 – 54.

[11] Liu (n 3) p 38.

[55] Finally, in this short indication of the nature of biometric data I refer to the fact that, it is a view held in the medical community that, the examination of a person's retina, iris, and even finger print patterns can indicate or suggest that a person is suffering from a range of medical conditions such as Down's syndrome, diabetes and hypertension. A single data breach can therefore have devastating privacy consequences for the individual.

[56] When data bases held by the Authority are linked through a unique identifier, in this case the NIN, it is not hard to see why persons are anxious about this type of data collection process. It is also not hard to see why the tendency is to insist on a strong, robust, safe collection and storage system. All a determined hacker needs is one successful breach out of one million attempts. Thus the stakes are very high and failure to properly secure the data is not an option. In this type of scenario it is not how many attempts were detected and deterred but whether the risk of a successful attack has been reduced to no possibility of a successful hack.

[57] Some have sought to say that this approach is overkill. I say, all it takes to be hit by a motor vehicle is a single act of carelessness. The previous millions of safe uses of the road are of no value in that single instance of carelessness.

[58] In resolving this case, eight necessary analyses must be done so that the response to the claim and the submissions can be properly appreciated.

The first necessary analysis: a review of the ancien régime

[59] It is important to review, briefly, the development of constitutional law in Jamaica and the Commonwealth Caribbean so that the fundamental change wrought by the new Jamaican Charter can be appreciated. Successful constitutional challenges were not very common because, it appears, that Commonwealth Caribbean constitutional law was firmly committed to two ideas. First, the burden of proving that a law was unconstitutional was a heavy one. Second, the standard of proof on the claimant was the criminal standard of proof beyond reasonable doubt. From my review of the new Charter, its phraseology and the jurisprudence developed in contexts similar to the

current Charter, the first idea has to be modified significantly, and the second abandoned altogether.

[60] I will use just three cases to show the orthodox position before the Jamaican Charter was enacted in 2011. In **Attorney General of Trinidad and Tobago v Mootoo** (1976) 28 WIR 304 the approach to constitutionality of legislation was captured by Corbin JA in this passage at page 335:

> *There is a very heavy burden cast on any person challenging the validity of any piece of legislation since there is a presumption that the legislature understands and correctly appreciates the needs of the people and that its laws are directed to problems made manifest by experience. The court will only declare a statute invalid if it conflicts with the Constitution and so the onus is on anyone seeking to impugn a statute to show that in the circumstances which existed at the time it was passed, the legislation violated rights enshrined in the Constitution.*
>
> *This strong presumption in favour of validity has been recognised by many learned authors of textbooks, but it will be sufficient to refer only to one or two of these, eg Cooley on Constitutional Limitations (1972) reprint at p 183:*
>
> *'The constitutionality of a law, then is to be presumed, because the legislature, which was first required to pass upon the question, acting, as they must be deemed to have acted, with integrity, and with a just desire to keep within the restrictions laid by the Constitution upon their action, have adjudged that it is so. They are a co-ordinate department of the government with the judiciary, invested with very high and responsible duties, as to some of which their acts are not subject to judicial scrutiny, and they legislate under the solemnity of an official oath, which it is not to be supposed they will disregard.'*
>
> *Black on Interpretation of Laws (1911) p 110:*
>
> *'41. Every Act of the legislature is presumed to be valid and constitutional until the contrary is shown. All doubts are resolved in favour of the validity of the Act. If it is fairly and reasonably open to more than one construction, that construction will be adopted which*

will reconcile the statute with the Constitution and avoid the consequence of unconstitutionality.

Legislators, as well as judges, are bound to obey and support the Constitution, and it is to be understood that they have weighed the constitutional validity of every Act they pass. Hence the presumption is always in favour of the constitutionality of a statute; every reasonable doubt must be resolved in favour of the statute, not against it; and the courts will not adjudge it invalid unless its violation of the Constitution is, in their judgment, clear, complete, and unmistakable*. And, further, a State statute can be declared unconstitutional only where specific restrictions upon the power of the legislature can be pointed out, and the case shown to come within them, and not upon any general theory that the statute is unjust, oppressive, or impolitic, or that it conflicts with a spirit supposed to pervade the Constitution, but not expressed in words. Neither will any court, in determining the constitutional validity of a statute, take into consideration or pass upon the motives of the legislature in its enactment.'*

And in Seervai's Constitutional Law of India at p 54:

'There is a presumption in favour of constitutionality and a law will not be declared unconstitutional unless this case is so clear as to be free from doubt; to doubt the constitutionality of a law is to resolve it in favour of its validity.'

The same principle has also been emphasised by the courts in a long list of decided cases. One of the most recent of these is the decision of the Privy Council in Attorney-General v Antigua Times Ltd ((1975) 21 WIR 560, [1975] 3 All ER 81, [1976] AC 16, [1975] 3 WLR 232) where Lord Fraser of Tulleybelton stated ((1975) 3 All ER at p 90):

'In some cases it may be possible for a court to decide from a mere perusal of an Act whether it was or was not reasonably required. In other cases the Act will not provide the answer to that question. In such cases has evidence to be brought before the court of the reasons for the Act and to show that it was reasonably required? Their Lordships think that the proper approach to the question is to

presume, until the contrary appears or is shown, that all Acts passed by the Parliament of Antigua were reasonably required. This presumption will be rebutted if the statutory provisions in question are, to use the words of Louisy J, "so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power but constitutes in substance and effect, the direct execution of a different and forbidden power".'

And in Hinds v The Queen and DPP v Jackson ((1975) 24 WIR 326, [1976] 1 All ER 353, [1976] 2 WLR 366, [1977] AC 195) Lord Diplock, after expressing the opinion that the presumption exists ((1976) 24 WIR at P 340), stated:

'The presumption is rebuttable. Parliament cannot evade a constitutional restriction by a colourable device. But in order to rebut the presumption their Lordships would have to be satisfied that no reasonable member of Parliament who understood correctly the meaning of the relevant provisions of the Constitution could have supposed that hearings in camera were reasonably required for the protection of any of the interests referred to; or, in other words, that Parliament in so declaring was either acting in bad faith or had misinterpreted the provisions of the Constitution under which it purported to act.' (emphasis added)

[61] In the same case Hyatali CJ approved the following at page 312:

And Washington J in Ogden v Saunders (12 Wheat 213) (12 Wheat at p 270) in stating the reason for the rule said:

'It is but a decent respect due to the wisdom, the integrity and the patriotism of the legislative body by which any law is passed to presume in favour of its validity, until its violation of the constitution is proved beyond all reasonable doubt.'

…

Dr Basu on Constitutional Law of India (supra), p 457, summarises the approach of the American courts thus:

'It is the first canon of judicial review of legislation in the United States, that "the legislature must be considered innocent till it is guilty beyond all reasonable doubt". Hence all reasonable doubt of

> *a statute's validity must be resolved in favour of a statute and it should not be pronounced to be unconstitutional unless it is clearly proved to be so ...'*
>
> *What the presumption means is that there should be such an opposition between the Constitution and the law that the judge should feel a clear and strong conviction of their incompatibility ...*
>
> *It must be presumed that a legislature understands and correctly appreciates the need of its own people that its laws are directed to problems made manifest by experience... and that its discriminations are based on adequate grounds.'*

[62] This approach was affirmed by the Privy Council on appeal ((1979) 30 WIR 411). The presumption referred to in the dictum from **Hinds v R** (1975) 24 WIR 326, 340 (Lord Diplock) by Corbin JA in the passage cited above is the presumption of constitutionality. The passage cited by Corbin JA is immediately preceded by this sentence by Lord Diplock in **Hinds** at page 340:

> *In considering the constitutionality of the provisions of s 13 (1) of the Act, a court should start with the presumption that the circumstances existing in Jamaica are such that hearings in camera are reasonably required in the interests of 'public safety, public order or the protection of the private lives of persons concerned in the proceedings'.*

[63] The complete passage was relied on by the learned Attorney General and was commended to the court as the starting point for dealing with the presumption of constitutionality. What I will say and endeavour to show is that the presumption of constitutionality as understood and applied at the time of **Hinds** has to yield to the wording of the new Charter and the jurisprudential approach developed by the doctrine of proportionality.

[64] The **Mootoo** case was reaffirmed by the Board and applied to an appeal from Jamaica. This was **Steven Grant v R** (2006) 68 WIR 354 where Lord Bingham stated at paragraph 15:

> *[15] It is, first of all, clear that the constitutionality of a parliamentary enactment is presumed unless it is shown to be unconstitutional, and* ***the burden on a party seeking to prove invalidity is a heavy one****; Ramesh Dipraj Kumar Mootoo v Attorney-General of Trinidad and Tobago (1979) 30 WIR 411 at 415. Thus the appellant has a difficult task.* (emphasis added)

[65] Interestingly, there do not seem to be many cases dealing expressly with the standard of proof but, it seems, that it was thought to be the criminal standard. In Australia in the case of **Federal Commissioner of Taxation v Munro** (1926) 38 CLR 153, 180 Isaacs J held:

> *Unless, therefore, it becomes* ***clear beyond reasonable doubt*** *that the legislation in question transgresses the limits laid down by the organic law of the Constitution, it must be allowed to stand as the true expression of the national will.* (emphasis added)

[66] Thus "heavy burden" seems to have been understood to mean proof beyond reasonable doubt.

[67] In **Suratt v Attorney General of Trinidad and Tobago** (2007) 71 WIR 391, Baroness Hale, speaking for the majority held at paragraph 45:

> ***[45]*** *It is a strong thing indeed to rule that legislation passed by a democratic Parliament establishing a new type of judicial body to adjudicate upon a new body of law is unconstitutional. The constitutionality of a parliamentary enactment is presumed unless it is shown to be unconstitutional and the burden on a party seeking to prove invalidity is a heavy one…*

[68] The Privy Council also gave guidance on how to approach the question of whether an Act of Parliament was unconstitutional. In **Attorney General and Minister of Home Affairs v Antigua Times Ltd** (1975) 21 WIR 560 where Lord Fraser stated at pages 573 – 574:

> *In some cases it may be possible for a court to decide from a mere perusal of an Act whether it was or was not reasonably required. In other cases the Act will not provide the answer to that question. In*

> *such cases has evidence to be brought before the court of the reasons for the Act and to show that it was reasonably required? Their Lordships think that the proper approach to the question is to presume, until the contrary appears or is shown, that all Acts passed by the Parliament of Antigua were reasonably required. This presumption will be rebutted if the statutory provisions in question are, to use the words of LOUISY J, "so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power but constitutes in substance and effect, the direct execution of a different and forbidden power".*

[69] What is being said here is that there are some instances where it is so clear from the text that it can be determined, from a mere textual analysis, that the statute is reasonably required. In other instances, the textual analysis does not reveal an answer one way or the other. In those instances, evidence is required. It is important to note that Lord Fraser did not say who should adduce the evidence to show that the statute was reasonably required. However, it would seem to me that this evidence would necessarily have to come from he who wants to uphold the constitutionality of the statute.

[70] This passage from Lord Fraser also answers another question. What if there is no evidence one way or the other and it does not appear on a textual analysis that the statute has violated the Constitution. The default position is that there is a presumption of constitutionality and until the contrary is shown, presumably by the claimant since it is extremely unlikely that the state would wish to show that the statute is unconstitutional, it is assumed that the statute was reasonably required.[12] The only way to get to a declaration of unconstitutionality is if the statute is so arbitrary that the conclusion must be that it violates the Constitution.

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[12] See National Transport Co-operative Society Limited v The Attorney General of Jamaica [2009] UKPC Case Ref 48; PCA 17 of 2009 where the government argued successfully that what it had done for nearly a decade was ultra vires the statute.

[71] There are two more cases to examine. The phraseology was different in the constitutional instruments considered in these two cases. The first is **Cable and Wireless (Dominica) Ltd v Marpin** (2000) 57 WIR 141. The issue there was whether the statute violated the Constitution of the Commonwealth of Dominica. [13]

[72] This is how Lord Cooke envisioned that that provision would operate in terms of the burden of proof. His Lordship said at page 152:

> *In the end, however, the question for the court is the objective one whether, in authorising and granting exclusivity, the Act and the licence make provision that is reasonably required for the purpose*

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[13] Section 10(1) and (2) of the Constitution of Dominica provide as follows:

(1) Except with his own consent, a person shall not be hindered in the enjoyment of his freedom of expression, including freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision --

(a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health;

(b) that is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts or regulating the technical administration or the technical operation of telephony, telegraphy, posts, wireless broadcasting or television; or

(c) that imposes restrictions upon public officers that are reasonably required for the proper performance of their functions,

and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society. (emphasis added)

> *of protecting the rights and freedoms of other persons. If that is shown, the onus falling on those who support exclusivity, the burden will shift to Marpin to show in terms of the last limb of s 10 (2) that it is not reasonably justifiable in a democratic society.*

[73] This way of expressing the matter, by Lord Cooke, can only make sense if it is accepted that all the claimant needs to do is to establish a violation, then the defendant shows that the law was reasonably required. This was a dispute between private citizens but that does not make a difference to the proposition advanced by Lord Cooke.

[74] This approach to the Grenadian Constitution, which was similarly worded, was affirmed by the Privy Council in **Wormes and Grenada Today Ltd v Commissioner of Police of Grenada** (2004) 63 WIR 79.[14]

[75] Lord Roger held at paragraph 41:

> *[41] It is, as already explained, common ground that the crime of intentional libel constitutes a hindrance to citizens' enjoyment of their freedom of expression under s 10 (1) of the Constitution. It is*

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[14] Section 10 of the Constitution of Grenada provides as follows:

(1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, including freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision - ... (b) that is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings ...

and except so far as that provision or, as the case may be, the thing done under the authority thereof, is shown not to be reasonably justifiable in a democratic society. (emphasis added)

> *therefore necessary for the respondent to show that the provisions of the Code are reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons. If that is established, the burden shifts to the appellants to show, in terms of the last limb of s 10 (2), that the provisions are not reasonably justifiable in a democratic society; see Cable and Wireless (Dominica) v Marpin Telecoms and Broadcasting Co Ltd (2000) 57 WIR 141 at 152, per Lord Cooke of Thorndon.*

[76] For present purposes what is also important, about the two last cited cases, is that there is an absence of language such as heavy burden on the challenger. In both cases, once there was a showing by the claimant that the right was violated then the burden shifted to the person seeking to uphold the violation to show that the law was reasonably required. If that was shown the burden shifted back to the challenger to show that such a law was not reasonably required in a democratic society.

[77] This approach of asking the claimant to prove a negative was the same as in **Madhewoo v The State of Mauritius** 2015 SCJ 117. That reasoning and outcome were upheld by the Privy Council ([2016] UKPC 30; [2016] 4 WLR 167). The issue there was whether the provisions of a statute similar to NIRA was constitutional.[15]

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[15] Section 9 (2) of the Mauritian Constitution read:

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in

question makes provision –

(a) in the interests of …… public order ……;

(b) for the purposes of protecting the rights or freedoms of other persons;

…

except so far as that provision or, as the case may be, the thing done under its authority is shown not to be reasonably justifiable in a democratic society. (emphasis added)

[78] The three cases involved Constitutions that have the words 'reasonably justifiable in a democratic society.' This led to language formulated in terms of proportionality in the judgments. This type of language is not found in **Hinds v R** (1975) 24 WIR 326, [1976] 1 All ER 353, [1976] 2 WLR 366, [1977] AC 195 because the then Jamaican Bill of Rights did not speak to 'reasonably justifiable in a democratic society.' This same observation applies to **Antigua Times, Mootoo** and the Australian case of **Munro**. In **Marpin, Wormes** and **Madhewoo**, the burden was on the claimant to prove that the law **was not reasonably justifiable in a democratic society** and not for the state to prove that the law was **reasonably justifiable in a democratic society**. It will be shown that the Jamaican Charter is worded differently in this regard. That difference in wording leads to a different conclusion on the question of who bears the burden of proving that the law was **reasonably justified in a democratic society**.

[79] Without saying whether or not the burden was heavy or light the Caribbean Court of Justice added its voice to this area in **Bar Association of Belize v Attorney General** (2017) 91 WIR 123 Nelson JCCJ stated at paragraph 22:

> ***[22]*** *At the outset when considering the constitutionality of a law, which may perhaps include a constitutional amendment, courts presume that the impugned law is valid and place the burden of establishing at least prima facie transgression on the party alleging breach. The presumption of constitutionality will also apply where an instrument is issued or an act is done under the Constitution and the relevant provision of the Constitution can fairly be interpreted so as to preserve the constitutionality of the instrument or act.*

[80] His Lordship cited, in footnotes, decisions such as **Antigua Times** and **Mootoo** in support of the proposition. This suggests that Nelson J may well have been thinking in terms of the criminal standard. There is not enough information to say definitively what the CCJ's position on this issue was.

[81] If the Constitutions of the Commonwealth of Dominica, Grenada and Mauritius by using the phrase 'reasonably justifiable in a democratic society' could usher in the language of proportionality in the context of the claimant being asked to prove that the

law was not reasonably justifiable in a democratic society then it is not unreasonable to conclude that similar phraseology in the Jamaican Charter leads to the conclusion that the concept of proportionality is applicable to the Jamaican Charter.

[82] The difficulty that I have with the pre-charter cases cited by the learned Attorney General is that those cases were decided on differently worded fundamental rights provisions and also a different philosophical climate. It seems to me that our Parliament decided to do away with the jurisprudential approach that underpinned the old Bill of Rights and start anew. This is reflected in the preamble of the Charter which reads:

> *Whereas a Constitutional Commission established by Parliament recommended, after wide consultation and due deliberation, that Chapter III of the Constitution of Jamaica should be replaced by a new Chapter* ***which provides more comprehensive and effective protection for the fundamental rights and freedoms of all persons in Jamaica:***

[83] Here then we see that the Jamaican Parliament, as the elected and appointed representatives of the people, stated that the then extant fundamental rights were found wanting in terms of comprehensiveness and effectiveness.

The second necessary analysis: proportionality

[84] Since the new Charter of Fundamental Rights and Freedoms the submission has been made consistently, by claimants, that the burden shifts to the person who wishes to uphold the provision under challenge once the claimant establishes that the provision violates one of the guaranteed rights. This, it is said, must be so because there is no language in the new Charter asking the claimant to prove that the law was not justifiable in a free and democratic society. In **Gerville Williams and others v The Commissioner of The Independent Commission of Investigations and others** [2012] JMFC Full 1 the Supreme Court did not depart completely from the traditional approach laid down in cases decided before the new Charter but took, what can now be seen in retrospect, a timorous approach to the new provisions. The court was trying to ride two horses at the same time; an impossible feat (see the judgment of Sykes J). The

court sought to adhere to the **Hinds, Mootoo, Grant** approach while moving in the direction of **R v Oakes** [1986] 1 SCR 103.

[85] At paragraph 221 in **Gerville Williams** I said that the issue of the burden and standard of proof should be reviewed by the higher courts. That was six years ago and to date the opportunity has not properly arisen for the Court of Appeal to address that issue. The **Gerville Williams** case failed on appeal, because the appellants did not get an extension of time within which to properly constitute the appeal.

[86] The time has now come for the Supreme Court to take a clear and unambiguous position on the matter. It is my view that the contention of Mr Hylton QC is correct that is, the wording of the new Charter requires a new approach and that new approach is the test of proportionality. What is proportionality? It is the legal doctrine of constitutional adjudication that states that all laws enacted by the legislature and all actions taken by any arm of the state, which impact a constitutional right, ought to go no further than is necessary to achieve the objective in view.

[87] This test of proportionality has been described by Dr Dhananjaya Chandrachud J in **Justice K Puttaswamy (Rtd) and anr v Union of India** Writ Petition (Civil) NO 494 of 2012 (delivered September 26, 2018). His Lordship said at paragraphs 197 - 198:

> *The test of proportionality, which began as an unwritten set of general principles of law, today constitutes the dominant "best practice" judicial standard for resolving disputes that involve either a conflict between two rights claims or between a right and a legitimate government interest. It has become a "centrepiece of jurisprudence" across the European continent as well as in common law jurisdictions including the United Kingdom, South Africa and Israel. … It has been raised to the rank of fundamental constitutional principle, and represents a global shift from a culture of authority to a culture of justification. …*
>
> ***…The test of proportionality stipulates that the nature and extent of the State's interference with the exercise of the right …must be proportionate to the goal it seeks to achieve….*** (emphasis added)

[88] Thus in a constitutional democracy where there is constitutionalism and not just the existence of a Constitution, the exercise of power, whether executive, legislative or judicial, is no longer based simply on the idea of having the power to do what one is authorised to do but is also accompanied by justification for decisions and actions. This is why judges give reasons for their decisions. Now, in the context of constitutional challenges, justification is now required of the executive and legislative arms of government. In a word, proportionality is about accountability.

[89] In this regard the Canadian case of **R v Oakes** 26 DLR (4th) 200 supports this position. That case applied the test of proportionality to legislation in Canada. This requires a close examination of that seminal case.

[90] Mr Oakes was charged with unlawful possession of a drug for the purposes of trafficking. Section 8 of the relevant statute created a presumption that if a person had possession of certain drugs he was presumed to have had it for trafficking purposes unless he showed that he had no such intention. The trial judge decided that the provision breached section 11 (d) of the Canadian Charter of Rights and Freedoms which set out the well-established principle of the presumption of innocence. The case eventually reached the Supreme Court, the Crown having lost in the Court of Appeal. Section 11 (d) states:

> ***11.*** *Any person charged with an offence has the right*
>
> *(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.*

[91] The Supreme Court also had to consider section 1 of the Canadian Charter which reads:

> *The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.*

[92] The necessity for the court to examine section 1 arose because the Crown submitted that even if the statute violated section 11 (d) it could be saved from unconstitutionality because it would be 'demonstrably justified in a free and democratic society.' I now quote directly from the judgment of Dickson CJ. The learned Chief Justice said at pages 224 - 225:

> *It is important to observe at the outset that s. 1 has two functions: first, it constitutionally guarantees the rights and freedoms set out in the provisions which follow; and second, it states explicitly the exclusive justificatory criteria (outside of s. 33 of the Constitution Act, 1982) against which limitations on those rights and freedoms must be measured. Accordingly, any s. 1 inquiry must be premised on an understanding that the impugned limit violates constitutional rights and freedoms — rights and freedoms which are part of the supreme law of Canada. As Wilson J. stated in Singh v. Min. of Employment & Immigration, supra, at p. 218:*
>
> > *... it is important to remember that the courts are conducting this inquiry in light of a commitment to uphold the rights and freedoms set out in the other sections of the Charter.*

[93] The important point here is that the learned Chief Justice recognised that section 1 did two things. Firstly, it guaranteed rights. Secondly, it explicitly stated the sole criteria for determining whether a limitation on the rights is permissible.

[94] Dickson CJ recognised the importance of the social and historical context in which the Charter came into being as well as the values of a free and democratic society. The social and historical context of the Jamaican Charter has been comprehensively addressed by Batts J in his reasons for judgment. I endorse them. I now state the observations of Dickson CJ at page 225:

> *A second contextual element of interpretation of s. 1 is provided by the words "free and democratic society". Inclusion of these words as the final standard of justification for limits on rights and freedoms refers the court to the very purpose for which the Charter was originally entrenched in the Constitution: Canadian society is to be*

> *free and democratic.* ***The court must be guided by the values and principles essential to a free and democratic society, which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.*** *The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.* (emphasis added)

[95] Dickson CJ noted that the rights guaranteed are not absolute but also noted that the limitation may become necessary if their exercise would be inimical to the interest of the whole. This is how that idea was expressed by his Lordship at page 225:

> *The rights and freedoms guaranteed by the Charter are not, however, absolute. It may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance. For this reason, s. 1 provides criteria of justification for limits on the rights and freedoms guaranteed by the Charter.*

[96] Having noted that the rights may be infringed his Lordship was equally anxious to state the following at page 225:

> *These criteria impose a stringent standard of justification, especially when understood in terms of the two contextual considerations discussed above, namely, the violation of a constitutionally-guaranteed right or freedom and the fundamental principles of a free and democratic society.*

[97] Dickson CJ sought to protect fundamental rights and freedoms from being violated easily.

[98] The learned Chief Justice was in no doubt where the burden of proof lay once a case had been made out that the right guaranteed was infringed. His Lordship stated at page 225 -226:

> *The onus of proving that a limit on a right or freedom guaranteed by the Charter is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation. It is clear from the text of s. 1 that limits on the rights and freedoms enumerated in the Charter are exceptions to their general guarantee. The presumption is that the rights and freedoms are guaranteed unless the party invoking s. 1 can bring itself within the exceptional criteria which justify their being limited. This is further substantiated by the use of the word "demonstrably", which clearly indicates that the onus of justification is on the party seeking to limit: Hunter v. Southam Inc., supra. (emphasis added).*

[99] The effect of the presumption in favour of guaranteed rights and freedoms is that once the claimant makes a case of violation, the burden, evidentially and legally, shifts to the one seeking to uphold the violation. Where the burden is not discharged the claimant must succeed at the end of the case. This also means that if the claimant makes a case of violation, and the violator responds but the adjudicator concludes that the response of the violator leaves the scales evenly balanced, the claimant must succeed because of the presumption in favour of fundamental rights and freedoms. The claimant having discharged his burden and if the violator fails to convince the court that the violation is justifiable in a free and democratic society then it must mean that the law is unconstitutional. Any other conclusion would be irrational and contrary to reason. The presumption of constitutionality cannot assist the violator if a prima facie case of violation is established. The violation must be justified.

[100] An identical conclusion applies to the Jamaican Charter. The Charter guarantees rights. No law is to be passed that ‘abrogates, abridges or infringes’ the guaranteed rights. Just on a textual analysis of section 13 (2) once the claimant shows that there is a violation, rationally, he could not be also asked to go on to show that the law is demonstrable justified in a free and democratic society for the reason that the prohibition is directed not to the citizen but to Parliament. Thus if Parliament is not to

pass any law that violates the right or rights of the citizen and the citizen has shown that his rights have been violated then it must necessarily be for the violator to justify his violation. The test is whether the violation is demonstrably justified. The old Bill of Rights cases, while useful, never had this understanding and perhaps could not because there was no provision like section 13 (2) in the previous Bill of Rights. I therefore, adopt fully and completely, the test laid down by Dickson CJ in **Oakes**.

[101] Thus under the Jamaican Charter it is not for the claimant as in **Marpin, Wormes** and **Madhewoo** to prove a negative, namely, that the law was not reasonably justified in a free and democratic society; it is for the violator to prove that the law is justifiable in a free and democratic society. This is a radical and fundamental shift that must be recognised. All the claimant needs to do is prove either on a textual analysis or by evidence or both that a violation has occurred, is occurring, or is likely to occur. If the case does not fall within the stated sections enumerated in section 13 (2) of the Jamaican Charter, then the only safe harbour left for the violator is to show that the law is justifiable in a free and democratic society.

[102] Dickson CJ also dealt with the standard of proof at pages 226:

> ***The standard of proof under s. 1 is the civil standard, namely, proof by a preponderance of probability. The alternative criminal standard, proof beyond a reasonable doubt, would, in my view, be unduly onerous on the party seeking to limit. Concepts such as "reasonableness", "justifiability" and "free and democratic society" are simply not amenable to such a standard. Nevertheless, the preponderance of probability test must be applied rigorously.*** *Indeed, the phrase "demonstrably justified" in s. 1 of the Charter supports this conclusion. Within the broad category of the civil standard, there exist different degrees of probability depending on the nature of the case: see Sopinka and Lederman, The Law of Evidence in Civil Cases (Toronto, 1974), at p. 385. As Denning L.J. explained in Bater v. Bater, [1951] P. 35, [1950] 2 All E.R. 458 at 459 (C.A.):*
>
> > *The case may be proved by a preponderance of probability, but there may be degrees of*

> *probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a standard as a criminal court, even when considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion.*

This passage was cited with approval in Hanes v. Wawanesa Mut. Ins. Co., [1963] S.C.R. 154 at 161, [1963] 1 C.C.C. 321, 36 D.L.R. (2d) 718 [Ont.]. A similar approach was put forward by Cartwright J. in Smith v. Smith, [1952] 2 S.C.R. 312 at 331-32, [1952] 3 D.L.R. 449 [B.C.]:

> *I wish, however, to emphasize that in every civil action before the tribunal can safely find the affirmative of an issue of fact required to be proved it must be satisfied, and that whether or not it will be so satisfied must depend on the totality of the circumstances on which its judgment is formed including the gravity of the consequences ...* (emphasis added)

[103] The learned Chief Justice did an analysis of the text of the Canadian Charter and arrived at the position that the criminal standard was not the one that any claimant had to meet in order to show that the law was unconstitutional. No cogent reason has been advanced to show why this reasoning cannot apply to the Jamaican Charter. I agree with, and adopt, the analysis of the learned Chief Justice. I am of the view that it should be applied to section 13 (2) of the Jamaican Charter.

[104] The passage just cited refers to the only two standards of proof known to Anglo-Jamaican law. These are the criminal standard of proof beyond reasonable doubt and the civil standard of a balance of probabilities. Importantly, the passage emphasises that within the civil standard the degree of cogency of evidence required to prove any

fact varies according to the gravamen of the matter before the court. It would seem to me that the violator should have cogent evidence to justify the violation. After all, one of the hallmarks of liberal democracies is the articulation, protection and upholding of human rights. This is especially so since it is well established that a fundamental right or freedom is to be given the widest and most generous interpretation that the language of the provision permits (**Minister of Home Affairs v Fisher** (1979) 44 WIR 107). What has just been stated is not just the view of the Privy Council. The Canadian Supreme Court has so held as well. In the case of **Canada (Director of Investigation & Research, Combines Investigation Branch) v Southam Inc.** 11 DLR 641, Dickson J (as he was at the time) stated at pages 650 - 651:

> ***I begin with the obvious. The Canadian Charter of Rights and Freedoms is a purposive document. Its purpose is to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines. It is intended to constrain governmental action inconsistent with those rights and freedoms; it is not in itself an authorization for governmental action.*** *In the present case this means, as Prowse J.A. pointed out, that in guaranteeing the right to be secure from unreasonable searches and seizures, s. 8 acts as a limitation on whatever powers of search and seizure the federal or provincial governments already and otherwise possess. It does not in itself confer any powers, even of "reasonable" search and seizure, on these governments. This leads, in my view, to the further conclusion that an assessment of the constitutionality of a search and seizure, or of a statute authorizing a search or seizure, must focus on its "reasonable" or "unreasonable" impact on the subject of the search or the seizure, and not simply on its rationality in furthering some valid government objective.*
>
> ***Since the proper approach to the interpretation of the Charter of Rights and Freedoms is a purposive one, before it is possible to assess the reasonableness or unreasonableness of the impact of a search or of a statute authorizing a search, it is first necessary to specify the purpose underlying s. 8: in other words, to delineate the nature of the interests it is meant to protect.*** (emphasis added)

[105] In light of this it should not be surprising that in **Oakes** Dickson CJ addressed the question of evidence. Dickson CJ held at pages 226 - 227:

> *Having regard to the fact that s. 1 is being invoked for the purpose of justifying a violation of the constitutional rights and freedoms the Charter was designed to protect, a very high degree of probability will be, in the words of Denning L.J., "commensurate with the occasion".* ***Where evidence is required in order to prove the constituent elements of a s. 1 inquiry, and this will generally be the case, it should be cogent and persuasive and make clear to the court the consequences of imposing or not imposing the limit****: see L.S.U.C. v. Skapinker, supra, at p. 384; Singh v. Min. of Employment & Immigration, supra, at p. 217.* ***A court will also need to know what alternative measures for implementing the objective were available to the legislators when they made their decisions. I should add, however, that there may be cases where certain elements of the s. 1 analysis are obvious or self-evident.*** (emphasis added).

[106] This means that in order to establish that a violation can stand, other than cases where it is self-evident that the justification is established, evidence will in all likelihood be needed from those who seek to uphold the violation in order to bring the case within the exception. As the learned Chief Justice indicated, the court will need to know the other alternative measures for implementing the objective that were available to the legislators when they made their decision. This is importing a high standard of accountability, with which we are not familiar, but this is where the law now is.

The third necessary analysis: the ingredients of proportionality

[107] Dickson CJ went on to articulate, in **Oakes**, the components of the proportionality test in constitutional litigation. His Lordship said at pages 227 - 228:

> *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"*: R. v. Big M Drug Mart Ltd., supra, at p. 352. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.*

Secondly, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. *This involves "a form of proportionality test": R. v. Big M Drug Mart Ltd., supra, at p. 352. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test.* ***First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question****: R. v. Big M Drug Mart Ltd., supra, at p. 352.* ***Third, there must be a 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****".*

With respect to the third component, it is clear that the general effect of any measure impugned under s. 1 will be the infringement of a right or freedom guaranteed by the Charter; this is the reason why resort to s. 1 is necessary. The inquiry into effects must, however, go further. A wide range of rights and freedoms are guaranteed by the Charter, and an almost infinite number of factual situations may arise in respect of these. ***Some limits on rights and freedoms protected by the Charter will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral***

> ***principles of a free and democratic society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.*** (emphasis added)

[108] Though Dickson CJ enumerated three criteria that must be met to pass the proportionality requirement, if one includes the proper purpose criterion, there are four. It seems that his Lordship envisaged a two-stage test in which the first stage is deciding whether the law met the proper purpose criterion, that is to say, an objective that was so important (not trivial) that it became necessary to violate the fundamental right. It is clear that for his Lordship, if the proper purpose test was not met then of necessity the law was unconstitutional and there was no need to go on to consider the other three criteria, which together, make up the second stage. Thus whether one thinks of it as a two-stage test, or one test with four parts, it does not matter because in the end the four criteria are applied. From my perspective I prefer to think of the test as four criteria rather than in two stages. The four criteria are:

b) the law must be directed at a proper purpose that is sufficiently important to warrant overriding fundamental rights or freedoms;

c) the measures adopted must be carefully designed to achieve the objective in question, that is to say rationally connected to the objective which means that the measures are capable of realising the objective. If they are not so capable then they are arbitrary, unfair or based on irrational considerations;

d) the means used to achieve the objective must violate the right as little as possible;

e) there must be proportionality between the effects of the measures limiting the right and the objective that has been identified as sufficiently important, that is to say, the benefit arising from the violation must be greater than the harm to the right.

[109] In respect of (d), if the consequences of the measure on individuals or groups are very severe then the objective must be shown to be of great importance in order to justify the severity of the consequences and if this is not shown then the law will be unconstitutional.

[110] It is at (d) that one finds the courts engaging in a balancing exercise. What is it that is balanced? The balancing that is being done arises because on the one hand there is a limiting law and on the other is the constitutional right or freedom. The court takes account of the benefit to be gained on the one hand and the harm on the other. What this requires is an assessment of whether the benefit to be gained by the violation is outweighed by the severity of the harm to persons. If the harm caused is greater than the benefit, then the law is unconstitutional. This component of the proportionality test is asking that there be a proper relationship between benefit to be gained and harm caused.

The fourth necessary analysis: the presumption of constitutionality; what it means in the context of the Charter, and how it ought to be used in adjudication

[111] Something further must now be said about the learned Attorney General's reference to the presumption of constitutionality. What that means is that we start from the prima facie position that when a bill goes through the legislative process and taken to completion evidenced by the assent of the Governor General, we all presume that the proper process was followed and that the law is compatible with the Charter. When the Act is challenged the presumption is still there until the court declares that there is a violation. That in and of itself simply means that the claimant must make the case for unconstitutionality but in the new Charter that is on a balance of probabilities and not proof beyond reasonable doubt. Neither is he under a heavy burden. Assuming the

claimant has made a case for unconstitutionality, the burden then shifts to those seeking to uphold the violation. The standard is the civil standard but there must be cogent proof of the justification because that is the only way that effect can be given to the expressed intent of the new Charter which is to provide more effective protection of the fundamental rights. I use the expression 'those seeking to uphold the violation' because the new Charter explicitly applies horizontally, that is between citizen and citizen, and not just between the state and citizens. Thus a private law provision can indeed be held to be incompatible with the Charter and therefore unenforceable. This is the consequence of section 13 (5).

[112] This reasoning, so far, is more expansive but completely compatible with this court's decision in **The Jamaican Bar Association v The Attorney General and The General Legal Council** [2017] JMFC Full 2 **[39] – [52]**. A reading of the joint judgment of Fraser and George JJ (concurred by Paulette Williams J, now Justice of Appeal) will show that it was the unanimous view of that court that 'in light of the clear similarities between the Canadian and Jamaican Charters, to also examine whether or not the impugned aspects of the Regime (sic) satisfy the ***Oakes*** test of constitutionality.' This statement was preceded by a recognition that there is a presumption of constitutionality of legislation but that did not mean that it was immune from the ***Oakes*** test. In other words, there is no incompatibility between the presumption of constitutionality and the **Oakes** test. As an aside and somewhat surprisingly, in the **Jamaican Bar Association** case, it was the claimant who made the submission that the proportionality test was not to be used under the new Charter. To repeat, the presumption of constitutionality, in the context of the new Charter, simply means that when an Act of Parliament is passed and there appears to be no breach of the mandatory legislative process including the signature of the Governor General it is assumed that the statute is compatible with the constitution and as such it is legitimate. That is as far as it goes. The presumption confers no immunity from challenge and certainly no longer connotes that there is a heavy burden on the claimant and neither does he/she have to prove unconstitutionality to the criminal standard.

[113] Another reason why I am convinced that the approach suggested by the learned Attorney General is incorrect is the analysis done by the Court of Appeal in **Attorney General of Antigua and Minister of Home Affairs v Antigua Times Ltd** (1973) 20 WIR 573. The Court of Appeal's reasoning was reversed by the Privy Council. The Court of Appeal's reasoning was in the context of what may be called the old style Constitutions in that there was no reference to reasonably justified in a democratic society. In other words, it was in the same or similar terms as the Bill of Rights considered in **Hinds**. The interesting observation about the Court of Appeal's reasoning was that the learned Justices of Appeal felt that even in the context of the old style Bill of Rights it was appropriate to place the burden on the state once the claimant showed a prima facie case of violation. There was no reference to a heavy burden or proof beyond reasonable doubt. It also shows that even, with the old style Bill of Rights, some Commonwealth Caribbean judges fully appreciated that fundamental rights were to be upheld unless there was clear justification for violating them. I now set out the reasoning of the Court of Appeal which the Privy Council regarded as anaethema. Lewis CJ (Ag) reasoned in this way at page 587:

> *Once it has been established that Act 8/1971 is **prima facie** a violation of s 10 of the Constitution (and in my view this is apparent on the face of this enactment itself) then the **burden shifts to the appellants** (a) to show that this Act comes within the permissible limits imposed by s 10(2) of the Constitution, and (b) to place before the court all relevant facts and materials to show that its enactment was reasonably required.* (emphasis added)

[114] And in respect of another provision his Lordship said at page 591:

> *Now what on the face of it does Act 9/1971 seek to do? It imposes on the respondent in its capacity as a publisher of a newspaper an obligation to deposit a sum of $10,000 before it can exercise a right freely granted to it by the Constitution. This **prima facie** constitutes a hindrance to its enjoyment of the right of freedom of expression specifically guaranteed by s 10 of the Constitution.* (emphasis added)

[115] His Lordship referred to the evidence in the case and said at page 591:

> ***This is the prima facie case made out by the respondent on the evidence of its witness Reuben Harris and it stands uncontradicted. In these circumstances the presumption of constitutionality recedes and the burden of proof shifts to the appellants to establish that Act 9/1971 is constitutionally justifiable****. This they must do by showing (a) that it falls within the permissible exceptions in s 10(2) of the Constitution, and (b) that its enactment was reasonably required. Counsel submitted as regards the first requirement that it did so fall because it was a law which "makes provision that is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons", within the meaning of this expression in the said subsection.* (emphasis added)

[116] In this passages Lewis CJ (Ag) addressed the question of burden of proof and the standard of proof. His Lordship used the words “prima facie”. The expression prima facie is used in civil and criminal law. In criminal law it is encountered when the court is asked to decide whether a prima facie case has been established against the defendant. In Jamaica, in the criminal appeal of **R v Miller and Wright** (1973) 12 JLR 1263, 1266 – 1267, the Court of Appeal found that there is no distinction between a prima facie case in criminal or civil cases. Thus it is clear that for Lewis CJ (Ag) the claimant’s burden was to show, prima facie or put another way, on a balance of probabilities, that his right was violated. Once this was shown, according to his Lordship, the burden shifted to the violator to establish that notwithstanding the violation that statute was within the stated exceptions and thus saved from unconstitutionality, not because it did not violate the given right but because, consistent with the proposition that no right is absolute, the right can be violated provided that it falls within the stated exceptions.

[117] Lewis CJ’s (Ag) analysis of the role of evidence is important. The learned Chief Justice, rightly, held that if the prima facie evidence showed a violation of a fundamental right and there was no evidence to rebut it then the presumption of constitutionality could not save the violation. The learned Chief Justice did not require the proof of a negative from the claimant. All this was firmly rejected by the Privy Council. The Privy Council’s view dominated Commonwealth Caribbean Constitutional law for the next four

decades until the newly worded constitutions came into being. In effect, Lewis CJ (Ag) was using the ideas that underpin the proportionality doctrine without using the actual word proportionality.

[118] It must be taken that the Jamaican legislature knew of these developments, and the body of law on constitutional interpretation developed by the Privy Council in cases from Jamaica and other countries in the Commonwealth Caribbean. The legislature therefore deliberately departed from the wording that yielded the results found in **Antigua Times** (Privy Council), **Mootoo** and **Grant**. Clearly, the legislature wanted to get back to the reasoning of Lewis CJ (Ag) but they had to find a verbal formula that would give effect to Lewis CJ's (Ag) reasoning and which avoided the **Mootoo** and **Grant** reasoning. This they did by adopting the verbal formula of the Canadian Charter of Rights which by then was well known to have been interpreted to mean that proportionality was the test for constitutionality. All this is obvious from an examination of the text of the new Jamaican Charter and comparing it with the original Bill of Rights. If the learned Attorney General is correct then the legislature, without meaning to do so, would have stumbled upon the verbal formula of the Canadian Charter which by then had been interpreted as incorporating the doctrine of proportionality. The wording of the Jamaican Charter is too deliberate to admit of that possibility. If the learned Attorney General is correct, then what we would have is perhaps one of history's greatest unintended consequences. I am not of the view that this is what the legislature did. Rather it made a deliberate choice of wording in order to bring about a particular approach to the interpretation of the fundamental rights and freedoms of the new Charter.

[119] Another very learned member of the Court of Appeal in **Antigua Times** addressed the proposition advanced by the state in that case, namely, that the learned trial judge did not give sufficient weight to the presumption of constitutionality. The state argued that the court should presume the existence of facts which can sustain the constitutionality. The state was arguing that the presumption of constitutionality in and of itself meant that the court should conclude that the legislature must have had some reason to legislate in the way that it did and despite the absence of evidence as to what

influenced the law, the court should rely on the presumption to reject the claim. Happily, such an approach was strongly rejected by St Bernard JA in this way at page 598:

> *In regard to the second question the trial judge found that both the amending Acts were unconstitutional and were repugnant to sub-s (1) of s 10 of the Constitution. Counsel for the appellant submitted that the trial judge did not give sufficient emphasis to the presumption in favour of the constitutional validity of the amending legislation. He contended that the onus of proof lay upon the person who attacked a statute to show that there was a clear transgression of the constitutional provisions and, unless the violation was patent, the court should presume the existence of facts which can be reasonably conceived to sustain the constitutionality of the legislation. Counsel further contended that by reason of the manner in which s 10 of the Constitution was framed the legal burden of proof was on the respondent to show that the impugned law violated the rights guaranteed by the Constitution. If the respondent showed a prima facie violation then the onus shifted to the appellant to show that the legislation came within the permissible limits imposed by sub-s (2) of s 10 of the Constitution. Counsel for the respondent submitted that s 10 of the Constitution in its structure was the same as s 19 of the Indian Constitution. Section 19 contained certain fundamental rights in sub-s (1) (a)-(g) and certain limitations in sub-ss (2) -(6).* ***In India a person seeking constitutional redress under s 19 had only to establish that he had the alleged right and that there was a prima facie invasion of that right whereupon the state was required to justify the restrictions imposed, showing that it came within the ambit of one of the permissible restrictions and placing material before the court to justify the reasonableness of the restriction. If there was a prima facie violation and the state failed to discharge the burden cast upon it, then the constitutional right of the person prevailed and the legislation would be considered unconstitutional. In support of his contention counsel cited the case of Saghir Ahmad v State of UP ([1954] All India Reports 707).***
>
> *In my opinion the burden of proof under s 10 of the Constitution is as set out in the argument of counsel for the respondent and supported by the judgement of MUKHERJEA J, in the Saghir Ahmad*

> *case (Saghir Ahmad v State of UP and Others [1954] All India Reports 707) ([1954] All India Report at p 726).* ***If the respondent is able to show a prima facie infringement of his right thereunder-he may do this by simply showing that the impugned legislation on the face of it violates his right-then the burden is on the appellant to show that the legislation falls within the provisions of sub-s (2) of s 10 and that it is reasonably required.*** (emphasis added)

[120] Again, note must be taken of the language used to describe the burden on the claimant. The expression is 'prima facie.' This is the civil standard. What this means is that once the claimant makes the prima facie case, then the presumption of constitutionality stands rebutted because the violation has been established and justification now shifts to the violator. It is my respectful view that this passage shows how the presumption of constitutionality is to be dealt with under the new Charter. St Bernard JA and Lewis CJ (Ag) were able to arrive at this position under the old style constitutions, when the extant wording of the constitution in question did not make this approach so explicit. If reasoning of the two learned judges was possible under the old formulation how much more so is that reasoning applicable in the current formulation of the Jamaican Charter? Therefore, I have no difficulty in declining to follow the lead of the learned Attorney General's approach in so far as it reflected the **Hinds** and **Mootoo** reasoning and conclusion.

[121] The other implication of St Bernard JA's reasoning is that if the claimant establishes a prima facie case and the state responds and things are evenly balanced then the claimant must succeed because a prima facie case of violation can only be overcome by clear evidence that the violation was justified. If the state cannot show convincing justification, then it cannot succeed in repelling the claim because constitutional litigation is sui generis in that the law presumes the claimant is intended to enjoy the right alleged to be violated to the fullest extent unless there is clear justification for its restriction. An evenly balanced case after a prima facie showing must mean that the state has not clearly justified the restriction of the right and therefore the claimant is to continue to enjoy the right to its fullest extent.

[122] In addition to all that has been said there is respectable academic opinion in favour of this new approach. It is found in the work of Aharon Barak.[16] Professor Barak is not just an academic of high standing but for twenty-eight years sat in the Israeli Supreme Court and the last eleven years of his judicial career as its President. He has written extensively on this area. In Chapter 16 of his book he indicated the following matters that are of practical value in this case:

> (1) Under the proportionality approach there are two stages. The first stage is whether the law or action has resulted in, is resulting in or may result in a limitation on the right alleged to have been infringed. To determine whether there is a limitation the court as a matter of objective interpretation of the provision must determine the scope, boundaries of, and what is included in the right. This aspect of interpretation is purely legal and the burden and standard of proof has no role to play.
>
> (2) The burden is on the claimant to show that the right has been, is being or likely to be limited. Once this is established whether by adducing evidence or from a textual analysis of the law or both or by showing that in practice the action will result in a violation of the right then the burden shifts to the violator to make the justification for the law.
>
> (3) Professor Barak argued that the burden of persuasion that there is justification for the limitation should lie on the violator once the claimant has made out a case of violation. This is because one of the main purposes of fundamental rights and freedoms embodied in the Constitution of a constitutional democracy is the protection of fundamental rights and freedoms. If the claimant establishes a prima facie case of violation and after the

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[16] Barak, Aharon, *Proportionality: Constitutional Rights and Their Limitations*, (2012) Cambridge University Press, ch 16.

response of the violator the court is left in state of doubt whether the justification has been established, the court should rule against the limitation and in favour of the right because that is how effect is given to democratic values as expressed in the bill of rights.

(4) Professor Barak also made the point that 'factual data used to justify the limitation of constitutional rights are found, in most cases, with [a] governmental authority [being a] typical respondent in these types of cases.'[17] 'The legislative branch is presented with – or at least should be presented with – those factual findings that may justify the limitation. The individuals directly harmed by that limitation – and who claim that their right has been unduly limited – have no appropriate tools, in most cases, to gather that information and to present it to the court.'[18]

(5) I would add that where the claimant is saying that his or her right is likely to be infringed, often times, reliance will be placed on a textual analysis. The reason is that the expression 'is likely' permits the claimant to advance his or her claim before the actual harm occurs. The Claimant need not wait for actual harm. Thus the learned Attorney General's suggestion that we are to wait and see what happens is not acceptable as a textual analysis may well show that if NIRA is implemented, in its present state, a fundamental right or freedom is likely to be violated.

(6) On the question of the presumption of constitutionality, Professor Barak made three points about the expression.

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[17] Barak (n 16) p 443.

[18] Barak (n 16) pp 443- 444.

(i) The first is where the expression is used as part of the objective purpose of each legislative provision meaning that there is a presumption that the law's purposes and the constitution are not in conflict. This means that if the court is faced with two interpretations, reasonably open, the court should opt for the one that brings the law in conformity with the constitution rather than declare the law unconstitutional;

(ii) The second is where interpretation can resolve the issue of legality of the provision that should be done rather than declare the provision unconstitutional.

(iii) The third is where it is said that the expression applies to the persuasive burden in relation to a fact which demonstrates the unconstitutionality of the law.

(7) Professor Barak had no difficulty with these three uses of the phrase presumption of constitutionality but he queried how the presumption should be applied in the context 'of proving the facts on which the justification for such limitation is based.'[19]

(8) This is how the learned professor made the point:

> ***The presumption of constitutionality cannot be properly used to justify the imposition of the burden of persuasion with the party arguing against the existence of a justification for the limitation on a constitutional right. The reason for that is the central status of the protection of human rights within a constitutional democracy.*** *This central status should justify the conclusion that the presumption has fulfilled its role once the burden of persuasion has been imposed on the person arguing that*

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[19] Barak (n 16) pp 445.

> *a limitation occurred during the first stage of the review**. It is not appropriate – from the standpoint of the constitutional protection of human rights – to continue to impose that burden on the same party, now arguing that no justification exists for the limitation it proved earlier.** *This is even more so in cases where the law in question preceded the constitution, and the presumption of constitutionality is artificial in the context of evidentiary burdens. The presumption of constitutionality is, therefore, the presumption of the non-limitation of the constitutional right; it does not apply to the matter of the justification of the limitation.* [20] (emphasis added)

[123] What this means, taken in the context of the chapter, is that the presumption of constitutionality only applies, to the extent that the law is presumed to be consistent with the Constitution, until the claimant establishes a case that the law has violated or is likely to violate or is violating his or her right. Once that is done the presumption of constitutionality has been displaced and indeed has served its purpose and from that point onwards the state must make the case for the justification because one of the roles of the state in a constitutional democracy is the preservation of constitutional rights and freedoms. If the state wishes to limit them in any way then the state with all its resources should have the legal burden of making that case.

[124] Professor Barak had much to say about the justification stage once the violation or limitation of the right or freedom has been established. He said:

> *The basic approach is that, during the second stage of the constitutional review – the stage relating to the justification for the limiting of the constitutional right – there is no point in distinguishing between the burden of persuasion and the burden of producing evidence. Both burdens lie with the same party – the one arguing that the limitation is justified. This approach is based on the central status of human rights, as well as on the access advantage the*

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[20] Barak (n 16) pp 445 – 446.

state enjoys to the factual data that may justify the means chosen and on the state's special status as a party to the legal proceedings within public law.

Once the burden has been lifted during the first stage of the constitutional review, the party arguing that a constitutional right has been limited has presented the court with a proper factual framework to support that claim, it is appropriate that the party arguing that a justification exists for such a limitation should be required to bear the burden of proof. In this context, there is no point in distinguishing between the burden of persuasion and the burden of producing evidence. This approach is based, first and foremost, on the constitutional value of protecting human rights. If we are interested in providing this value with proper treatment, it is necessary that the party that has limited the constitutional right justify the limitation. The imposition of the said burden – be it the burden of persuasion or the burden of producing evidence – on the person claiming the lack of a justification devalues the constitutional protection of those rights.

The general argument, which applies both to the burden of persuasion and to the burden of producing evidence, is reinforced due to the following claim, unique to the burden of producing evidence when the defendant is the state. The state, which legislated the law limiting the constitutional right, possesses all the information required to present a factual framework to the court justifying the limitation. We may therefore reasonably assume that the state was in possession of that same information at the time the legislation was adopted. In any event, it cannot be disputed that the state enjoys much better access to the information than any party claiming that their right has been limited. Therefore, we should not demand that the party – whose constitutional right has been limited and who has presented the court with the factual framework supporting that claim – now brings evidence to persuade the court that such limitation has no justification. Often that party has no access, within their available means, to information that may support the existence – or non-existence – of such a justification. Furthermore, in most cases the justification – if it exists – was made with the full knowledge of the state, which limited the constitutional

> *right, since the limitation was based on that justification in the first place. Accordingly, it is appropriate that the burden of producing evidence of the justification of the limitation be imposed on the state that has limited the constitutional right.* [21](emphasis added)

[125] This last citation makes an important point with which I agree. The state has vast resources available to it. In modern Jamaica, the executive arm has the Legal Reform Department, the Attorney General's Chambers, the Chief Parliamentary Counsel, and other departments and agencies at its disposal to assist in the formulation of policy. The Cabinet, so far as I understand it, when contemplating the implementation of policy, would have presented to it a Cabinet Submission by the relevant minister. That submission sets out the justification for the policy and also indicates whether legislation is needed. If Cabinet approves the policy and legislation is needed, drafting instructions are given to the Office of the Chief Parliamentary Counsel. Where necessary, the Legal Reform Department does extensive and exhaustive research and produces well researched papers. All this demonstrates the soundness of what Professor Barak noted when he said that the state is in possession of the factual data leading up to the law. The citizen is not privy to any of this unless the executive makes it public before legislation is introduced to the legislature by the relevant minister. Professor Barak added that if all the evidence has been presented and there is a tie then having regard to the 'central role of limited human rights, the court's decision should be against the party claiming a justification for the limitation of the human right.' [22] The reason; *When a justification is not fully established, the limitation on the right is not constitutional.*[23] If the process is as I believe it to be can there be any rational reason not to impose the

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[21] Barak (n 16) pp 447 – 448.

[22] Barak (n 16) p 453.

[23] Barak (n 16) p 453.

obligation on the state to make the justification once the claimant makes out a case of violation of fundamental rights and freedoms?

[126] What has been said by Professor Barak is consistent with **Oakes** in that Dickson CJ took the view that once the claimant made out a case of violation then the burden shifts to the violator to persuade the court that the violation is justified and to adduce evidence of what was placed before the legislators regarding the choices they had. Professor Barak is consistent with Lewis CJ (Ag) and St Bernard JA. This approach is only fair because of the close intimate connection, in our constitutional system between the legislature and the executive. In Jamaica, the political executive is drawn from the legislature. The vast majority of legislation is passed at the behest of the executive arm of government. Private members' Bills are a rare occurrence in our constitutional framework. Given all this it is only fair that the state is obliged to produce the evidence indicating the policy choice and what went into the choice that was eventually made.

[127] He also addressed the special nature of public law litigation and constitutional litigation in particular where he suggested that the special nature of constitutional litigation involving the state was such that there is duty of candour on the state to lay all the relevant facts before the court if it is seeking to justify a limitation on a constitutional right. I agree with this because the constitution is a special document. It is the supreme law. It is the foundation of the state's relationship with its citizens. The state is under a duty to preserve, uphold and extend protection to its citizens by keeping within the boundaries of the Constitution. Thus if the state is violating a right then it should properly bear the responsibility of explaining why it is departing from one of its primary duties. Professor Barak sought support for his position in the Constitutional Court of South Africa's decision in **Matatiele Municipality v President of the Republic of South Africa** [2006] ZACC 622 which saw the state being criticised for not being forthcoming with information justifying its violation of a constitutional right.

[128] Professor Barak advances the proposition that the special nature of constitutional litigation should affect the court's resolution of cases. He proposed that constitutional litigation affects not just the parties to the actual case but the wider society.

Constitutional litigation goes to the rule of law and the validity of executive/administrative action

[129] Professor Barak concludes:

> *It seems that, if at the end of the day the court is not convinced that there exists a justification for the limitation of the right, then the court should hold that the limitation could not satisfy the requirement posed by the proportionality tests; therefore, the limitation is unconstitutional. Neither the presumption of constitutionality nor the presumption of legality applies at this stage of the review. The administration's efficiency, as well as other public interest considerations cannot produce, in and of themselves, a valid justification for a limitation on a constitutionally protected right, or even impose the burden of showing such a justification on the party arguing that their right was unduly limited. However, such considerations may affect the remedies for such a limitation; those remedies are outside the scope of this book.* [24]

[130] From all that Professor Barak has said, it is quite clear that proportionality in constitutional law does not involve the court in making policy. What it does is demand that the executive and the legislature lay bare what options they considered once the claimant makes the case that his or her rights are being, have been or are likely to be violated. The way in which Professor Barak envisages that the court should operate is that the state should be forthcoming with information to complete the factual background which the citizen may not be able to do because in many instances the citizen simply does not know or have the means to seek discovery from the state. This high standard of candour placed on the state is as it should be because we are talking about limitation of fundamental rights and freedoms that define the very core and essence of the state. The rights and freedoms guaranteed are a statement made to all citizens that the ideals captured will not be reduced or violated except for very good

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[24] Barak (n 16) p 454.

reason. Assuming that there is good reason, then the means chosen must pass the test of proportionality. I agree with Professor Barak that where there is a tie between the claimant and the state regarding the justification for limiting the right then having regard to the fact that fundamental rights and freedoms are in issue the court should always rule in favour of upholding the right and in that sense constitutional litigation differs from ordinary party and party litigation where it can be said that if there is a tie the claimant loses. In constitutional litigation the starting point is that the right must be enjoyed to its fullest extent possible without limitation while respecting the rights of others. That right must not be reduced in scope or enjoyment without good reason and that good reason must always be shown by the violator, once the violation is established. So it stands to reason that in the event of a tie, after the claimant has made a prima facie case, then the right prevails without the proposed restriction. It really cannot be any other way in a constitutional democracy based on the supremacy of the Constitution and the rule of law.

[131] It also follows that I agree with Professor Barak that once the claimant shows a violation the presumption of constitutionality has been displaced and cannot be used to justify the violation in the absence of failing the proportionality test.

The fifth necessary analysis: policy, judicial deference, margin of appreciation and constitutionality

[132] The learned Attorney General seemed to have suggested that NIRA and its provisions were a policy choice and implied that that choice should be respected, meaning, not to be interfered with by the courts. In response to this submission I cite the Canadian Supreme Court's decision in **Skapinker v Law Society of Upper Canada** 9 DLR (4th) 161. Estey J stated at 168 - 170:

> *There are some simple but important considerations which guide a Court in construing the Charter, and which are more sharply focussed and discernible than in the case of the federal Bill of Rights. The Charter comes from neither level of the legislative branches of government but from the Constitution itself. It is part of the fabric of Canadian law. Indeed, it "is the supreme law of*

Canada": s. 52, Constitution Act, 1982. It cannot be readily amended. The fine and constant adjustment process of these constitutional provisions is left by a tradition of necessity to the judicial branch. Flexibility must be balanced with certainty. The future must, to the extent foreseeably possible, be accommodated in the present. The Charter is designed and adopted to guide and serve the Canadian community for a long time. Narrow and technical interpretation, if not modulated by a sense of the unknowns of the future, can stunt the growth of the law and hence the community it serves. All this has long been with us in the process of developing the institutions of government under the B.N.A. Act, 1867 (now the Constitution Act). With the Constitution Act, 1982 comes a new dimension, a new yardstick of reconciliation between the individual and the community and their respective rights, a dimension which, like the balance of the Constitution, remains to be interpreted and applied by the Court.

The Courts in the United States have had almost 200 years experience at this task and it is of more than passing interest to those concerned with these new developments in Canada to study the experience of the United States Courts. When the United States Supreme Court was first concerned with the supervision of constitutional development through the application of the recently adopted Constitution of the United States, the Supreme Court of the United States speaking through Chief Justice Marshall stated:

> *The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognise certain principles, supposed to have been long and well established, to decide it.*

Marbury v. Madison, 5 U.S. (1 Cranch) 173 (1803), at p. 175.

There followed a lengthy discussion not dissimilar to that engaged in by the Privy Council and by this Court in considering the allocation of powers and institutional provisions in the Constitution as it existed, at least to 1981. As to the nature of a written

constitution in relation to the component governments, the Chief Justice continued (pp. 176-77):

> *Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.*
>
> *This theory is essentially attached to a written constitution, and, is consequently, to be considered, by this court, as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject.*

The Court then turned to the role of the Court (at p. 177):

> *It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.*
>
> *So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.*

The Court having staked out its constitutional ground then moved on in M'Culloch v. State of Maryland, 17 U.S. (4 Wheaton's) 316 (1819), to consider the techniques of interpretation to be applied in construing a constitution. Again speaking through Chief Justice Marshall (at p. 407):

> *A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into*

> *execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. ... In considering this question, then, we must never forget, that it is a constitution we are expounding.*

In recognizing that both legislative and judicial power under the Constitution is limited, the Chief Justice observed that the Court must allow the legislative branch to exercise that discretion authorized by the Constitution which will (at p. 421):

> *... enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.*

[133] It is to be noticed that the observation of the Chief Justice of the United States, Marshall CJ was to the effect that the legislature was free to act but action must (a) pursue a legitimate object; (b) be compatible with the constitution; and (c) be by appropriate means that are not prohibited but consistent with the letter and spirit of the Constitution.

[134] What has been said by Estey J applies equally to the Jamaican Judiciary. We do not engage in policy choices but simply declare the law and where necessary declare whether a statute is compatible with the Charter. There is no such thing as a policy choice, when translated into law, which makes such a law immune from judicial scrutiny. In constitutional law, there is no such thing as the end justifying the means. The end may be laudable but the means must also be compatible with the Constitution.

[135] I am also aware that since **Oakes** there has been a line of cases beginning with **Irwin Toy Ltd v Quebec (Attorney General)** 58 DLR (4th) 577 in which the Canadian Supreme Court introduced or developed the idea that in some spheres the courts are ill equipped to decide whether some legislative choices are compatible with the Constitution. The oft cited areas are those policy decisions involving socio-economic policy and national security. The outcome of this thinking was that these areas were given such deference that the court declined to apply the **Oakes** test with the rigour that was normally expected. In other words, in some areas the infringement of the right is permitted on the ground that the courts are not well placed to decide on constitutionality of the law. The threshold for violation was lowered so that in some areas a law, that would quite likely have failed the test of constitutionality had the full rigour of **Oakes** been applied, was allowed to stand.

[136] Having read the **Irwin Toy Ltd** case and others I am not convinced of the soundness of this judicial doctrine. I find the arguments made against it by Guy Davidov persuasive. [25] He observed the following at page 141:

> *The question is, however, whether the courts will have all the relevant information needed to justify the law. We do not want the laws enacted by our representatives to be struck down just because courts, due to the attributes of adjudication, did not receive all the relevant information. But all relevant information on the part of the state can be submitted to the courts. We expect legislatures and governments to respect constitutional rights. Before limiting rights, we expect them to make sure that the objective is sufficiently important, that the means are rationally related to it and restrict the rights as little as possible and that the deleterious and salutary effects of the law are proportionate. If all this is examined in advance, as it should, then all the relevant information is already prepared, even if no constitutional challenge is made. There should*

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[25] Davidov, Guy, *The Paradox of Judicial Deference*, 12 Nat'l J. Const. L 133.

> *not be any problem to submit all this information — and this is, in fact, all the relevant information to support the impugned law — to the court. And if this preparatory work was not done in advance (or was not done fully enough) — then we should be glad that legal proceedings are forcing the state to do it. Indeed, this is one of the most important achievements of the Charter — it forces legislatures and governments to think about the consequences of their actions and consider the effect on fundamental rights.*

[137] And at pages 142-143:

> *Even if courts can have all the relevant information to decide constitutional cases, it can still be argued that they lack the abilities to understand and to evaluate this information. Generally speaking, the argument is that it is more difficult — and requires different expertise — to deal with legislative/social facts, as opposed to historical/adjudicative ones. The claim is usually focused on the review of socio-economic policies. But judges can surely understand social and economic arguments, just like any other arguments. There is no reason to suspect that they cannot understand the social background and objectives of a law or arguments about the effectiveness of alternative means. A case about a piece of economic legislation would not be more difficult, in this respect, than a civil case concerning medical malpractice or a major commercial contractual relationship. Courts do not have to define goals, choose means or come up with ideas. They do not have to create social policies; they just have to understand what the other branches have created. No special expertise is required for such an understanding.*

[138] He had this to say about legislatures at pages 143-144:

> *The point is best understood when one considers the work of legislatures. Those who make the decisions are not experts in all areas of legislation. It is inevitable that they have no expertise or experience in most — if not all — of the areas in which they legislate. We do not choose our representatives because they are experts in a certain field, but because we want them to make the decisions. Democracy is built on the idea that the people (through their representatives) make the decisions, not the experts. As far as*

> *professional matters are concerned, we expect the legislatures to rely on experts and make the final decisions. We assume that they are capable of understanding the information submitted by experts, information which is of course necessary to make the best legislative decisions. Surely judges can understand the information just as well. The legislatures are elected to make decisions in matters of policy; the courts are required by the constitution to ensure these decisions conform to the Charter. None of the branches is expected to have expertise or experience in all fields; both branches are equally capable of understanding the information collected from those who have the expertise and experience.*

[139] In other words the legislature can make no greater claim to having an inherent power, of understanding socio-economic issues, than anyone else's. The legislature seeks expert advice, it is hoped, then analyses the information received, makes decisions, and passes laws. There is no reason why the approach cannot be taken in constitutional litigation as is done, in virtually all other areas of law, where judges are expected to and do understand high science involved in medical negligence cases, patent infringement, futures and derivatives in commercial litigation, and complex forensic science frequently deployed in criminal cases. The clear duty then is to adduce evidence in support of whatever factual conclusion the proponent of the conclusion wants the court to accept. In **Oakes** itself, although it is not clear by what means the evidence (that the court took cognisance of) came before the court and from whom, there was evidence of (i) the international concern about drug trafficking; (ii) the increase of drug trafficking since the 1950s and (iii) the ills associated with drug trafficking. This enabled Dickson CJ to say 'the degree of seriousness of drug trafficking makes its acknowledgement as a sufficiently important objective for the purposes of s. 1 to a large extent self-evident.'

[140] I am fully aware that **Oakes** marks the high water mark of judicial insistence that the legislature meet the constitutional standard before laws can be said to have passed

constitutional muster. The article of Mr Michael Johnston reveals what can happen when courts do not enforce the constitutional standard with firmness.[26] If too much deference is consistently given to the executive and legislature there is the risk that there is likely to be creeping encroachment on fundamental rights. This risk of encroachment is such that we may end up with a de facto application of the presumption of constitutionality approach found in the jurisprudence of the pre-Charter era where primacy was given to legislative preference and not the legal standard. From Mr Johnston's perspective it is not that the **Oakes** test is weak, the problem, in his view, is that judges of the Canadian Supreme Court, in some instances, have tended to lower the evidential threshold.

[141] Even if I were to accept this doctrine of deference I also wish to say such deference cannot be taken to the point, as seemingly suggested by the learned Attorney General, where the courts are reduced to being a spectator to possible unconstitutionality. The courts do not make policy but the courts cannot shirk their role by hiding behind the principle of deference. The dissenting judgment of McLachlin J (later Chief Justice of the Supreme Court of Canada) sums up the matter quite well in **RJR MacDonald Inc v Canada** [1995] 3 LRC 653, where her Ladyship said at page 727 - 731:

> *(a) The Wording of Section 1*
>
> *126 I agree with La Forest J. that "[t]he appropriate 'test' ... in a s. 1 analysis is that found in s. 1 itself" (para. 62). The ultimate issue is whether the infringement is reasonable and "demonstrably justified in a free and democratic society". The jurisprudence laying down the dual considerations of importance of objective and proportionality between the good which may be achieved by the law and the infringement of rights it works, may be seen as articulating the factors which must be considered in determining whether a law*

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[26] Johnston, Michael A, *Section and the Oakes Test; A Critical Analysis*, 26 Nat'l J. Const. L 85.

that violates constitutional rights is nevertheless "reasonable" and "demonstrably justified". ***If the objective of a law which limits constitutional rights lacks sufficient importance, the infringement cannot be reasonable or justified. Similarly, if the good which may be achieved by the law pales beside the seriousness of the infringement of rights which it works, that law cannot be considered reasonable or justified.*** *While sharing La Forest J.'s view that an over technical approach to s. 1 is to be eschewed, I find no conflict between the words of s. 1 and the jurisprudence founded upon R. v. Oakes, [1986] 1 S.C.R. 103. The latter complements the former.*

127 This said, there is merit in reminding ourselves of the words chosen by those who framed and agreed upon s. 1 of the Charter. ***First, to be saved under s. 1 the party defending the law (here the Attorney General of Canada) must show that the law which violates the right or freedom guaranteed by the Charter is "reasonable". In other words, the infringing measure must be justifiable by the processes of reason and rationality. The question is not whether the measure is popular or accords with the current public opinion polls. The question is rather whether it can be justified by application of the processes of reason. In the legal context, reason imports the notion of inference from evidence or established truths.*** *This is not to deny intuition its role, or to require proof to the standards required by science in every case, but it is to insist on a rational, reasoned defensibility.*

128 ***Second, to meet its burden under s. 1 of the Charter, the state must show that the violative law is "demonstrably justified". The choice of the word "demonstrably" is critical. The process is not one of mere intuition, nor is it one of deference to Parliament's choice. It is a process of demonstration. This reinforces the notion inherent in the word "reasonable" of rational inference from evidence or established truths.***

129 ***The bottom line is this. While remaining sensitive to the social and political context of the impugned law and allowing for difficulties of proof inherent in that context, the courts must nevertheless insist that before the state can override***

constitutional rights, there be a reasoned demonstration of the good which the law may achieve in relation to the seriousness of the infringement. It is the task of the courts to maintain this bottom line if the rights conferred by our constitution are to have force and meaning. The task is not easily discharged, and may require the courts to confront the tide of popular public opinion. But that has always been the price of maintaining constitutional rights. No matter how important Parliament's goal may seem, if the state has not demonstrated that the means by which it seeks to achieve its goal are reasonable and proportionate to the infringement of rights, then the law must perforce fail.

(b) The Factors to be Considered under Section 1

130 The factors generally relevant to determining whether a violative law is reasonable and demonstrably justified in a free and democratic society remain those set out in Oakes. ***The first requirement is that the objective of the law limiting the Charter right or freedom must be of sufficient importance to warrant overriding it. The second is that the means chosen to achieve the objective must be proportional to the objective and the effect of the law — proportionate, in short, to the good which it may produce. Three matters are considered in determining proportionality: the measures chosen must be rationally connected to the objective; they must impair the guaranteed right or freedom as little as reasonably possible (minimal impairment); and there must be overall proportionality between the deleterious effects of the measures and the salutary effects of the law.***

(c) Applying the Oakes Factors — Context, Deference to Parliament, Standard of Proof and the Trial Judge's Findings

131 Having set out the criteria determinative of whether a law that infringes a guaranteed right or freedom is justified under s. 1, La Forest J. offers observations on the approach the courts should use in applying them.

132 His first point is that the Oakes test must be applied flexibly, having regard to the factual and social context of each case. I

agree. The need to consider the context of the case has been accepted since Wilson J. propounded it in Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326. This "sensitive, case-oriented approach" was affirmed in Rocket, supra, which also concerned a law limiting advertising. There I wrote at pp. 246-47:

While the Canadian approach does not apply special tests to restrictions on commercial expression, our method of analysis does permit a sensitive, case-oriented approach to the determination of their constitutionality. Placing the conflicting values in their factual and social context when performing the s. 1 analysis permits the courts to have regard to special features of the expression in question. As Wilson J. notes in Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326, not all expression is equally worthy of protection. Nor are all infringements of free expression equally serious.

133 ***That the s. 1 analysis takes into account the context in which the particular law is situate should hardly surprise us. The s. 1 inquiry is by its very nature a fact-specific inquiry. In determining whether the objective of the law is sufficiently important to be capable of overriding a guaranteed right, the court must examine the actual objective of the law. In determining proportionality, it must determine the actual connection between the objective and what the law will in fact achieve; the actual degree to which it impairs the right; and whether the actual benefit which the law is calculated to achieve outweighs the actual seriousness of the limitation of the right. In short, s. 1 is an exercise based on the facts of the law at issue and the proof offered of its justification, not on abstractions.***

134 ***However, while the impugned law must be considered in its social and economic context, nothing in the jurisprudence suggests that the contextual approach reduces the obligation on the state to meet the burden of demonstrating that the limitation on rights imposed by the law is reasonable and justified. Context is essential in determining legislative objective and proportionality, but it cannot be carried to the extreme of treating the challenged law as a unique socio-economic phenomenon, of which Parliament is deemed the***

best judge. This would be to undercut the obligation on Parliament to justify limitations which it places on Charter rights and would be to substitute ad hoc judicial discretion for the reasoned demonstration contemplated by the Charter*.*

135 Related to context is the degree of deference which the courts should accord to Parliament. It is established that the deference accorded to Parliament or the legislatures may vary with the social context in which the limitation on rights is imposed. For example, it has been suggested that greater deference to Parliament or the Legislature may be appropriate if the law is concerned with the competing rights between different sectors of society than if it is a contest between the individual and the state: Irwin Toy, supra, at pp. 993-94; Stoffman v. Vancouver General Hospital, [1990] 3 S.C.R. 483, at p. 521. However, such distinctions may not always be easy to apply. For example, the criminal law is generally seen as involving a contest between the state and the accused, but it also involves an allocation of priorities between the accused and the victim, actual or potential. The cases at bar provide a cogent example. We are concerned with a criminal law, which pits the state against the offender. But the social values reflected in this criminal law lead La Forest J. to conclude that "the Act is the very type of legislation to which this Court has generally accorded a high degree of deference" (para. 70). This said, I accept that the situation which the law is attempting to redress may affect the degree of deference which the court should accord to Parliament's choice. The difficulty of devising legislative solutions to social problems which may be only incompletely understood may also affect the degree of deference that the courts accord to Parliament or the Legislature. As I wrote in Committee for the Commonwealth of Canada v. Canada, [1991] 1 S.C.R. 139, at p. 248, "some deference must be paid to the legislators and the difficulties inherent in the process of drafting rules of general application. A limit prescribed by law should not be struck out merely because the Court can conceive of an alternative which seems to it to be less restrictive".

136 ***As with context, however, care must be taken not to extend the notion of deference too far. Deference must not be carried to the point of relieving the government of the burden which the Charter places upon it of demonstrating that the***

limits it has imposed on guaranteed rights are reasonable and justifiable. Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the Constitution. But the courts also have a role: to determine, objectively and impartially, whether Parliament's choice falls within the limiting framework of the Constitution. The courts are no more permitted to abdicate their responsibility than is Parliament. To carry judicial deference to the point of accepting Parliament's view simply on the basis that the problem is serious and the solution difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded.

137 Context and deference are related to a third concept in the s. 1 analysis: standard of proof. I agree with La Forest J. that proof to the standard required by science is not required. Nor is proof beyond a reasonable doubt on the criminal standard required. As the s. 1 jurisprudence has established, the civil standard of proof on a balance of probabilities at all stages of the proportionality analysis is more appropriate: Oakes, supra, at p. 137; Irwin Toy, supra, at p. 992. I thus disagree with La Forest J.'s conclusion (in para. 82) that in these cases "it is unnecessary ... for the government to demonstrate a rational connection according to a civil standard of proof". Discharge of the civil standard does not require scientific demonstration; the balance of probabilities may be established by the application of common sense to what is known, even though what is known may be deficient from a scientific point of view: see Snell v. Farrell, [1990] 2 S.C.R. 311.

138 In summary, while I agree with La Forest J. that context, deference and a flexible and realistic standard of proof are essential aspects of the s. 1 analysis, these concepts should be used as they have been used by this Court in previous cases. They must not be attenuated to the point that they relieve the state of the burden the Charter imposes of demonstrating that the limits imposed on our constitutional rights and freedoms are reasonable and justifiable in a free and democratic society.

139 I come finally to a fourth general matter discussed by La Forest J. — the degree of deference which appellate courts should

> *accord to the findings of the trial judge under s. 1 of the Charter analysis. The trial judge in these cases concluded that the proportionality test was not met. He based this conclusion on findings that the evidence failed to establish any of the three requirements for proportionality under s. 1.* (emphasis added)

[142] Her Ladyship acknowledged the difficulty in determining whether a law violates the constitution especially in areas of social and economic policy but nonetheless if the challenge is made the courts must do their job by applying the constitutional standard. I respect her Ladyship's reasoning but I do not agree because she seems to accept the doctrine of judicial deference. I note that her Ladyship repeated her own dictum from an earlier judgment which was that a law is not to be struck down merely because the court could think of another way that restricts the right in a lesser manner than that which the legislature decided. Respectfully, I would qualify that dictum by saying that if the claimant can show that there is a less restrictive way to meet the objective then that would be a strong basis to say that there is a violation because that is what the **Oakes** test requires. To repeat, under the proportionality test for constitutionality, the legislature must find the least harmful way to achieve the objective. Her Ladyship's view on this aspect of the matter comes very close to endorsing Parliamentary sovereignty as distinct from constitutional supremacy. It would be remarkable, in my respectful view, for a court, objectively speaking, to say that there is in fact another way that is least restrictive of the fundamental right and freedom while permitting the purpose of the law to be met but still allow the law to stand. I humbly, suggest that her Ladyship's reasoning on this matter ought not to be followed. It is my view, not original, but referred to already in these reasons for judgment, that when a court allows a violation to stand, it must not forget that what it is doing is saying that the value and principle embodied in the fundamental right or freedom is to be replaced in that area by another value or principle that now becomes the fundamental law in that area thereby erasing the original constitutional value or principle in that area. This is always a crucial step for a court. The citizenry looks to the courts to hold the line and enforce the constitution and only allow the violation when the strict **Oakes** test is satisfied.

[143] The road to state control of the lives of persons usually begins with small imperceptible steps. It is usually clothed in the garb of some perceived greater good such as national security, economic growth, and the like. There begins one slight trespass, and then another, and another, and before long the trespass becomes the norm, and the right the exception. This is one of the dangers of the Canadian doctrine of judicial deference. The rejection of that doctrine is not obstructing the legislature but ensuring that no rights are removed, constrained or impaired unless the stringent **Oakes** test is satisfied.

[144] The learned Attorney General referred to the margin of appreciation principle found in cases from the European Court of Human Rights of which **S and Marper** (2008) 48 EHRR 50 was cited as an example. This is how it was expressed by the court at paragraph 102:

> *102. A margin of appreciation must be left to the competent national authorities in this assessment. The breadth of this margin varies and depends on a number of factors, including the nature of the Convention right in issue, its importance for the individual, the nature of the interference and the object pursued by the interference. The margin will tend to be narrower where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights (see Connors v. the United Kingdom, no. 66746/01, § 82, 27 May 2004, with further references). Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted (see Evans v. the United Kingdom [GC], no. 6339/05, § 77, ECHR 2007-I). Where, however, there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to how best to protect it, the margin will be wider (see Dickson v. the United Kingdom [GC], no. 44362/04, § 78, ECHR 2007-V).*

[145] To my mind this seems a very close relative if not the same thing as the Canadian doctrine of judicial deference. Respectfully, I don't agree with this margin of appreciation principle. If the legislature in a free and democratic state, based on the concepts of freedom and privacy, wish to pass a law that abrogates, restricts or

undermines guaranteed fundamental rights there surely must be good reason. The upholding of a fundamental right should not depend on the preponderance of the practice number of nation states.' This seems to suggest that such consensus is coming from the executive or legislature and not the courts. It does not seem appropriate that the extent to which fundamental rights are affected should be dependent upon whether states agree or don't agree, as the case may be, on the relative importance of the interest at stake.

The sixth necessary analysis: prematurity

[146] From my reading of the cases on constitutional challenges there are two broad categories of these types of cases. The first is where it is being said that the actual text of the statute or regulation, without more, violates the Charter. The second is where it is being said that the effect of the law operationally is unconstitutional even if the text is compatible with the constitution.

[147] It is against this understanding that the learned Attorney General's submissions on prematurity are examined.

[148] The learned Attorney General submitted that this constitutional challenge is premature. The Caribbean Court of Justice's decision in **August and Gabb v R** [2018] CCJ 07 (AJ) was cited. In that case, the CCJ held that the text of the statute did not infringe any constitutional right but that reasoning did not preclude a future challenge to the way in which the Parole Board actually operated. What the CCJ decided was that on a textual analysis there was no violation of any constitutional right but that finding did not preclude a future constitutional challenge arising from the manner in which the Parole Board carried out its functions, that is to say, the claimant could return to complain about the manner in which the statute was interpreted and applied. The reasoning of the judges is consistent with the proposition advanced in the immediately preceding paragraph.

[149] It is my respectful view that this case is not very helpful because Mr Robinson's approach is to rely on the text of NIRA to say that if it is brought into force as it presently

stands then it is likely that there will be violation of some of his rights. He is not relying on the actual effect of NIRA, which is an empirical question, as it has operated because it is not yet law. The second type of challenge is not open to Mr Robinson.

[150] I have taken careful note of the majority judgment in **Justice K S Puttaswamy (Rtd) v Union of India and others** Writ Petition (Civil) No 494 of 2012 (delivered September 26, 2018) at paragraphs 155 to 190. One of the issues that arose in that case was whether the Aadhaar Act itself had sufficient protection for the data that was already collected and was to be collected. Their Lordships examined the Information Technology Act (ITA) because it was the only legislation covering data protection. In other words, that statute was part of the legal architecture dealing with biometric data collection and protection. At paragraph 163 (a) (i) their Lordships observed that the Act and its rules did not determine the constitutionality of the Aadhaar Act, and the rules made thereunder, but found that what existed under the IT Act was 'instructive in determining the safeguards that must be taken to collect biometric information.' What followed was an analysis of the ITA, case law from the EU, and the position of the United States of America.

[151] The majority gleaned from their examination of EU case law (the European Court of Human Rights and the Court of Justice of European Court) that in the EU, when it came to 'data collection, usage and storage (including biometric data) … **requires adherence** to the principles of consent, purpose and storage limitation, data differentiation, data exception, data immunization, substantive and procedural fairness and safeguards, transparency, data protection and security' (para 187) (emphasis added). I am of the view that this approach provides a proper conceptual framework within which to examine NIRA in order to see whether the provisions in that statute meet the standards indicated by the majority in **Puttaswamy** (September 26, 2018). I must also say that in the application of the standard I prefer the reasoning of Dr Chandrachud J to that of the majority.

[152] The **Puttaswamy** majority also noted that it was only 'by such strict observance of the above principles can the State successfully discharge the burden of

proportionality while affecting the privacy rights of citizens' (para 187). Then their Lordships indicated that they were now going to examine the Aadhaar Act in light of the principles gleaned. They were saying that once the law is passed that law has to be examined for constitutionality once the issue is raised regardless of what other laws exists. The principles gathered from the EU case law permitted examination of the constitutionality of legislation. This is another reason for not accepting the learned Attorney General's submission that the examination of NIRA should wait until the legal framework is completed. Constitutionality or the lack of it cannot be decided on what legislation is to come; it is determined on what is.

The seventh necessary analysis: proportionality and the separation of powers

[153] There seems to be a significant misunderstanding of the doctrine of proportionality and its role in a constitutional democracy. This brief discussion should allay concerns that the judiciary is usurping the role of the executive and the legislature.

[154] The separation of powers doctrine is a political idea that was clearly enunciated by Charles Louis de Baron Montesquieu in his great work, ***The Spirit of the Laws***. The doctrine of separation of powers was developed to enhance liberty and restrict tyranny by ensuring that all power - executive, legislative, and judicial - was not concentrated in the same person or group of persons. Montesquieu said:

> ***In every government there are three sorts of power: the legislative; the executive in respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law.***
>
> *By virtue of the first, the prince or magistrate enacts temporary or perpetual laws, and amends or abrogates those that have been already enacted. By the second, he makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions. By the third, he punishes criminals, or*

> *determines the disputes that arise between individuals. The latter we shall call the judiciary power, and the other, simply, the executive power of the state.* [27] (emphasis added)

[155] This is a fundamental statement of the make-up of government that has not been shown to be false or inaccurate. In my view it is one of those basic truths that transcends all forms of government that has ever existed or will ever exist. All societies in human history have had law makers, law enforcers, and law interpreters. The difference between societies has been how those powers are distributed or combined.

[156] And later Montesquieu observed:

> ***When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.***
>
> ***Again, there is no liberty if the judiciary power be not separated from the legislative and executive****. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.* [28] (emphasis added)

[157] And Montesquieu concluded:

> *The executive power ought to be in the hands of a monarch, because this branch of government, having need of dispatch, is better administered by one than by many: on the other hand, whatever depends on the legislative power, is oftentimes better regulated by many than by a single person.*

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[27] Montesquieu, Charles Louis de Baron, *The Spirit of the Laws, Book XI, Chap 6*.

[28] Montesquieu (n 27).

> *But, if there were no monarch, and the executive power should be committed to a certain number of persons, selected from the legislative body, there would be an end of liberty, by reason the two powers would be united; as the same persons would sometimes possess, and would be always able to possess, a share in both.* [29]

[158] Here we see a very significant observation. If the executive is drawn from the legislature, liberty is endangered simply by uniting the two powers in the same person or group of persons. In other words, there is no check on the exercise of executive power by the legislature and vice versa.

[159] This is the governmental framework which we have adopted. Each arm of government is free to operate in its sphere but all three arms must operate according to the Constitution. A judge is not authorised to make an unconstitutional decision any more than the legislature can enact an unconstitutional law, and any more than the executive can promulgate an unconstitutional policy. The Constitution stands above all three arms of government and must be obeyed by all three arms.

[160] The executive's role is to develop and execute policy. The executive arm cannot enact primary (Acts of Parliament) or secondary laws (regulations) unless in the case of the latter, the relevant functionary is specifically authorised to do so by primary legislation. This is nothing more than the reflection of the rule of legality.

[161] In the early stages of policy development, the executive has the widest possible discretion in the sense that it can decide which policy, from many, to adopt and promote; when to do so and how. However, that discretion narrows when it seeks to translate the policy into law or some executive action. Why is this? When the policy makes its entry into the legislature the law makers, as they are duty bound to do, may question the executive and raise issues that in all probability the executive did not think

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[29] Montesquieu (n 27).

of. When the policy moves from a green to white paper, to a Bill, the discretion narrows even more because there are now words used to turn the policy into law. The meaning of words has boundaries of understanding. If this were not so then communication would be impossible.

[162] Many competing interests have an impact on the Bill. It is quite common for a Bill to be introduced into the legislature and what emerges is quite different from what went in. There are amendments. The promoting Minister often times must make compromises to get the Bill through. Sometimes the Bill goes to a Joint Select Committee of both Houses of Parliament. Depending on the nature of the Bill, the country at large is invited to make submissions to the law makers. What this means is that the discretion of the executive is narrowed even further because it is now forced to take account of views other than its own. The executive does not hear only its voice. This is what happens in a democracy.

[163] The role of the legislature is to pass the law necessary to give effect to the policy. Before the Bill becomes an Act of Parliament, the legislature has a wide discretion over what the law should contain. It often times has a range of options open to it in relation to the objective of the proposed law and the means to realise the objective of the proposed law. During the legislative process, the discretion of the legislature narrows. The legislature is further constrained by the Constitution which prohibits Parliament from passing any law that violates any of the guaranteed rights and freedoms.

[164] Up to this point the judicial branch has nothing to say because the matter has not yet come before the courts. The judicial branch does not comment on the wisdom or lack of wisdom of any policy.

[165] The judicial branch only speaks when the matter, at whatever stage in the process, is brought before the court by a claim. The speaking of the judiciary, at this point, is restricted to the question of constitutionality or the specific legal issue raised, not the choice or wisdom of the other two branches of government. The judicial branch determines whether the law is compatible with the Constitution if that is the issue raised,

and part of that assessment involves a determination of whether the means chosen impairs the constitutional right and freedom as little as possible having regard to the objective sought.

[166] I wish to cite the judgment of A K Sikri J who wrote for the majority (alongside Misra CJI and Khanwilkar J) in **Puttaswamy** (September 2018). His Lordship said at paragraph 74:

> *Judicial Review means the supremacy of law. It is the power of the court to review the actions the Legislature, the Executive and the Judiciary itself and to scrutinize (sic) the validity of any law or action. It has emerged as one of the most effective instruments of protecting and preserving the cherished freedoms in a constitutional democracy and upholding principles such as separation of powers and rule of law. The Judiciary, through judicial review, prevents the decisions of other branches from impinging the constitutional values. The fundamental nature of the Constitution is that of a limiting document, it curtails the power of majoritarianism from hijacking the State. The power of review is the shield which is placed in the hands of most judiciaries of constitutional democracies to enable the protection of the supreme document.*

[167] This should put an end to the notion that once the executive choses policy and the legislature passes a law, then for some inexplicable reason, the judicial arm cannot determine constitutionality merely because a choice has been made and a law passed. Governance in a constitutional democracy based on the rule of law is actually an institutional arrangement founded upon each arm acting within its designated sphere. It is by understanding this fundamental idea that tyranny is restrained and liberty advanced. No arm has absolute power. All power is subject to constitutional restraint. Popularity and constitutionality are separate things. Popularity does not determine constitutionality. It is the text of the Constitution, its interpretation, and application that determines constitutionality. The final say on this is a judicial function and not an executive one. As Sikri J noted in **Puttaswamy** (September 26, 2018) at paragraph 72 (v):

> *We are in the age of constitutional democracy…it is the judiciary which is assigned the role of upholding the rule of law and protecting the Constitution and democracy.*

[168] The doctrine of proportionality does not eliminate executive and legislative discretion. The executive has full control over policy but full control does not mean the absence of constraints if one is dealing with a constitution in a free and democratic society. The legislature has the choice to decide whether legislation is even necessary, and if necessary determine its content. The executive may want a particular content but the legislature can say no or agree or defer or modify the executive's desired content. There is no constitutional requirement that the legislature give the executive what it wants. The fact that the executive wants legislation does not mean that the law must be passed. The legislature can properly decline to legislate. If the legislature decides to pass a law it still has wide powers to decide the content of the law, its purpose, the means to achieve the purpose which restricts any particular right or freedom the least. The legislature, while having full control over the content of legislation is not without constraints. The constitution sets out the parameters of the legislature's choices. The choices made or to be made are circumscribed by fundamental rights and freedoms. The purpose and the means to realise the purpose must be constitutional.

[169] The judicial branch decides on the constitutionality of laws. The judiciary deals with legal disputes. For the judiciary to become involved, someone must file a claim and in that claim the person enumerates the facts and circumstances that are claimed to have violated his or her constitutional right. The person sets out the remedy sought. The usual process is for the contending parties to adduce evidence, make legal submissions and then the courts render a decision. Having decided the applicable law, the court is to pronounce the decision in accordance with the law as the court understands it. This is to be done regardless of the popularity or otherwise of the courts' decision. Even in the face of hostility from any quarter, the judiciary must do its job without fear, favour, malice, or ill will and without regard to the consequences for the judge. In a phrase, the judiciary must show and demonstrate courage especially in difficult times or when hard choices have to be made.

[170] A declaration of unconstitutionality does not mean that the legislature cannot pass a law to give effect to the executive's policy. All that has happened is that the judicial arm has said that that particular law has violated the Constitution. The legislature is free to revisit the issue.

[171] A declaration of constitutionality does not mean that the judge personally agrees with the policy or the law. The judge's personal views are irrelevant to the question of constitutionality. When a constitutional challenge fails, all that is being said is that the law is compatible with the Constitution having regard the facts and submissions made. The judicial decision has nothing to do with judicial deference or a doctrine of the margin of appreciation.

The eighth necessary analysis: freedom and privacy

[172] The underlying theme of this claim is freedom and privacy. Two important final courts have had important words on these issues. In the Canadian Supreme Court, Dickson J (as he was at the time) in **Big M Drug Mart Ltd** 18 DLR (4th) 321 had this to say about freedom, in the context of religious freedom, at page 354:

> *95 Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the Charter is to protect within reason from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.*

[173] This passage is of general application and can be used as a basis for understanding freedom. The citation, in my view, explains what one aspect of the Jamaican Charter is about. The rights dealing with freedoms of thought, religion, peaceful assembly, movement and from discrimination are about being free from compulsion or restraint from doing or not doing something that one does not want to do when there is no compelling reason other than somebody else's views, including the executive's and legislature's, that one should do it.

[174] If I am permitted I will cite a very long extract from the majority judgment in **Justice K S Puttaswamy (Rtd)** (September 28, 2018). To establish some context here. The Indian government introduced a voluntary scheme of identification registration similar to NIRA. That scheme became known as the Aadhaar number scheme. Though it was stated to be voluntary, over time it was treated as if it were mandatory. The main claimant, Justice Puttaswamy and others raised challenges to the law. They submitted that their privacy rights were violated. The problem here was that the Indian Constitution did not contain any explicit right to privacy. The first issue that had to be resolved was whether there was a right to privacy in the Indian Constitution. The answer given by the Supreme Court of India was "yes". That decision was given on August 24, 2017. The next stage of the litigation was to determine whether the scheme violated that right. The answer was that the objective did not violate the privacy right but the court drove home the point that those provisions that in effect made the obtaining of the number mandatory were unconstitutional. This decision was given in September 2018. It is a formidable judgment in terms of length (1,444 pages), the depth of analysis and the quality of reasoning. This extract is from the judgment of A K Sikri J. I have cited this very long passage from this very learned judge because he has extracted important passages from the 2017 Puttaswamy judgment that captures the heart of the Indian Supreme Court's understanding of freedom and privacy. I agree with the majority's reasoning on this point of freedom and privacy. I must not be taken as agreeing necessarily with the majority's analysis and conclusion on everything. Sikri J stated at paragraphs 81 - 83:

A close reading of this judgment [KS Putttaswamy v Union of India Writ Petition (Civil) No 494 of 2012) (delivered August 24, 2017)] brings about the following features:

(i) Privacy has always been a natural right: The correct position in this behalf has been established by a number of judgments starting from Gobind v. State of M.P. Various opinions conclude that:

(a) privacy is a concomitant of the right of the individual to exercise control over his or her personality.

(b) Privacy is the necessary condition precedent to the enjoyment of any of the guarantees in Part III.

(c) The fundamental right to privacy would cover at least three

aspects –

(i) intrusion with an individual's physical body,

(ii) informational privacy, and (iii) privacy of choice.

(d) One aspect of privacy is the right to control the dissemination of personal information. And that every individual should have a right to be able to control exercise over his/her own life and image as portrayed in the world and to control commercial use of his/her identity.

Following passages from different opinions reflect the aforesaid proposition:

> *Dr. D.Y. Chandrachud, J.:*
>
> *42. Privacy is a concomitant of the right of the individual to exercise control over his or her personality. It finds an origin in the notion that there are certain rights which are natural to or inherent in a human being. Natural rights are inalienable because they are inseparable from the human personality. The human element in life is impossible to conceive without the existence of natural rights. In 1690, John Locke had in his*

Second Treatise of Government observed that the lives, liberties and estates of are as a matter of fundamental natural law, a private preserve. The idea of a private preserve was to create barriers from outside interference. In 1765, William Blackstone in his Commentaries on the Laws of England spoke of a "natural liberty". There were, in his view, absolute rights which were vested in the individual by the immutable laws of nature. These absolute rights were divided into rights of personal security, personal liberty and property. The right of personal security involved a legal and uninterrupted enjoyment of life, limbs, body, health and reputation by an individual.

xx xx xx

46. Natural rights are not bestowed by the State. They inhere in human beings because they are human. They exist equally in the individual irrespective of class or strata, gender or orientation.

xx xx xx

318. Life and personal liberty are inalienable rights. These are rights which are inseparable from a dignified human existence. The dignity of the individual, equality between human beings and the quest for liberty are the foundational pillars of the Indian Constitution.

S.A. Bobde, J :

415. Therefore, privacy is the necessary condition precedent to the enjoyment of any of the guarantees in Part III. As a result, when it is claimed by rights bearers before constitutional courts, a right to privacy may be situated not only in Article 21, but also simultaneously in any of the other guarantees in Part III. In the current state of

things, Articles 19(1), 20(3), 25, 28 and 29 are all rights helped up and made meaningful by the exercise of privacy. This is not an exhaustive list. Future developments in technology and social ordering may well reveal that there are yet more constitutional sites in which a privacy right inheres that are not at present evident to us.

R.F. Nariman, J:

521. In the Indian context, a fundamental right to privacy would cover at least the following three aspects:

- *Privacy that involves the person i.e. when there is some invasion by the State of a person's rights relatable to his physical body, such as the right to move freely;*

- *Informational privacy which does not deal with a person's body but deals with a person's mind, and therefore recognises that an individual may have control over the dissemination of material that is personal to him. Unauthorised use of such information may, therefore lead to infringement of this right; and*

- *The privacy of choice, which protects an individual's autonomy over fundamental personal choices.*

For instance, we can ground physical privacy or privacy relating to the body in Articles 19(1)(d) and (e) read with Article 21; ground personal information privacy under Article 21; and the privacy of choice in Articles 19(1)(a) to (c), 20(3), 21 and 25. The argument based on "privacy" being a vague and nebulous concept need not, therefore, detain us.

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532. The learned counsel for the petitioners also referred to another important aspect of the right to privacy. According to the learned counsel for the petitioner this right is a natural law right which is inalienable. Indeed, the reference order itself, in para 12, refers to this aspect of the fundamental right contained. It was, therefore, argued before us that given the international conventions referred to hereinabove and the fact that this right inheres in every individual by virtue of his being a human being, such right is not conferred by the Constitution but is only recognised and given the status of being fundamental. There is no doubt that the petitioners are correct in this submission. However, one important roadblock in the way needs to be got over.

533. In ADM, Jabalpur v. Shivakant Shukla, a Constitution Bench of this Court arrived at the conclusion (by majority) that Article 21 is the sole repository of all rights to life and personal liberty, and, when suspended, takes away those rights altogether. A remarkable dissent was that of Khanna, J. [Khanna, J. was in line to be Chief Justice of India but was superseded because of this dissenting judgment. Nani Palkhivala in an article written on this great Judge's supersession ended with a poignant sentence, "To the stature of such a man, the Chief Justiceship of India can add nothing." Seervai, in his monumental treatise Constitutional Law of India had this to say: ". If in this Appendix the dissenting judgment of Khanna, J. has not been considered in detail, it is not for lack of admiration for the judgment, or the courage which he showed in delivering it regardless of the cost and consequences to himself. It cost him the Chief Justiceship of India, but it gained for him universal esteem not only for his courage but also for his inflexible judicial independence. If his judgment is not considered

in detail it is because under the theory of precedents which we have adopted, a dissenting judgment, however valuable, does not lay down the law and the object of a critical examination of the majority judgments in this Appendix was to show that those judgments are untenable in law, productive of grave public mischief and ought to be overruled at the earliest opportunity. The conclusion which Justice Khanna has reached on the effect of the suspension of Article 21 is correct. His reminder that the rule of law did not merely mean giving effect to an enacted law was timely, and was reinforced by his reference to the mass murders of millions of Jews in Nazi concentration camps under an enacted law. However, the legal analysis in this Chapter confirms his conclusion though on different grounds from those which he has given." (at Appendix p. 2229).] The learned Judge

held: (SCC pp. 747 & 751, paras 525 & 531)

"525. The effect of the suspension of the right to move any court for the enforcement of the right conferred by Article 21, in my opinion, is that when a petition is filed in a court, the court would have to proceed upon the basis that no reliance can be placed upon that article for obtaining relief from the court during the period of emergency. Question then arises as to whether the rule that no one shall be deprived of his life or personal liberty without the authority of law still survives during the period of emergency despite the Presidential Order suspending the right to move any court for the enforcement of the right contained in Article 21. The answer to this question is linked with the answer to the question as to whether Article 21 is the sole repository of the right to life and personal liberty. After giving the matter my earnest consideration, I am of the opinion that Article 21

cannot be considered to be the sole repository of the right to life and personal liberty. The right to life and personal liberty is the most precious right of human beings in civilised societies governed by the rule of law. Many modern Constitutions incorporate certain fundamental rights, including the one relating to personal freedom. According to Blackstone, the absolute rights of Englishmen were the rights of personal security, personal liberty and private property. The American Declaration of Independence (1776) states that all men are created equal, and among their inalienable rights are life, liberty, and the pursuit of happiness. The Second Amendment to the US Constitution refers inter alia to security of person, while the Fifth Amendment prohibits inter alia deprivation of life and liberty without due process, of law. The different Declarations of Human Rights and fundamental freedoms have all laid stress upon the sanctity of life and liberty. They have also given expression in varying words to the principle that no one shall be derived of his life or liberty without the authority of law. The International Commission of Jurists, which is affiliated to UNESCO, has been attempting with, considerable success to give material content to "the rule of law", an expression used in the Universal Declaration of Human Rights. One of its most notable achievements was the Declaration of Delhi, 1959. This resulted in a Congress held in New Delhi attended by jurists from more than 50 countries, and was based on a questionnaire circulated to 75,000 lawyers. "Respect for the supreme value of human personality" was stated to be the basis of all law (see p. 21 of the Constitutional and Administrative Law by O. Hood Phillips, 3rd Edn.).

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531. I am unable to subscribe to the view that when right to enforce the right under Article 21 is suspended, the result would be that there would be no remedy against deprivation of a person's life or liberty by the State even though such deprivation is without the authority of law or even in flagrant violation of the provisions of law. The right not to be deprived of one's life or liberty without the authority of law was not the creation of the Constitution. Such right existed before the Constitution came into force. The fact that the Framers of the Constitution made an aspect of such right a part of the fundamental rights did not have the effect of exterminating the independent identity of such right and of making Article 21 to be the sole repository of that right. Its real effect was to ensure that a law under which a person can be deprived of his life or personal liberty should prescribe a procedure for such deprivation or, according to the dictum laid down by Mukherjea, J. in Gopalan case [A.K. Gopalan v. State of Madras, AIR 1950 SC 27: 1950 SCR 88], such law should be a valid law not violative of fundamental rights guaranteed by Part III of the Constitution. Recognition as fundamental right of one aspect of the preconstitutional right cannot have the effect of making things less favourable so far as the sanctity of life and personal liberty is concerned compared to the position if an aspect of such right had not been recognised as fundamental right because of the vulnerability of fundamental rights accruing from Article 359. I am also unable to agree that in view of the Presidential Order in the matter of sanctity of life and liberty, things would be worse off compared to the state of law as it existed before the coming into force of the Constitution." (emphasis in original)

S.K. Kaul, J:

574. I have had the benefit of reading the exhaustive and erudite opinions of Rohinton F. Nariman and Dr D.Y. Chandrachud, JJ. The conclusion is the same, answering the reference that privacy is not just a common law right, but a fundamental right falling in Part III of the Constitution of India. I agree with this conclusion as privacy is a primal, natural right which is inherent to an individual. However, I am tempted to set out my perspective on the issue of privacy as a right, which to my mind, is an important core of any individual existence.

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620. I had earlier adverted to an aspect of privacy — the right to control dissemination of personal information. The boundaries that people establish from others in society are not only physical but also informational. There are different kinds of boundaries in respect to different relations. Privacy assists in preventing awkward social situations and reducing social frictions. Most of the information about individuals can fall under the phrase "none of your business". On information being shared voluntarily, the same may be said to be in confidence and any breach of confidentiality is a breach of the trust. This is more so in the professional relationships such as with doctors and lawyers which requires an element of candour in disclosure of information. An individual has the right to control one's life while submitting personal data for various facilities and services. It is but essential that the individual knows as to what the data is being used for with the ability to correct and amend it. The hallmark of freedom in a democracy is having the autonomy and control over our lives which becomes impossible, if important decisions are made in secret without our awareness or participation. [Daniel Solove, "10

Reasons Why Privacy Matters" published on 20-1-2014 <https://www.teachprivacy.com/10-reasonsprivacy-matters/>.]

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625. Every individual should have a right to be able to exercise control over his/her own life and image as portrayed to the world and to control commercial use of his/her identity. This also means that an individual may be permitted to prevent others from using his image, name and other aspects of his/her personal life and identity for commercial purposes without his/her consent. [The Second Circuit's decision in Haelan Laboratories Inc. v. Topps Chewing Gum Inc., 202 F 2d 866 (2d Cir 1953) penned by Jerome Frank, J. defined the right to publicity as "the right to grant the exclusive privilege of publishing his picture".]"

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646. If the individual permits someone to enter the house it does not mean that others can enter the house. The only check and balance is that it should not harm the other individual or affect his or her rights. This applies both to the physical form and to technology. In an era where there are wide, varied, social and cultural norms and more so in a country like ours which prides itself on its diversity, privacy is one of the most important rights to be protected both against State and non-State actors and be recognised as a fundamental right. How it thereafter works out in its interplay with other fundamental rights and when such restrictions would become necessary would depend on the factual matrix of each case. That it may give rise to more litigation can hardly be the reason not to recognise this important, natural, primordial right as a fundamental right."

(ii) The sanctity of privacy lies in its functional relationship with dignity: Privacy ensures that a human being can lead a life of dignity by securing the inner recesses of the human personality from unwanted intrusions. While the legitimate expectation of privacy may vary from intimate zone to the private zone and from the private to the public arena, it is important to underscore that privacy is not lost or surrendered merely because the individual is in a public place. Further, privacy is a postulate of dignity itself. Also, privacy concerns arise when the State seeks to intrude into the body and the mind of the citizen. This aspect is discussed in the following manner:

> *Dr. D.Y. Chandrachud, J.:*
>
> *127. The submission that recognising the right to privacy is an exercise which would require a constitutional amendment and cannot be a matter of judicial interpretation is not an acceptable doctrinal position. The argument assumes that the right to privacy is independent of the liberties guaranteed by Part III of the Constitution. There lies the error. The right to privacy is an element of human dignity. The sanctity of privacy lies in its functional relationship with dignity. Privacy ensures that a human being can lead a life of dignity by securing the inner recesses of the human personality from unwanted intrusion. Privacy recognises the autonomy of the individual and the right of every person to make essential choices which affect the course of life. In doing so privacy recognises that living a life of dignity is essential for a human being to fulfill the liberties and freedoms which are the cornerstone of the Constitution. To recognise the value of privacy as a constitutional entitlement and interest is not to fashion a new fundamental right by a process of amendment through judicial fiat. Neither are the Judges nor is the process of judicial review entrusted with the constitutional responsibility to amend the Constitution. But judicial review*

certainly has the task before it of determining the nature and extent of the freedoms available to each person under the fabric of those constitutional guarantees which are protected. Courts have traditionally discharged that function and in the context of Article 21 itself, as we have already noted, a panoply of protections governing different facets of a dignified existence has been held to fall within the protection of Article 21.

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297. What, then, does privacy postulate? Privacy postulates the reservation of a private space for the individual, described as the right to be let alone. The concept is founded on the autonomy of the individual. The ability of an individual to make choices lies at the core of the human personality. The notion of privacy enables the individual to assert and control the human element which is inseparable from the personality of the individual. The inviolable nature of the human personality is manifested in the ability to make decisions on matters intimate to human life. The autonomy of the individual is associated over matters which can be kept private. These are concerns over which there is a legitimate expectation of privacy. The body and the mind are inseparable elements of the human personality. The integrity of the body and the sanctity of the mind can exist on the foundation that each individual possesses an inalienable ability and right to preserve a private space in which the human personality can develop. Without the ability to make choices, the inviolability of the personality would be in doubt. Recognising a zone of privacy is but an acknowledgment that each individual must be entitled to chart and pursue the course of development of personality. Hence privacy is a postulate of human dignity itself. Thoughts and

behavioural patterns which are intimate to an individual are entitled to a zone of privacy where one is free of social expectations. In that zone of privacy, an individual is not judged by others. Privacy enables each individual to take crucial decisions which find expression in the human personality. It enables individuals to preserve their beliefs, thoughts, expressions, ideas, ideologies, preferences and choices against societal demands of homogeneity. Privacy is an intrinsic recognition of heterogeneity, of the right of the individual to be different and to stand against the tide of conformity in creating a zone of solitude. Privacy protects the individual from the searching glare of publicity in matters which are personal to his or her life. Privacy attaches to the person and not to the place where it is associated. Privacy constitutes the foundation of all liberty because it is in privacy that the individual can decide how liberty is best exercised. Individual dignity and privacy are inextricably linked in a pattern woven out of a thread of diversity into the fabric of a plural culture.

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322. Privacy is the constitutional core of human dignity. Privacy has both a normative and descriptive function. At a normative level privacy subserves those eternal values upon which the guarantees of life, liberty and freedom are founded. At a descriptive level, privacy postulates a bundle of entitlements and interests which lie at the foundation of ordered liberty.

323. Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connotes a right to be left alone. Privacy safeguards individual autonomy and recognises the ability of the individual to control vital aspects of his or her life. Personal

choices governing a way of life are intrinsic to privacy. Privacy protects heterogeneity and recognises the plurality and diversity of our culture. While the legitimate expectation of privacy may vary from the intimate zone to the private zone and from the private to the public arenas, it is important to underscore that privacy is not lost or surrendered merely because the individual is in a public place. Privacy attaches to the person since it is an essential facet of the dignity of the human being.

S.A. Bobde, J.:

407. Undoubtedly, privacy exists, as the foregoing demonstrates, as a verifiable fact in all civilised societies. But privacy does not stop at being merely a descriptive claim. It also embodies a normative one. The normative case for privacy is intuitively simple. Nature has clothed man, amongst other things, with dignity and liberty so that he may be free to do what he will consistent with the freedom of another and to develop his faculties to the fullest measure necessary to live in happiness and peace. The Constitution, through its Part III, enumerates many of these freedoms and their corresponding rights as fundamental rights. Privacy is an essential condition for the exercise of most of these freedoms. Ex facie, every right which is integral to the constitutional rights to dignity, life, personal liberty and freedom, as indeed the right to privacy is, must itself be regarded as a fundamental right.

408. Though he did not use the name of "privacy", it is clear that it is what J.S. Mill took to be indispensable to the existence of the general reservoir of liberty that democracies are expected to reserve to their citizens. In the introduction to his seminal On Liberty (1859), he characterised freedom in the following way:

“This, then, is the appropriate region of human liberty. It comprises, first, the inward domain of consciousness; demanding liberty of conscience, in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological. The liberty of expressing and publishing opinions may seem to fall under a different principle, since it belongs to that part of the conduct of an individual which concerns other people; but, being almost of as much importance as the liberty of thought itself, and resting in great part on the same reasons, is practically inseparable from it. Secondly, the principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow: without impediment from our fellow creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong. Thirdly, from this liberty of each individual, follows the liberty, within the same limits, of combination among individuals; freedom to unite, for any purpose not involving harm to others: the persons combining being supposed to be of full age, and not forced or deceived. No society in which these liberties are not, on the whole, respected, is free, whatever may be its form of Government; and none is completely free in which they do not exist absolute and unqualified. The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it. Each is the proper guardian of his own health, whether bodily, or mental and spiritual. Mankind are greater gainers by suffering each

other to live as seems good to themselves, than by compelling each to live as seems good to the rest. Though this doctrine is anything but new, and, to some persons, may have the air of a truism, there is no doctrine which stands more directly opposed to the general tendency of existing opinion and practice. Society has expended fully as much effort in the attempt (according to its lights) to compel people to conform to its notions of personal, as of social excellence." [John Stuart Mill, On Liberty and Other Essay s (Stefan Collini Edition, 1989) (1859)] (emphasis supplied)

…

Privacy is, therefore, necessary in both its mental and physical aspects as an enabler of guaranteed freedoms.

411. It is difficult to see how dignity—whose constitutional significance is acknowledged both by the Preamble and by this Court in its exposition of Article 21, among other rights — can be assured to the individual without privacy. Both dignity and privacy are intimately intertwined and are natural conditions for the birth and death of individuals, and for many significant events in life between these events. Necessarily, then, the right to privacy is an integral part of both "life" and "personal liberty" under Article 21, and is intended to enable the rights bearer to develop her potential to the fullest extent made possible only in consonance with the constitutional values expressed in the Preamble as well as across Part III.

…

Chelameswar, J.:

375. All liberal democracies believe that the State should not have unqualified authority to intrude into certain aspects of human life and that the authority should be limited by parameters constitutionally fixed. Fundamental rights are the only constitutional firewall to prevent State's interference with those core freedoms constituting liberty of a human being. The right to privacy is certainly one of the core freedoms which is to be defended. It is part of liberty within the meaning of that expression in Article 21.

376. I am in complete agreement with the conclusions recorded by my learned Brothers in this regard."

(iii) Privacy is intrinsic to freedom, liberty and dignity: The right to privacy is inherent to the liberties guaranteed by Part-III of the Constitution and privacy is an element of human dignity. The fundamental right to privacy derives from Part-III of the Constitution and recognition of this right does not require a constitutional amendment. Privacy is more than merely a derivative constitutional right. It is the necessary basis of rights guaranteed in the text of the Constitution. Discussion in this behalf is captured in the following passages:

Dr. D.Y. Chandrachud. J.:

127. The submission that recognising the right to privacy is an exercise which would require a constitutional amendment and cannot be a matter of judicial interpretation is not an acceptable doctrinal position. The argument assumes that the right to privacy is independent of the liberties guaranteed by Part III of the Constitution. There lies the error. The right to privacy is an element of human dignity. The sanctity of privacy lies in its functional relationship with dignity. Privacy ensures that a human being can lead a life of dignity by securing the inner recesses of the human personality from unwanted intrusion.

Privacy recognises the autonomy of the individual and the right of every person to make essential choices which affect the course of life. In doing so privacy recognises that living a life of dignity is essential for a human being to fulfill the liberties and freedoms which are the cornerstone of the Constitution. To recognise the value of privacy as a constitutional entitlement and interest is not to fashion a new fundamental right by a process of amendment through judicial fiat. Neither are the Judges nor is the process of judicial review entrusted with the constitutional responsibility to amend the Constitution. But judicial review certainly has the task before it of determining the nature and extent of the freedoms available to each person under the fabric of those constitutional guarantees which are protected. Courts have traditionally discharged that function and in the context of Article 21 itself, as we have already noted, a panoply of protections governing different facets of a dignified existence has been held to fall within the protection of Article 21.

S.A. Bobde, J.:

416. There is nothing unusual in the judicial enumeration of one right on the basis of another under the Constitution. In the case of Article 21's guarantee of "personal liberty", this practice is only natural if Salmond's formulation of liberty as "incipient rights" [P.J. Fitzgerald, Salmond on Jurisprudence at p. 228.] is correct. By the process of enumeration, constitutional courts merely give a name and specify the core of guarantees already present in the residue of constitutional liberty. Over time, the Supreme Court has been able to imply by its interpretative process that several fundamental rights including the right to privacy emerge out of expressly stated fundamental rights.

R.F. Nariman, J :

> *482. Shri Sundaram has argued that rights have to be traced directly to those expressly stated in the fundamental rights chapter of the Constitution for such rights to receive protection, and privacy is not one of them. It will be noticed that the dignity of the individual is a cardinal value, which is expressed in the Preamble to the Constitution. Such dignity is not expressly stated as a right in the fundamental rights chapter, but has been read into the right to life and personal liberty. The right to live with dignity is expressly read into Article 21 by the judgment in Jolly George Varghesev. Bank of Cochin [Jolly George Varghese v. Bank of Cochin, (1980) 2 SCC 360], at para 10. Similarly, the right against bar fetters and handcuffing being integral to an individual's dignity was read into Article 21 by the judgment in Sunil Batra v. Delhi Admn. [Sunil Batra v. Delhi Admn., (1978) 4 SCC 494: 1979 SCC (Cri) 155], at paras 192, 197-B, 234 and 241 and Prem Shankar Shukla v Delhi Admn. [Prem Shankar Shukla v. Delhi Admn., (1980) 3 SCC 526: 1980 SCC (Cri) 815], at paras 21 and 22. It is too late in the day to canvas that a fundamental right must be traceable to express language in Part III of the Constitution. As will be pointed out later in this judgment, a Constitution has to be read in such a way that words deliver up principles that are to be followed and if this is kept in mind, it is clear that the concept of privacy is contained not merely in personal liberty, but also in the dignity of the individual."*

(iv) Privacy has both positive and negative content: The negative content restrains the State from committing an intrusion upon the life and personal liberty of a citizen. Its positive content imposes an obligation on the State to take all necessary measures to protect the privacy of the individual.

Dr. D.Y. Chandrachud, J.:

> *326. Privacy has both positive and negative content. The negative content restrains the State from committing an intrusion upon the life and personal liberty of a citizen. Its positive content imposes an obligation on the State to take all necessary measures to protect the privacy of the individual."*

(v) Informational Privacy is a facet of right to privacy: The old adage that 'knowledge is power' has stark implications for the position of individual where data is ubiquitous, an all encompassing presence. Every transaction of an individual user leaves electronic tracks without her knowledge. Individually these information silos may seem inconsequential. In aggregation, information provides a picture of the beings. The challenges which big data poses to privacy emanate from both State and non-State entities. This proposition is described in the following manner:

Dr. D.Y. Chandrachud, J.:

> *300. Ours is an age of information. Information is knowledge. The old adage that "knowledge is power" has stark implications for the position of the individual where data is ubiquitous, an all-encompassing presence. Technology has made life fundamentally interconnected. The internet has become all-pervasive as individuals spend more and more time online each day of their lives. Individuals connect with others and use the internet as a means of communication. The internet is used to carry on business and to buy goods and services. Individuals browse the web in search of information, to send e-mails, use instant messaging services and to download movies. Online purchases have become an efficient substitute for the daily visit to the neighbouring store. Online banking has redefined relationships between bankers and customers. Online trading has created a new platform for the market in*

securities. Online music has refashioned the radio. Online books have opened up a new universe for the bibliophile. The old-fashioned travel agent has been rendered redundant by web portals which provide everything from restaurants to rest houses, airline tickets to art galleries, museum tickets to music shows. These are but a few of the reasons people access the internet each day of their lives. Yet every transaction of an individual user and every site that she visits, leaves electronic tracks generally without her knowledge. These electronic tracks contain powerful means of information which provide knowledge of the sort of person that the user is and her interests [See Francois Nawrot, Katarzyna Syska and Przemyslaw Switalski "Horizontal Application of Fundamental Rights — Right to Privacy on the Internet", 9th Annual European Constitutionalism Seminar (May 2010), University of Warsaw, available at <http://en.zpc.wpia.uw.edu.pl/wpcontent/uploads/2010/04/9_Horizontal_Application_of_Fundamental_Rights.pdf>.] . Individually, these information silos may seem inconsequential. In aggregation, they disclose the nature of the personality: food habits, language, health, hobbies, sexual preferences, friendships, ways of dress and political affiliation. In aggregation, information provides a picture of the being: of things which matter and those that do not, of things to be disclosed and those best hidden.

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304. Data mining processes together with knowledge discovery can be combined to create facts about individuals. Metadata and the internet of things have the ability to redefine human existence in ways which are yet fully to be perceived. This, as Christina Moniodis states in

her illuminating article, results in the creation of new knowledge about individuals; something which even she or he did not possess.

…

The contemporary age has been aptly regarded as "an era of ubiquitous dataveillance, or the systematic monitoring of citizen's communications or actions through the use of information technology" [Yvonne McDermott, "Conceptualizing the Right to Data Protection in an Era of Big Data", Big Data and Society (2017), at p. 1.]. It is also an age of "big data" or the collection of data sets. These data sets are capable of being searched; they have linkages with other data sets; and are marked by their exhaustive scope and the permanency of collection. [Id, at pp. 1 and 4.] The challenges which big data poses to privacy interests emanate from State and non-State entities. Users of wearable devices and social media networks may not conceive of themselves as having volunteered data but their activities of use and engagement result in the generation of vast amounts of data about individual lifestyles, choices and preferences. Yvonne McDermott speaks about the quantified self in eloquent terms:

> *"… The rise in the so-called 'quantified self', or the self-tracking of biological, environmental, physical, or behavioural information through tracking devices, Internet-of-things devices, social network data and other means (Swan.2013) may result in information being gathered not just about the individual user, but about people around them as well. Thus, a solely consent-based model does not entirely ensure the protection of one's data, especially when data collected for one purpose can be repurposed for another." [Id, at p. 4.]*

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328. Informational privacy is a facet of the right to privacy. The dangers to privacy in an age of information can originate not only from the State but from non-State actors as well. We commend to the Union Government the need to examine and put into place a robust regime for data protection. The creation of such a regime requires a careful and sensitive balance between individual interests and legitimate concerns of the State. The legitimate aims of the State would include for instance protecting national security, preventing and investigating crime, encouraging innovation and the spread of knowledge, and preventing the dissipation of social welfare benefits. These are matters of policy to be considered by the Union Government while designing a carefully structured regime for the protection of the data. Since the Union Government has informed the Court that it has constituted a Committee chaired by Hon'ble Shri Justice B.N. Srikrishna, former Judge of this Court, for that purpose, the matter shall be dealt with appropriately by the Union Government having due regard to what has been set out in this judgment.

S.K. Kaul, J.:

585. The growth and development of technology has created new instruments for the possible invasion of privacy by the State, including through surveillance, profiling and data collection and processing. Surveillance is not new, but technology has permitted surveillance in ways that are unimaginable. Edward Snowden shocked the world with his disclosures about global surveillance. States are utilising technology in the most imaginative ways particularly in view of increasing global terrorist attacks and heightened

public safety concerns. One such technique being adopted by the States is "profiling".

…

Such profiling can result in discrimination based on religion, ethnicity and caste. However, "profiling" can also be used to further public interest and for the benefit of national security.

586. The security environment, not only in our country, but throughout the world makes the safety of persons and the State a matter to be balanced against this right to privacy.

587. The capacity of non-State actors to invade the home and privacy has also been enhanced. Technological development has facilitated journalism that is more intrusive than ever before.

588. Further, in this digital age, individuals are constantly generating valuable data which can be used by non-State actors to track their moves, choices and preferences. Data is generated not just by active sharing of information, but also passively, with every click on the "world wide web". We are stated to be creating an equal amount of information every other day, as humanity created from the beginning of recorded history to the year 2003 — enabled by the "world wide web". [Michael L. Rustad, Sanna Kulevska, "Reconceptualizing the right to be forgotten to enable transatlantic data flow", (2015) 28 HarvJL & Tech 349.]

589. Recently, it was pointed out that "Uber", the world's largest taxi company, owns no vehicles. "Facebook", the world's most popular media owner, creates no content. "Alibaba", the most valuable retailer, has no inventory. And "Airbnb", the world's largest accommodation provider, owns

no real estate. Something interesting is happening." [Tom Goodwin "The Battle is for Customer Interface", <https://techcrunch.com/2015/03/03/in-the-age-ofdisintermediation-the-battle-is-all-for-the-customerinterface/>.] "Uber" knows our whereabouts and the places we frequent. "Facebook" at the least, knows who we are friends with. "Alibaba" knows our shopping habits. "Airbnb" knows where we are travelling to. Social network providers, search engines, e-mail service providers, messaging applications are all further examples of non-State actors that have extensive knowledge of our movements, financial transactions, conversations — both personal and professional, health, mental state, interest, travel locations, fares and shopping habits. As we move towards becoming a digital economy and increase our reliance on internet-based services, we are creating deeper and deeper digital footprints — passively and actively.

590. These digital footprints and extensive data can be analysed computationally to reveal patterns, trends, and associations, especially relating to human behaviour and interactions and hence, is valuable information. This is the age of "big data". The advancement in technology has created not just new forms of data, but also new methods of analysing the data and has led to the discovery of new uses for data. The algorithms are more effective and the computational power has magnified exponentially. A large number of people would like to keep such search history private, but it rarely remains private, and is collected, sold and analysed for purposes such as targeted advertising. Of course, "big data" can also be used to further public interest. There may be cases where collection and processing of big data is

legitimate and proportionate, despite being invasive of privacy otherwise.

591. Knowledge about a person gives a power over that person. The personal data collected is capable of effecting representations, influencing decision-making processes and shaping behaviour. It can be used as a tool to exercise control over us like the "big brother" State exercised. This can have a stultifying effect on the expression of dissent and difference of opinion, which no democracy can afford.

592. Thus, there is an unprecedented need for regulation regarding the extent to which such information can be stored, processed and used by non-State actors. There is also a need for protection of such information from the State. Our Government was successful in compelling Blackberry to give to it the ability to intercept data sent over Blackberry devices. While such interception may be desirable and permissible in order to ensure national security, it cannot be unregulated. [Kadhim Shubber, "Blackberry gives Indian Government ability to intercept messages" published by Wired on 11-7-2013<http://www.wired.co.uk/article/blackberry-india>.]

593. The concept of "invasion of privacy" is not the early conventional thought process of "poking one's nose in another person's affairs". It is not so simplistic. In today's world, privacy is a limit on the Government's power as well as the power of private sector entities. [Daniel Solove, "10 Reasons Why Privacy Matters" published on 20-1-2014 <https://www.teachprivacy.com/10-reasons-privacymatters/>.]

594. George Orwell created a fictional State in Nineteen Eighty-Four. Today, it can be a reality.

The technological development today can enable not only the State, but also big corporations and private entities to be the "big brother".

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629. The right of an individual to exercise control over his personal data and to be able to control his/her own life would also encompass his right to control his existence on the internet. Needless to say that this would not be an absolute right. The existence of such a right does not imply that a criminal can obliterate his past, but that there are variant degrees of mistakes, small and big, and it cannot be said that a person should be profiled to the nth extent for all and sundry to know.

630. A high school teacher was fired after posting on her Facebook page that she was "so not looking forward to another [school] year" since the school district's residents were "arrogant and snobby". A flight attendant was fired for posting suggestive photos of herself in the company's uniform. [Patricia Sanchez Abril, "Blurred Boundaries: Social Media Privacy and the Twenty-First-Century Employee", 49 Am Bus LJ 63 at p. 69 (2012).] In the predigital era, such incidents would have never occurred. People could then make mistakes and embarrass themselves, with the comfort that the information will be typically forgotten over time.

631. The impact of the digital age results in information on the internet being permanent. Humans forget, but the internet does not forget and does not let humans forget. Any endeavour to remove information from the internet does not result in its absolute obliteration. The footprints remain. It is thus, said that in the digital world preservation is the norm and forgetting a struggle [Ravi Antani, "THE RESISTANCE OF MEMORY:

COULD THE EUROPEAN UNION'S RIGHT TO BE FORGOTTEN EXIST IN THE UNITED STATES?", 30 Berkeley Tech LJ 1173 (2015).].

632. The technology results almost in a sort of a permanent storage in some way or the other making it difficult to begin life again giving up past mistakes. People are not static, they change and grow through their lives. They evolve. They make mistakes. But they are entitled to re-invent themselves and reform and correct their mistakes. It is privacy which nurtures this ability and removes the shackles of unadvisable things which may have been done in the past.

...

(vi) Right to privacy cannot be impinged without a just, fair and reasonable law: It has to fulfill the test of proportionality i.e. (i) existence of a law; (ii) must serve a legitimate State aim; and (iii) proportionality.

"Dr. D.Y. Chandrachud, J.:

310. While it intervenes to protect legitimate State interests, the State must nevertheless put into place a robust regime that ensures the fulfilment of a threefold requirement. These three requirements apply to all restraints on privacy (not just informational privacy). They emanate from the procedural and content-based mandate of Article 21. The first requirement that there must be a law in existence to justify an encroachment on privacy is an express requirement of Article 21. For, no person can be deprived of his life or personal liberty except in accordance with the procedure established by law. The existence of law is an essential requirement. Second, the requirement of a need, in terms of a legitimate State aim, ensures that the nature and content of the law which imposes the restriction falls within the zone of

reasonableness mandated by Article 14, which is a guarantee against arbitrary State action. The pursuit of a legitimate State aim ensures that the law does not suffer from manifest arbitrariness. Legitimacy, as a postulate, involves a value judgment. Judicial review does not reappreciate or second guess the value judgment of the legislature but is for deciding whether the aim which is sought to be pursued suffers from palpable or manifest arbitrariness. The third requirement ensures that the means which are adopted by the legislature are proportional to the object and needs sought to be fulfilled by the law. Proportionality is an essential facet of the guarantee against arbitrary State action because it ensures that the nature and quality of the encroachment on the right is not disproportionate to the purpose of the law. Hence, the threefold requirement for a valid law arises out of the mutual interdependence between the fundamental guarantees against arbitrariness on the one hand and the protection of life and personal liberty, on the other. The right to privacy, which is an intrinsic part of the right to life and liberty, and the freedoms embodied in Part III is subject to the same restraints which apply to those freedoms.

311. Apart from national security, the State may have justifiable reasons for the collection and storage of data. In a social welfare State, the Government embarks upon programmes which provide benefits to impoverished and marginalised sections of society. There is a vital State interest in ensuring that scarce public resources are not dissipated by the diversion of resources to persons who do not qualify as recipients. Allocation of resources for human development is coupled with a legitimate concern that the utilisation of resources should not be siphoned away for extraneous purposes. Data mining with

the object of ensuring that resources are properly deployed to legitimate beneficiaries is a valid ground for the State to insist on the collection of authentic data. But, the data which the State has collected has to be utilised for legitimate purposes of the State and ought not to be utilised unauthorisedly for extraneous purposes. This will ensure that the legitimate concerns of the State are duly safeguarded while, at the same time, protecting privacy concerns. Prevention and investigation of crime and protection of the revenue are among the legitimate aims of the State. Digital platforms are a vital tool of ensuring good governance in a social welfare State. Information technology—legitimately deployed is a powerful enabler in the spread of innovation and knowledge.

…

313. Privacy has been held to be an intrinsic element of the right to life and personal liberty under Article 21 and as a constitutional value which is embodied in the fundamental freedoms embedded in Part III of the Constitution. Like the right to life and liberty, privacy is not absolute. The limitations which operate on the right to life and personal liberty would operate on the right to privacy. Any curtailment or deprivation of that right would have to take place under a regime of law. The procedure established by law must be fair, just and reasonable. The law which provides for the curtailment of the right must also be subject to constitutional safeguards.

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325. Like other rights which form part of the fundamental freedoms protected by Part III, including the right to life and personal liberty under Article 21, privacy is not an absolute right. A law

which encroaches upon privacy will have to withstand the touchstone of permissible restrictions on fundamental rights. In the context of Article 21 an invasion of privacy must be justified on the basis of a law which stipulates a procedure which is fair, just and reasonable. The law must also be valid with reference to the encroachment on life and personal liberty under Article 21. An invasion of life or personal liberty must meet the threefold requirement of (i) legality, which postulates the existence of law; (ii) need, defined in terms of a legitimate State aim; and (iii) proportionality which ensures a rational nexus between the objects and the means adopted to achieve them.

S.A. Bobde, J.:

426. There is no doubt that privacy is integral to the several fundamental rights recognised by Part III of the Constitution and must be regarded as a fundamental right itself. The relationship between the right to privacy and the particular fundamental right (or rights) involved would depend on the action interdicted by a particular law. At a minimum, since privacy is always integrated with personal liberty, the constitutionality of the law which is alleged to have invaded into a rights bearer's privacy must be tested by the same standards by which a law which invades personal liberty under Article 21 is liable to be tested. Under Article 21, the standard test at present is the rationality review expressed in Maneka Gandhi case [Maneka Gandhi v. Union of India, (1978) 1 SCC 248]. This requires that any procedure by which the State interferes with an Article 21 right to be "fair, just and reasonable, not fanciful, oppressive or arbitrary" [Maneka Gandhi v. Union of India, (1978) 1 SCC 248 at p.323, para 48].

R.F. Nariman, J. :

526. But this is not to say that such a right is absolute. This right is subject to reasonable regulations made by the State to protect legitimate State interests or public interest. However, when it comes to restrictions on this right, the drill of various articles to which the right relates must be scrupulously followed. For example, if the restraint on privacy is over fundamental personal choices that an individual is to make, State action can be restrained under Article 21 read with Article 14 if it is arbitrary and unreasonable; and under Article 21 read with Article 19(1) (a) only if it relates to the subjects mentioned in Article 19(2) and the tests laid down by this Court for such legislation or subordinate legislation to pass muster under the said article. Each of the tests evolved by this Court, qua legislation or executive action, under Article 21 read with Article 14; or Article 21 read with Article 19(1)(a) in the aforesaid examples must be met in order that State action pass muster. In the ultimate analysis, the balancing act that is to be carried out between individual, societal and State interests must be left to the training and expertise of the judicial mind.

S.K. Kaul, J.:

638. The concerns expressed on behalf of the petitioners arising from the possibility of the State infringing the right to privacy can be met by the test suggested for limiting the discretion of the State:

"(i) The action must be sanctioned by law;

(ii) The proposed action must be necessary in a democratic society for a legitimate aim;

(iii) The extent of such interference must be proportionate

to the need for such interference;

(iv) There must be procedural guarantees against abuse of such interference."

Chelameswar, J.:

377. It goes without saying that no legal right can be absolute. Every right has limitations. This aspect of the matter is conceded at the Bar. Therefore, even a fundamental right to privacy has limitations. The limitations are to be identified on case-to-case basis depending upon the nature of the privacy interest claimed. There are different standards of review to test infractions of fundamental rights. While the concept of reasonableness overarches Part III, it operates differently across Articles (even if only slightly differently across some of them). Having emphatically interpreted the Constitution's liberty guarantee to contain a fundamental right to privacy, it is necessary for me to outline the manner in which such a right to privacy can be limited. I only do this to indicate the direction of the debate as the nature of limitation is not at issue here.

378. To begin with, the options canvassed for limiting the right to privacy include an Article 14 type reasonableness enquiry [A challenge under Article 14 can be made if there is an unreasonable classification and/or if the impugned measure is arbitrary. The classification is unreasonable if there is no intelligible differentia justifying the classification and if the classification has no rational nexus with the objective sought to be achieved. Arbitrariness, which was first explained at para 85 of E.P. Royappa v. State of T.N., (1974)

4 SCC 3: 1974 SCC (L&S) 165: AIR 1974 SC 555, is very simply the lack of any reasoning.]; limitation as per the express provisions of Article 19; a just, fair and reasonable basis (that is, substantive due process) for limitation per Article 21; and finally, a just, fair and reasonable standard per Article 21 plus the amorphous standard of "compelling State interest". The last of these four options is the highest standard of scrutiny [A tiered level of scrutiny was indicated in what came to be known as the most famous footnote in constitutional law, that is, fn4 in United States v. Carolene Products Co., 1938 SCC OnLine US SC 93: 82 L Ed 1234: 304 US 144 (1938). Depending on the graveness of the right at stake, the court adopts a correspondingly rigorous standard of scrutiny.] that a court can adopt. It is from this menu that a standard of review for limiting the right to privacy needs to be chosen.

379. At the very outset, if a privacy claim specifically flows only from one of the expressly enumerated provisions under Article 19, then the standard of review would be as expressly provided under Article 19. However, the possibility of a privacy claim being entirely traceable to rights other than Article 21 is bleak. Without discounting that possibility, it needs to be noted that Article 21 is the bedrock of the privacy guarantee. If the spirit of liberty permeates every claim of privacy, it is difficult, if not impossible, to imagine that any standard of limitation other than the one under Article 21 applies. It is for this reason that I will restrict the available options to the latter two from the above described four.

380. The just, fair and reasonable standard of review under Article 21 needs no elaboration. It has also most commonly been used in cases dealing with a privacy claim hitherto. [District

Registrar and Collector v. Canara Bank, (2005) 1 SCC 496: AIR 2005 SC 186], [State of Maharashtra v. Bharat Shanti Lal Shah, (2008) 13 SCC 5] Gobind [Gobind v. State of M.P., (1975) 2 SCC 148: 1975 SCC (Cri) 468] resorted to the compelling State interest standard in addition to the Article 21 reasonableness enquiry. From the United States, where the terminology of "compelling State interest" originated, a strict standard of scrutiny comprises two things—a "compelling State interest" and a requirement of "narrow tailoring" (narrow tailoring means that the law must be narrowly framed to achieve the objective). As a term, "compelling State interest" does not have definite contours in the US. Hence, it is critical that this standard be adopted with some clarity as to when and in what types of privacy claims it is to be used. Only in privacy claims which deserve the strictest scrutiny is the standard of compelling State interest to be used. As for others, the just, fair and reasonable standard under Article 21 will apply. When the compelling State interest standard is to be employed, must depend upon the context of concrete cases. However, this discussion sets the ground rules within which a limitation for the right to privacy is to be found."

82) In view of the aforesaid detailed discussion in all the opinions penned by six Hon'ble Judges, it stands established, without any pale of doubt, that privacy has now been treated as part of fundamental rights. The Court has held, in no uncertain terms, that privacy has always been a natural right which gives an individual freedom to exercise control over his or her personality. The judgment further affirms three aspects of the fundamental right to privacy, namely:

(i) intrusion with an individual's physical body;

(ii) informational privacy; and

(iii) privacy of choice.

83) As succinctly put by Nariman, J. first aspect involves the person himself/herself and guards a person's rights relatable to his/her physical body thereby controlling the uncalled invasion by the State. Insofar as the second aspect, namely, informational privacy is concerned, it does not deal with a person's body but deals with a person's mind. In this manner, it protects a person by giving her control over the dissemination of material that is personal to her and disallowing unauthorised use of such information by the State. Third aspect of privacy relates to individual's autonomy by protecting her fundamental personal choices. These aspects have functional connection and relationship with dignity. In this sense, privacy is a postulate of human dignity itself. Human dignity has a constitutional value and its significance is acknowledged by the Preamble. Further, by catena of judgments, human dignity is treated as a fundamental right and as a facet not only of Article 21 but that of right to equality (Article 14) and also part of bouquet of freedoms stipulated in Article 19. Therefore, privacy as a right is intrinsic of freedom, liberty and dignity. Viewed in this manner, one can trace positive and negative contents of privacy. The negative content restricts the State from committing an intrusion upon the life and personal liberty of a citizen. Its positive content imposes an obligation on the State to take all necessary measures to protect the privacy of the individual.

[175] What emerges from the various judgments is that privacy, as now understood, has at least three aspects: privacy of the person; informational privacy, and privacy of choice. These aspects of privacy arise not because they are conferred by the state but are possessed by all persons simply by being human.

[176] What I have said should not be seen as new or strange. The new Jamaican Charter is actually predicated on the inherent dignity of human beings. Section 13 (1) (a) is a preamble that provides that the 'state has an obligation to promote universal respect for, and observance of human rights and freedoms' and further that all Jamaicans are entitled to these rights 'by virtue of their **inherent dignity** as persons and as citizens of a free and democratic society' ((emphasis added) (section 13 (1) (b)). The rights and freedoms guaranteed are therefore designed to give effect to and

reinforce the inherent dignity of persons. Dignity, at its core, means worthy of respect and honour. Inherent means in something, in this case – persons, as a permanent, essential characteristic or attribute. Our legislature has said that all Jamaicans simply by being citizens of Jamaica have a permanent, essential attribute of honour and respect. Add to this their declared status as citizens of a free and democratic society.

[177] It is the duty of the courts to spell out, as the need arises, the full contours of the rights guaranteed. Where I differ from the majority of the Supreme Court of India and I do so with great regret is that I am of the view that the strict application of **Oakes** is the best way to preserve fundamental rights and freedoms. The majority appeared to have taken a more relaxed view. The strict **Oakes** test makes a more granular scrutiny possible by saying that the court must take account of any deleterious effect of the measure being relied on to meet the objective. Thus the greater the severity of the effect the more important the objective must be, furthermore the measure chosen needs to be shown to be the least harmful means of achieving the objective.

[178] This type of thinking is not new. As an example of this approach I will reference the European Court of Human Rights. Subject to one reservation, the dicta is acceptable. In the case of **S and another v United Kingdom** at paragraphs 101 – 102:

> *101. An interference will be considered "necessary in a democratic society" for a legitimate aim if it answers a "pressing social need" and, in particular, if it is proportionate to the legitimate aim pursued and if the reasons adduced by the national authorities to justify it are "relevant and sufficient". While it is for the national authorities to make the initial assessment in all these respects, the final evaluation of whether the interference is necessary remains subject to review by the Court for conformity with the requirements of the Convention (see Coster v UK [2001] ECHR 24876/94 at para 104, 18 January 2001, with further references).*
>
> *102. A margin of appreciation must be left to the competent national authorities in this assessment. The breadth of this margin varies and depends on a number of factors including the nature of the Convention right in issue, its importance for the individual, the nature of the interference and the object pursued by the*

> *interference. The margin will tend to be narrower where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights (see Connors v UK [2004] ECHR 66746/01 at para 82, 27 May 2004, with further references). Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted (see Evans v UK [2007] ECHR 6339/05 at para 77). Where, however, there is no consensus within the Member States of the Council of Europe, either as to the relative importance of the interest at stake or as to how best to protect it, the margin will be wider (see Dickson v UK [2007] ECHR 44362/04 at para 78).*

[179] I now state the reservation. Paragraph 101 does not reflect the strict **Oakes** test and neither does it have the granular analysis necessary that was established by **Oakes**. In particular, it does not ask whether the injury to the right is so disproportionate to the benefit that the law is unconstitutional.

Proportionality, the Mauritian Constitution, the Mauritian Supreme Court and the Judicial Committee of the Privy Council

[180] The learned Attorney General cited the case of **Mahdewoo v The State of Mauritius** 2015 SCJ 177 (delivered May 29, 2915) (affirmed by Judicial Committee of the Privy Council) [2016] 4 WLR 167; [2016] UKPC 30) in support of her submission on the approach that should be taken to compulsory registration systems of identification. I propose to show that the case does not provide as strong a support as the learned Attorney General suggested having regard to the phraseology of the Jamaican Charter.

[181] The **Madhewoo** case is the only case cited by the learned Attorney General in support of the criminalisation of citizens who did not register under a system similar to the one under consideration in this case. That decision of the Supreme Court of Mauritius was affirmed by the Judicial Committee of the Privy Council. The facts are that Mr Madhewoo was challenging a law that required citizens to provide finger prints and photographs to the state in order to receive a biometric identity card. The scheme had two tracks: one was for persons replacing a previously issued biometric identity card (‘BIC’) and the other for persons who were applying for the first time. It was also the

case that the Mauritian Constitution ('MC') at the time of the litigation did not have an explicit right to privacy.

[182] Mr Madhewoo argued that the compulsory provision of biometric data violated his (a) his right to life (section 4 of the MC); [30] (b) right not to be deprived of liberty (section 5 of the MC); [31] right to humane treatment (section 7 of the MC); [32] right to freedom of assembly and association (section 13 of the MC); [33] right to freedom of movement (section 15 of the MC); [34] right to non-discrimination (section 16 of the MC). [35] Finally, Mr Madhewoo argued that the combined effect of sections 3 [36] and 9 [37] of the MC was

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[30] Section 4 (1) of the MC reads: No person shall be deprived of his life intentionally save in the execution of the sentence of a Court in respect of a criminal offence of which he has been convicted.

[31] Section 5 (1) of the MC reads: No person shall be deprived of his personal liberty save as may be authorised by law. The number of authorised instance were enumerated in sub-paragraphs.

[32] Section 7 (1) of the MC reads: No person shall be subject to torture or to inhuman or degrading punishment or such other treatment.

[33] Section 13 (1) of the MC reads: Except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and, in particular, to form or belong to trade unions or other associations for the protection of his interests.

[34] Section 15 (1) of the MC reads: No person shall be deprived of his freedom of movement, and for the purposes of this section that freedom means the right to move freely throughout Mauritius, the right to reside in any part of Mauritius, the right to enter Mauritius, the right to leave Mauritius and the immunity from expulsion from Mauritius.

[35] Section 16 (1) of the MC reads: (1) Subject to subsection (4), (5) and (7), no law shall make any provision that is discriminatory either of itself or in its effect.

[36] Section 3 of the MC reads: It is hereby recognised and declared that in Mauritius there have existed and shall continue to exist without discrimination by reason of race, place of origin, political opinions,

to create a right to privacy which was violated by the compulsory taking of finger prints and other biometric data.

[183] In respect of the right to life, Mr Madhewoo argued that the proposed scheme violated his right to life. This argument was similar to the Aadhaar case from India where the Supreme Court of India held that article 21 of the Indian Constitution established a right to privacy.[38] The Mauritian Supreme Court found that Mr Madhewoo could not rely on interpretation of article 21 because the wording of the Mauritius Constitution was different from that of India's. The Mauritian Supreme Court specifically held that the right to life was not violated.

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colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, each and all of the following human rights and fundamental freedoms -
(a) the right of the individual to life, liberty, security of the person and the protection of the law;
(b) freedom of conscience, of expression, of assembly and association and freedom to establish schools; and
(c) the right of the individual to protection for the privacy of his home and other property and from deprivation of property without compensation, and the provisions of this chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

[37] Section 9 (1) of the MC reads: Except with his own consent, no person shall be subjected to the search of his own person or his property or the entry by others on his premises.

[38] Section 21 of the Indian Constitution reads: "No person shall be deprived of his life or personal liberty except according to procedure established by law." Madhewoo was relying on decisions from courts lower than the Indian Supreme Court to support his point. Madhewoo was decided by the Mauritian Supreme Court in May 2015, two years before the first Puttaswamy judgment (August 2017) from the Indian Supreme Court.

[184] Regarding the right to liberty, it was argued that there was a serious risk that he would be compelled to show the BIC on request from any person; that there was no indication in the law as to who was authorised to ask for the BIC. The Mauritian Supreme Court held that the right of liberty was not violated because the protection given under section 5 of the MC was physical liberty and a request to produce the BIC did not amount to physical deprivation of liberty. It further held that the only obligation created by the law was to produce the BIC.

[185] On the question of inhuman treatment, the Mauritian Supreme Court held, relying on a previous decision, that inhuman in section 7 of the MC means 'brutal, unfeeling, barbarous.' The taking and storage of finger prints, it was held, did not amount to torture, or to inhuman, or degrading punishment under section 7.

[186] Under the right to freedom of assembly and association, it was held that there was no evidence showing in what way section 13 was violated. The Mauritian Supreme Court held that the submissions made in that regard did not have any evidential foundation.

[187] In dealing with the right to freedom of movement, the Mauritian Supreme Court held that no cogent submissions were made regarding this particular violation. Mr Madhewoo had submitted that persons over 60 years old would have to show the new BIC in order to travel on the bus and that he (Madhewoo) would soon be 60. The court agreed with the government that there was no constitutional right to travel by bus and the evidence put forward by the state showed that only the photograph on the card and a logo would be relevant for bus travel.

[188] The Mauritian Supreme Court dealt very tersely with the right to non-discrimination by pointing out that Mr Madhewoo had not made out a case for any breach of the section.

[189] Mr Madhewoo's woes continued. He sought to argue that the law was inconsistent with section 45 of the MC which spoke to the power of Parliament to make laws for 'peace, order and good government of Mauritius.' No specific violation was

identified and so the court declined to intervene having noted that Parliament can pass laws for peace, order and good government.

[190] Turning now to the privacy argument, the Mauritian Supreme Court took the view that section 3 did not extend to physical privacy and consequently the section did not contain words sufficient to confer a right to privacy of the person 'which may encompass any protection against the taking of fingerprints from a person.' The court further held that section 3 'thus appears to afford protection only for the privacy of a person's home and property.' It also held that the language of section 3 (c) 'of the Constitution in the light of its natural and ordinary meaning, [did] not create or confer any right of privacy to the person and would not, in the present matter, afford constitutional protection against the taking of fingerprints

[191] The Mauritian Supreme Court emphasised that as 'opposed to those countries where the right to privacy or the respect for one's private life is constitutionally entrenched, **in Mauritius the right to privacy is not provided for in the Constitution, but in article 22 of the Civil Code**. **It is also secured through the Data Protection Act. This means that the right may be limited, modified or varied by a subsequent statute**' (emphasis added).

[192] The Mauritian Supreme Court compared and contrasted the MC with article 8 of the European Convention on Human Rights. Article 8 expressly states that everyone 'has the right to respect for his private and family life, his home and his correspondence.' The court then referred to **S and Marper v United Kingdom** which held that 'the concept of 'private life' is a broad term not susceptible to exhaustive definition' yet 'it covers physical and psychological integrity of a person and 'can therefore embrace multiple aspects of the person's physical and social identity.' The burden of the Supreme Court was to show that the decisions of the European Court of Human Rights 'are based on the protection of a right to respect for private life, which protection is not afforded by the wording of sections 3 and 9 of our Constitution.'

[193] The court concluded that section 3 of the MC did not protect against the taking of finger prints. This conclusion left only section 9 of the MC as the last viable hook on which to hang the right to privacy. The court was able to hold that the compulsory taking of fingerprint constituted a violation of section 9 (1).

[194] Having found a violation under section 9 (1), the court then looked to see whether the derogation from the right was permitted by the MC. The court held that the burden was on Mr Madhewoo to prove the negative, namely, that the law was not reasonably justifiable in a democratic society. This followed the conclusion that under section 9 (2) the legislature could derogate from the right under section 9 (1) if it was in the interest of public order. In the end, Mr Madhewoo failed because the court found that the pressing social need was the establishment of a sound and secure identity protection system. The court also found that the degree of interference was limited and proportionate to the legitimate aim pursued.

[195] Mr Madhewoo was not finished yet. He also attacked the storage and retention of the biometric data including his finger prints. The Mauritian Supreme Court found that although the storage and retention were done under a law providing for such activity, and although the public order justification applied, there were 'highly disturbing questions which arise concerning the system and legal framework.' In particular, it was 'highly questionable whether the relevant laws and existing legal framework provide sufficient guarantees and safeguards for the storage and retention of personal biometric data and whether in the present circumstances they would constitute an interference proportionate to the legitimate aim pursued.' The court examined the identity card legislation as well as the Data Protection Act and found that 'it was manifestly clear that the personal data of individuals such as the plaintiff can be readily accessed in a large number of situations' and what was more alarming was 'the low threshold prescribed for obtaining access to personal data.' After this review the court held that the 'potential for misuse or abuse of the exercise of the powers granted under the law would be significantly disproportionate to the legitimate aim which the defendants have claimed in order to justify the retention and storage of personal data under the Data Protection Act.'

[196] It must be noted that the court grounded its decision on the 'potential for misuse or abuse' and not the actual misuse and abuse. Put another way, it was not premature for Mr Madhewoo to bring the challenge and he need not wait until there was actual misuse and abuse. Mr Madhewoo was able to show on a textual analysis that the provisions for storage and access were weak.

[197] It is to be observed that neither the judgment of the Mauritian Supreme Court nor the Board addressed the standard of proof. The MC, in the view of the Mauritian Supreme Court, and necessarily the Privy Council, placed the burden of proof on Mr Madhewoo but was silent on the standard. There was no textual analysis of the words, as was done by Dickson CJ in **Oakes**, nor was a determination made whether the language was more in keeping with either the civil or criminal standard.

[198] This stands in sharp contrast to **Oakes** where Dickson CJ analysed the words and concluded that concepts such as 'justifiable', 'reasonableness' and 'free and democratic society' are not compatible with the criminal standard and therefore the criminal standard would be too onerous on the party seeking to limit the right. **Oakes** insisted that even in the context of the civil standard there was a recognition that the degree of cogency of evidence varied according to importance of the objective being sought and the severity of the deleterious effect of the trespass on the right.

[199] The other observation I must make about the decisions of the Mauritian Supreme Court and the Board is that it there is no evidence that the court was presented with any evidence indicating whether the Parliament had considered other methods of enforcement. The specific issue of whether a method of enforcement existed which impaired the right to privacy as little as possible was not enquired into. In effect, if I may say so respectfully, both the Supreme Court of Mauritius and the Board seemed to have proceeded on the presumption that the legislature must have had good reason to choose the criminalisation route rather than enquire whether other options were considered by the legislature before it settled on the criminalisation of its population to enforce compliance. Both courts seemed to have been satisfied that compulsory enrolment was permitted by the Mauritian Constitution. But then this is not surprising

because both courts held that the burden of proving that the law was not reasonably justifiable was on Mr Madhewoo and that it was not for the state to show that it was reasonably justifiable in a democratic society. The other point to note is that the Jamaican Charter speaks of 'free and democratic' whereas the MC spoke only to democratic.

[200] The Canadian Supreme Court, in **Oakes**, rightly spoke to the grave social and personal consequences for a person facing a criminal charge. No such analysis appears in the **Madhewoo** case either in the Mauritian Supreme Court or before the Board. This is what Dickson CJ had to say:

> *An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic harms.*

[201] This was spoken in the context of a challenge to the constitutionality of a criminal provision. However, there can be no doubt that a person charged with a criminal offence does in fact face 'grave social and personal consequences including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic harms.' It is this form of coercion that Parliament has decided to employ in this case.

[202] From all that has been said I am now able to summarise the proper approach to constitutional adjudication under the new Charter.

The proper approach to adjudication on the constitutionality of legislation in the Jamaican Charter of Fundamental Rights and Freedoms

[203] The proper approach is a follows:

(a) Section 13 (2) of the Jamaican Charter of Fundamental Rights and Freedoms guarantees the fundamental rights and freedom set out in the Charter subject to the specific limitations as well as a general limitation. Where the statute in question does not fall within the specified limitations, the sole test is the general

limitation of whether the law is demonstrably justified in a free and democratic society.

(b) In order for section 13 (2) to be invoked by way of a claim under section 19 of the Constitution of Jamaica, the claimant must show that his or her right has been violated, is being violated, or is likely to be violated. The burden of proof is on a balance of probabilities but at the lower end since this would enable any claimant to have the full and best possible protection guaranteed by the fundamental rights and freedoms. If the claimant fails to do this then no claim for redress can possibly arise under the Charter for the reason that no Charter violation has occurred, is occurring, or is likely to occur.

(c) The court must determine the scope of the right or freedom in order to have an appreciation of the right or aspects of the right or freedom that are protected by the Charter.

(d) The starting point for the court is always that the fundamental rights and freedoms are not to be restricted and are to be given their fullest meaning having regard to the words used.

(e) The test of 'demonstrably justified in a free and democratic society' cannot be stated with greater precision because the concept of a free and democratic society is itself based on values that are incapable of precise definition. The concept of a free and democratic society includes '*respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society* '

(f) The absence of the word 'reasonable' from section 13 (2) of the Jamaican Charter does not mean that reasonableness is unimportant.

(g) The rights and freedoms guaranteed are not absolute. This is self-evident because the Charter has specified limitations and one general limitation.

(h) Since the rights and freedoms guaranteed by the Charter are at the core of the Jamaican society's foundation as a free and democratic society it necessarily means that a high standard of justification must be established before rights and freedoms are abrogated, modified, or trespassed on once the claimant shows, prima facie, that there has been a violation of his or her rights or freedoms.

(i) Once the claimant establishes that a right or freedom has been violated the burden of proof shifts to the violator and unless the violator can bring the law within the specific or general limitation then the claimant will succeed. The standard of proof on the claimant is a balance of probabilities but at the lower end. This can be established by (i) producing evidence; (ii) a textual analysis of the statute, or (iii) analysis of the proposed law in order to show the likely effect it may have. This way of phrasing the matter is to take account of the wording of section 19 (1) of the Charter. Let us be reminded that section 19 (1) states that '[i]f any person alleges any of the provisions of this Charter **has been, is being or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress**' (emphasis added). This means that the claimant does not have to wait for the violation to occur. If he or she can show that a violation is likely then the Constitution of Jamaica authorises the claimant to seek redress.

(j) The standard of proof on the violator is on a balance of probabilities but at the higher end, closer to the fraud end of the spectrum of proof. The justification for this approach is that what is being dealt with are fundamental rights and freedoms which are to be enjoyed to their fullest extent subject only to necessary limitations. These rights and freedoms must never be lightly curtailed, or infringed, or abrogated. This way of looking at the matter guards against the tyranny of the majority.

(k) In some cases, it will be self-evident that the violation is necessary but even in that context that does not necessarily lead to the conclusion that the means used are constitutional.

(l) The **Oakes** test has four components. First, the challenged law must be for a proper purpose, that is to say, that the purpose or objective must be sufficiently important to warrant violation of the right of freedom (the proper purpose component). Second, the measures or the means chosen to secure the purpose or objective must be carefully designed (the careful design component). By careful design it is meant that the means must be rationally connected to the objective sought to be met. The term rationally connected does not invoke any notion of Wednesbury (un)reasonableness. Rational here means that it has to be shown that the measures or means are capable of realising the purpose or objective of the law. Third, the right or freedom is to be impaired as little as possible (minimum impairment component). Fourth, there is a proportionate relationship between the important objective and the effects of the measures, legislative or action (the proportionate effect component). This means that even if a law or action meets the first three components the statute may be declared unconstitutional if the deleterious effects of the law are so severe that the law cannot be justified.

(m) I respectfully agree with and adopt this summary of the other three components of the test by Mr Johnston*:*

> *The second tier of the Oakes test looks at proportionality. This tier is trifurcated. It begins by examining if the law is well-suited to accomplish its purpose. It must be rationally connected to the ends it seeks, and not be "unfair, arbitrary or based on irrational considerations." Next, the law must infringe the Charter right as little as is necessary to accomplish its end. Finally, the benefit gained by the impugned law must be weighed against the cost of infringing a constitutional right. In short, a law must pursue an objective of sufficient importance to warrant overriding a constitutionally entrenched right, and the measures it employs must be precise and aim to improve our free and democratic society in a way that the unfettered Charter right could not.*

> *An important component of the Oakes test, which often seems neglected, is the onus the Supreme Court placed on the evidence which would be required for the justificatory process. The Court appreciated the nature of the rights that would be at stake in any Charter case, thus their demand for the infringing limit to cross a high threshold. This threshold was set high because the guarantee of the entrenched rights was to be the norm, and their limitation the exception. The standard of proof that these "exceptions" would have to meet was the civil standard of proof "applied rigorously." To meet this burden, evidence would be required for each element of the test, and the quality of that evidence was to be "cogent and persuasive." The evidence would also need to clearly illustrate the effects of allowing the limit, and what other options the government actor had when they decided on their final course of action. Dickson CJC added a caveat to the test when he declared that there may be some cases, where an element of the test may be met without evidence because the matters are so straightforward.* [39]

(n) The nature and extent of the problem sought to be solved by legislation or governmental action ought to be placed before the court by admissible evidence once the claimant makes a prima facie case that a right and/or freedom has been violated. The executive's or legislature's assertion that they are solving something so important that fundamental rights and freedoms can be trespassed upon is no longer sufficient. This is the ultimate logic of constitutional supremacy and not Parliamentary supremacy. A naked assertion by the legislator and/or executive without evidence is not likely to be sufficient in many cases. The very existence of guaranteed entrenched fundamental rights and freedoms, thereby giving them special protection, is a clear recognition of the fact that legislature, executive, judiciary, and individuals have been known to abuse their power. To prevent this, the rights and freedoms that are entrenched are to be given pride of place at all times in all circumstances unless stringent conditions for overriding them are met.

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[39] Johnston (n 26) pp 89 – 90.

The twentieth century has seen some of the most horrific abuses of human beings in all of history. While Jamaica may not have experienced genocide, as was attempted by the Nazis or as occurred in Rwanda, the Jamaican Parliament sought to forestall such eventualities by putting in place entrenched and guaranteed rights and freedoms. This is even more important in the context of this present Charter because it is one that was crafted after possibly the longest and widest consultative process in our post-independence history. Whereas the previous Bill of Rights was open to the attack that it was drafted by Jamaica's political and intellectual elite in consultation with the colonial masters of the time, the 2011 Charter suffers no such birth defect. To use Professor Munroe's words, this present charter is autochthonous which means that the present Charter is indigenous, home grown, originating with us rather imposed from outside. [40] The present Charter is Jamaica's statement to itself and the world that it intends to uphold certain rights and freedoms and will trespass on them only where necessary. If it occurs the trespass must be justified; if justified then the trespass must be the least harmful having regard to the purpose or objective of the law; if justified then the benefit must be greater than the harm.

(o) It follows that the more serious the effects of the law the more closely it must be examined. Prudence suggests that evidence would be necessary to show what choices were placed before the legislature in order to justify the violation. The evidence would assist in assessing whether the means chosen impaired the right or freedom the least. This comes about because the very Charter declares that Parliament shall pass no law that violates the rights and freedoms unless sections 13 (9), (12), 18 and 49 apply and in addition 'save only as may be demonstrably justified in a free and democratic society.' Thus except in the most self-evident

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[40] Munroe, Trevor, *Politics of Constitutional Decolonisation*, 1944 – 1962 (1972) (UWI) (ISER).

cases, it is not easy to see how this demonstration can be made without some kind of evidence.

(p) From what has been said there is no room for the doctrine of deference as developed by the Canadian Supreme Court or for the margin of appreciation spoken of by the European Court of Human Rights, a latter doctrine that depends, it appears, not on legal principles but rather on a consensus expressed by the member states of the European Union. The text of section 13 (2) of the Jamaican Charter does not admit of such a possibility. The doctrines of deference and margin of appreciation indicate a decision deliberately taken by the judicial branch not to apply full constitutional rigour when some types of laws are passed. Respectfully, this approach does not enhance democracy but actually poses a threat to freedom and democracy because the judicial branch is deciding not to exercise its constitutional duty to examine laws and action for constitutionality when asked to do so. This could not be what citizens expect of the judiciary in a free and democratic society.

(q) The benefit to the society is clear when the judicial arm carries out its function. What has been said does not obstruct the executive and legislature in their work. As observed by Mr Davidov

> ***When a legislature or government is simply indifferent to the infringement of rights, there is no justification for deference. Those who hold the power to make decisions for the rest of us must take the infringements of people's fundamental rights into account.*** *Fortunately, thanks to the clear message sent out in Oakes and efforts of the courts in applying this standard, such cases are less and less frequent in recent years. Today state authorities tend to be much more careful, putting some time and*

effort into minimizing the infringement of rights as part of the legislative process.[41] (emphasis added)

(r) Since the three arms - the executive, legislative and judicial - are co-equal and engaged in the governance endeavour there is a dialogue that takes place when each arm acts within its sphere. The executive often times has to offer alternatives in order to get a Bill through the legislature. The legislature has reversed judicial decisions and the judiciary has declared Acts of Parliament and governmental actions unconstitutional. That is the way a democracy works. When the judiciary points out the unconstitutionality then the expectation is that the legislature will act in accordance with the judicial determination. In an important article the authors, Mr Peter Hogg and Ms Allison Bushnell, pointed out that, in Canada, in the aftermath of Charter litigation, legislation follows that takes account of the decision of the Canadian Supreme Court. [42] As the authors indicated, the '**effect of the Charter is rarely to block legislative objective, but rather to influence the design of implementing legislation**' (emphasis added). If I may say so, this is the point being made by this challenge since Mr Robinson has not opposed or questioned whether or not there should be a system of identification. His challenge is to the design of the law rather than the core objective of the law which is to provide a reliable source of identification of Jamaicans and those persons ordinarily resident in Jamaica.

(s) In order to determine whether a right or freedom is violated the court must seek to establish the interest that the right or freedom was meant to protect. This comes from the words used to describe the particular right or freedom and those words looked at in the context of the entire Charter. The words are to be given

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[41] Davidov (n 25) p 162.

[42] Hogg, Peter W and Bushnell, Allison A, *The Charter Dialogue between Courts and Legislature (Or Perhaps the Charter Isn't Such a Bad Thing after All)*, Osgoode Hall Law Journal 35.1 (1997): 75 – 124.

wide and generous interpretation, once the words can carry the meaning proposed and the context of the words makes it possible for the proposed meaning to be given to the words used.

(t) If the claimant discharges the burden of proof that a right or freedom has been, is being, or is likely to be violated then the burden, legal and evidential, shifts to the violator to establish that the statute can be saved by specific limitations found in sections 13 (9), (12), 18 or 49, or the general limitation, namely, the law is demonstrably justified in a free and democratic society. In the event that the court is left in a state of uncertainty of whether the violator has satisfied his burden then the claimant must succeed. In the event that the court is of the view that there is a tie then the claimant must prevail for the reason that in constitutional litigation the attitude of the court must be that the right or freedom prevails unless the violation is clearly justified. This approach ensures that the guarantee given by the Charter is maintained.

(u) Finally, there is a duty of candour on the violator, especially if the violator is the state, to place all relevant information before the court. Charter rights and freedoms are too important to be left to the usual position in civil litigation that the claimant is to adduce all relevant facts. Legislation is informed by information that is not in the possession of the citizen. The citizen may not have the means or the sophistication to know what he or she should be asking for in disclosure applications. The claimant should do the best he or she can in the circumstances but the state should not seek to take advantage of the citizen's lack of means or lack of precision in formulating a disclosure request in order not to present the complete picture before the court by withholding factual information.

Cases from the United States of America

[204] The learned Attorney General cited three cases from the United States of America. Very respectfully, I do not think that those cases were particularly helpful. They will now be examined in order to show why they were not apposite to this case. The first was **Whalen, Commissioner of Health of New York v Roe** 429 US 589. The facts are that a law was passed to correct defects in an existing law regarding the prescribing and use of drugs regarded as potentially harmful. The statute required that when certain drugs were being prescribed the following persons needed to be identified: the doctor, the dispensing pharmacy, drug and dosage, the patient's name, address and age. The information was retained for a period of five years and then destroyed. Public disclosure of the patient's identity was prohibited and access to the information was restricted to a limited number of health department and investigatory personnel. The District Court held that the statutory provisions violated the right to privacy. The United State Supreme Court reversed that conclusion. On the face of it, this is very different from NIRA which is mandatory, permanent, and carries criminal sanction for those who don't wish to register.

[205] Steven J delivered the unanimous judgment of the court. His Honour found that there were detailed provisions protecting the data and those provisions were backed by severe criminal sanctions for those who violated the provisions. The evidence showed that 17 health department officials had access to the files and in addition there were 24 investigators with authority to investigate a case of over dispensing 'which might be identified by the computer.'

[206] Steven J held that state legislation 'which has some effect on individual liberty or privacy may not be held unconstitutional simply because a court finds it unnecessary, in whole or in part.' His Honour added that 'we have frequently recognised that individual states have broad latitude in experimenting with possible solutions to problems of vital local concern.' In other words, the United States Supreme Court would defer to the judgment of the state in certain instances.

[207] It was also noted that the state had a vital interest in controlling the distribution of dangerous drugs and so could take measures to control distribution.

[208] It is to be noted that in **Whalen**, there was no collection of biometric data – no finger print, no blood type, no DNA. Not even a photograph. More important though, was the fact that the patient had a choice whether to accept the medication. It was not a compulsory scheme that he or she had to be a part of. His or her right to choose treatment with consequential registration in a database whenever the particular drug was prescribed was not impaired. Also there was nothing in the case to show that the patient was criminalised if he or she failed to take the prescription. Finally, the information was destroyed after five years which means that there was no permanent keeping of the patient's health record. That case is clearly different from the present one.

[209] In addition to all that has been said above, the part of the decision that was cited to the court is preceded by these words: *A final word about issues we have not decided.* Steven J, in effect, was saying, the matters about which comment is to be made were not decided. To put it more bluntly, they were nothing more than the personal views of the judge and had absolutely nothing to do with the facts and issues before the court.

[210] The next case cited was that of **National Aeronautics And Space Administration v Nelson** 562 US 134 (2011). The facts were that Mr Nelson and others were contract employees at the National Aeronautics and Space Administration laboratory operated by the California Institute of Technology ('Cal Tech'). At the time of initial employment certain information was not required but that changed and they were required to indicate whether they had ever 'used, possessed, supplied, or manufactured illegal drugs' within a stated time period. They also had to authorise the Government to obtain personal information from schools, employers, and other persons. In addition, the references provided by the employees could be asked questions relating to the probity of the employee. The employees challenged the new requirements on the ground that the background checks infringed their constitutional right to informational privacy.

[211] The United States Supreme Court made a very important distinction that in no way arises in the present case before this court. The distinction was between the government exercising power in its capacity as employer and exercising 'sovereign

power.' In the former the court held that the government has much greater freedom to act. It was distinctly stated in **Nelson** that "[t]ime and again our cases have recognised that the Government has much freer hand in dealing 'with citizen employees than it does when it brings sovereign power to bear on citizens at large'." This distinction, it was further stated, "is grounded on the 'common-sense realisation' that if every 'employment decision became a constitutional matter,' the Government could not function." In this case, NIRA is being passed in exercise of sovereign power whereas in the **Nelson** case the government was acting as employer. Thus, it was concluded that an 'assessment of the constitutionality of the challenged portions [of the forms] must account for this distinction.' Alito J delivered the judgment of the court. Scalia and Thomas JJ filed concurrent opinions. Also the judgment makes it plain that most of the information required was biographical and not biometric. The latter two justices stated that the jurisprudence of the United States did not support the notion of informational privacy as a constitutional right. This case is of no assistance to the court.

[212] The third case is **Nixon v Administrative General Services** 433 US 425. In that case the legislature had passed a law authorising an official of the executive branch to take possession of President Nixon's papers and tape recordings. The law made specific provision for the official to promulgate regulations for the statute. He did. There were regulations for the orderly 'processing and screening' of the material so that those of a personal and private nature were returned to the President. That law was challenged on various grounds including violation of the president's privacy rights. The court held that the regulations as crafted were the least intrusive method having regard to the president's privacy interests.

[213] When considering cases from the United States Supreme Court they have to be read in this context: that court has not accepted the least intrusive means as part of the test for proportionality (**Vernonia School District v Wayne Acton** 515 US 646, 663

(Scalia J speaking for majority)).[43] In that case, Scalia J referred to footnote 9 in **Skinner v Railway Labor Executives' Assn** 489 US 602. In **Skinner** the judgment of the court was delivered by Kennedy J and in that case the court responded to the submission on least intrusive means by collecting the decisions of the court on this issue, all of which have rebuffed that idea.[44] This means that although the United States Supreme Court accepted that proportionality was the measure of constitutionality, the court has not accepted that judges should evaluate legislation or government action by using the least intrusive means analysis. This means that that court will permit cases where there is in fact a less intrusive means than the one chosen provided that it is reasonable. This is not a permissible outcome under the **Oakes** test.

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[43] 'Respondents argue that a "less intrusive means to the same end" was available, namely, "drug testing on suspicion of drug use." Brief for Respondents 45-46. We have repeatedly refused to declare that only the "least intrusive" search practicable can be reasonable under the Fourth Amendment.'

[44] Footnote 9 reads: [9] Respondents offer a list of "less drastic and equally effective means" of addressing the Government's concerns, including reliance on the private proscriptions already in force, and training supervisory personnel "to effectively detect employees who are impaired by drug or alcohol use without resort to such intrusive procedures as blood and urine tests." Brief for Respondents 40-43. We have repeatedly stated, however, that "[t]he reasonableness of any particular government activity does not necessarily or invariably turn on the existence of alternative `less intrusive' means." *Illinois* v. *Lafayette,* 462 U. S. 640, 647 (1983). See also *Colorado* v. *Bertine,* 479 U. S. 367, 373-374 (1987). It is obvious that "[t]he logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers," *United States* v. *Martinez-Fuerte,* 428 U. S., at 556-557, n. 12, because judges engaged in *post hoc* evaluations of government conduct " `can almost always imagine some alternative means by which the objectives of the [government] might have been accomplished.' " *United States* v. *Montoya de Hernandez,* 473 U. S. 531, 542 (1985), quoting *United States* v. *Sharpe,* 470 U. S. 675, 686-687 (1985). Here, the FRA expressly considered various alternatives to its drug-screening program and reasonably found them wanting. At bottom, respondents' insistence on less drastic alternatives would require us to second-guess the reasonable conclusions drawn by the FRA after years of investigation and study. This we decline to do.

The evidence of the defendant

[214] Mrs Jacqueline Lynch Stewart, the sole deponent for the defendant, identifies herself as the Chief Technical Director, Planning, Monitoring and Evaluation Division in the Office of the Prime Minister. She states that she has 'direct oversight and supervision of the [identification project]' (para. 1). If nowhere else one would have expected to find justification for the reason for selecting mandatory registration, and the means of criminalisation of all citizens of Jamaica for failing to apply for NIN in this affidavit. Whether other options were considered was not stated. Regrettably, no such evidence was present in her affidavit. The submissions of the learned Attorney General presented no such justification other than to say that if something is compulsory then an enforcement method has to be found. However, in the context of proportionality, that is just the beginning of the enquiry. Was criminalisation the least harmful way of going about this? Also is the mandatory enrolment in the context of this case a permissible violation of privacy rights guaranteed by the Charter?

[215] Mrs Lynch Stewart says at paragraph 4 of her affidavit that there is no violation of Mr Robinson's constitutional rights but then goes on to say that she is asking the court 'to find that such infringement or abridgement 'is demonstrably justified in a free and democratic society, like Jamaica's.' To the extent that the law has not been brought into force, Mrs Lynch Stewart is correct but this claim is not based on actual violations but on the likelihood of violations if the law is brought into force in its present state. Also there was no demonstration by reason and rationality that the violation was justified in a free and democratic society (McLachlin J in **RJR MacDonald**). A free and democratic society is based upon consent from the population. A democracy proceeds usually by reason and argument from the elected official in order to convince the populace of any particular position advanced by the officials. Where is the reason and rationale in the evidence? Is there any other means other than criminalisation of the population to achieve the objective of registration? Was that considered and having been considered, was it the means that impaired the constitutional right of freedom the least?

[216] At paragraph 24, Mrs Lynch Stewart states that if the 'Act is not implemented in its current form, or at all, many of the grave challenges that we currently experience, which stem from the lack of a unique form of identification for each person in Jamaica will not only continue, but will be aggravated.' The assertion is that unless the compulsory taking of biometric and biographical information backed by criminal sanction is implemented the grave challenges 'will not only continue, but will be aggravated.' How does Mrs Lynch Stewart know this? What survey or empirical analysis was done to make not only a statement of the now ('will continue') true but the future prediction ('will be aggravated') true accurate? Merely making an assertion does not make it true. Was any other form of compliance contemplated? There is no evidence of even a comparison with countries similar to Jamaica or with a similar history as Jamaica's to suggest that coercion is the least harmful means to achieve enrolment which is said to be a step towards the perceived benefits of the NIN and/or NIC. Mrs Lynch Stewart respectfully, has stated a conclusion and not a statement of verified fact or testable opinion. No cogent evidence was presented in support of the view that unless implemented in its current form including criminalisation for failing to register was the means that impaired privacy rights the least.

[217] The irony in this case is that the presentation by the learned Attorney General suggested that the purpose of the legislation is so urgent, so important that it was necessary to be passed in its present form but despite the apparent urgency it has not been brought into force, and there is no known date when it will be brought into force. This means that the 'many grave challenges that we currently experience which stem form a unique form of identification' deponed to by Mrs Lynch Stewart, will continue for an indefinite time (para 24). No one has suggested that the sky has fallen in, or will fall in, or is likely to fall in if the law in its present form is not brought into force immediately. Evidence of that is gleaned from the fact that the society is still functioning more than a year after NIRA received the Governor General's assent.

[218] Paragraph 24 goes on to speak of the many young persons between 15 – 18 years' old who have left school but are unable to establish their identities with certainty. This was said to be a detriment to them finding employment. This is merely an

unsupported statement of alleged fact. This statement is not backed up by empirical data in support. The evidence may exist. The courts do not presume that such evidence exists. It is to be presented so that it can be subjected to examination by both the challenger and the courts. Let us bear in mind that constitutional litigation is sui generis. It is not like the regular party and party litigation. Constitutional litigation of this kind involves violation of rights which are said to be guaranteed against violation unless justification is established. The new Charter says 'demonstrably justified.' So far Mrs Lynch Stewart has not 'demonstrably justified' any basis for the violations which have been established. What exists so far are assertions of alleged fact and statements about the future without any empirical data in support. It is my strong and respectful view that guaranteed fundamental rights and freedoms cannot be compromised on the mere say so of a government official regardless of how eminent or bona fide they may be in their assertions.

[219] Mrs Lynch Stewart also mentions persons who are unable to establish their identity. There is no evidence of the scale of the problem or urgency of the problem that would require mandatory registration and the risk of a criminal conviction. This is the age of evidenced-based policy making. What Mrs Lynch Stewart has said about young persons being unable to establish their identification is at best intuition or anecdotal evidence but that is not a substitute for evidence. This cannot be a proper way of establishing facts. This is the twenty first century where there are numerous pollsters and opinion gatherers. This is the age of measurement and evaluation. Admittedly, some things are not capable of precise measurement but naked assertions are not a substitute for some measurement. Proportionality means, among other things, that the cure must not be worse than the ailment. The cure should not leave the patient in a worse state than before the medicine was administered. One way of ensuring this is correct diagnosis using the correct diagnostic tools followed by reasonable interpretation of the data.

[220] Paragraphs 24, 25, 26 and 27 are perhaps the closest that one gets to some possible justification for the coercive power of the state being employed to enforce registration. Speaking for myself, it is common knowledge that by the time a child is 15

– 18 years old that child would have been in the school system for at least 10 years. If these 15 – 18 year olds have left school and cannot establish their identities with certainty then one wonders how they were identified in school to begin with. In Jamaica, students begin schooling at around 4 to 5 years and are now usually in school for approximately 10 – 13 years. They go from basic school, kindergarten, or pre-preparatory school to grade 1 of primary education which lasts six years and then to high school which lasts five years. Is Mrs Lynch Stewart really saying that between the ages of 4 years and 18 years the number of persons who are unable to properly identify themselves is so great and so pervasive throughout the length and breadth of Jamaica that this means of bringing about compliance was the least intrusive and most enhancing of privacy rights? Is it being said that for a decade or more having moved from basic school to primary school and from primary school to high school, the number of children who are unable to establish their identity is so vast and this inability has created such significant problems for them that forced taking of fingerprints, iris or vein scans backed by criminalisation, with the risk of a fine and/or imprisonment is the remedy that best cures this situation in a constitutional democracy? What are the numbers on this? What is the percentage of the whole affected by this problem? Mrs Lynch Stewart may well be correct but where is the evidence? Mrs Lynch Stewart's assertion on this point is so counter-intuitive that it would be unwise to accept it a face value without asking probing questions. So let me repeat the issue is not whether such a possibility exists but rather whether the problem is as wide spread as is being suggested to justify the violations of privacy rights that have been established and will be demonstrated below.

[221] It is also common knowledge that for entry into primary school and high school these educational institutions usually require immunisation records. This suggests that some form of identification had to have been presented on entry into school. There is no evidence before this court of any large scale inability to identify children in school. It is difficult to accept, in the absence of data, that the problem of identification is so grave that a person in the twenty first century in Jamaica cannot establish his or her identity with reasonable certainty for the purpose of employment. This is not to say that every

single person is identified with perfection but on the other hand there is no evidence to suggest that the problem is so great as to require criminalised mandatory registration. Difficulty in establishing identification is not a synonym for an inability to establish identity. No data was presented to the court to support the proposition that school leavers were unable, in large and statistically significant numbers, to find employment because they could not identify themselves or establish their identity with reasonable certainty. Mrs Lynch Stewart's naked assertions are not reliable evidence upon which the conclusion that she wishes to be inferred can rest.

[222] Paragraphs 25 to 27 inform of the need for Jamaica to fulfil its international obligations under Financial Action Task Force and Caribbean Financial Action Task Force rules. Mrs Lynch Stewart speaks of prevention of financial fraud, prevention of identity theft, prevention of money laundering, prevention of terrorist financing and other organised crimes. There is the need, it is said, for financial institutions to know more about their customers. There is no evidence that financial institutions have been unable to identify their customers with reasonable certainty. This would be an absolutely remarkable state of affairs given that financial institutions have been operating in a regulatory environment for over twenty years. That regulatory framework demands that they know their customers. If what Mrs Lynch Stewart is suggesting is correct, then it would mean that the Bank of Jamaica and other regulators have failed in their duty to ensure that our financial institutions meet one of the basic requirements of anti-money laundering regulation, namely, to establish the identity of their customers with reasonable, not absolute, certainty. Again, no data of any kind was presented. These are simply naked assertions. To what extent is there identify theft and money laundering and other organised crime that the considered proportionate response is criminalised mandatory registration? Have investigations or prosecutions been stymied because of an absence of identification of the alleged perpetrators? Is there statistically significant evidence that financial institutions have been unable to conduct business because of the absence of proper identification of potential or actual customers? There may be answers to these questions but no such evidence was placed before the court. These

questions are necessary in order to determine whether the measures are proportionate to the objective.

[223] The affidavit of Mrs Lynch Stewart seems focused a lot on the economic benefits to be derived from registration. There is no reflection in the affidavit that Mrs Lynch Stewart appreciates the origin and importance of fundamental rights. More will be said about that later. As Palmer-Hamilton J (Ag) pointed out during argument, the affidavit was preoccupied with commerce, a little about crime, but not much about the fundamental rights and freedoms of citizens. The affidavit does not say whether options of encouraging compliance other than criminalisation were considered.

[224] Mrs Lynch Stewart exhibits a document headed 'Ministry Paper No [no number] White Paper on the National Identification System Policy.' At pages 14 and 15 of a document there is a discussion under the heading 'Public Perception and Attitudes' research was said to have been done 'to develop information regarding the perceptions, attitudes, opinions and knowledge of Jamaicans in respect of a NIDS was conducted in 2013 and 2014.' So here some data is presented but on relatively cursory scrutiny the data are wanting. The survey covered 1,050 persons in Jamaica and the diaspora. At page 15 there is this paragraph:

> *Given that end users have a **positive perception of a NIDS**, it is anticipated that there will be uptake of the system by the population within the context of a clearly defined policy and communication programme.* (emphasis added)

[225] The paragraph suggests that Jamaicans would be enthusiastic in their support and participation in the programme. If this is a reasonable reading of the document then why does Mrs Lynch Stewart say that the statute can only be effective if it is implemented in its current form? Is this counter to the 'positive perception of NIDS'? Why would a person need to be coerced to do something that he or she views positively? The paragraph quoted is inconsistent with a justification for using the criminal law to support the programme. This actually, goes to the issue of proportionality

in that the evidence, such as it was, indicated that there is more likely to be acceptance than resistance. This begs the question of why criminalisation?

[226] There are other observations to be made about the statistical evidence presented. There is no information regarding the method by which the 1,050 were selected; nothing to indicate how many were in Jamaica; how many were in the diaspora; and in the diaspora. where exactly these persons were. In short, there is no evidence – there is not even a naked statement to that effect – that the 1,050 persons were a representative sample of Jamaicans in Jamaica and overseas. In the absence of evidence of the kind just mentioned it is difficult to see why criminalisation of Jamaicans and those ordinarily resident in Jamaica was the preferred means of encouraging enrolment.

[227] The White Paper makes broad statements about social and financial exclusion, fraud and double-dipping in social benefit programmes, identity theft for use of birth certificate and passport of deceased persons. Again, no data indicating the extent of the problem were presented in this hearing. There is no indication of how many instances of the use of deceased persons' birth certificates and passports to see whether the problem is so severe that requires criminalisation and mandatory taking of biometric data in order to ensure registration. There is no evidence that the passport issuing system has been so compromised that the passport is no longer a reliable document for identification purposes and to stop it, criminalisation of the population is the least harmful means to achieve the objective of registration. Are we using a nuclear weapon to kill a mosquito?

[228] By way of contrast it is interesting to note that in the **Puttaswamy** case (September 2018) which had over one billion enrolees so far as demographic information only required (a) name; (b) date of birth; (c) gender; (d) residential address. This stands in sharp contrast to the extensive biographic information required under the Third Schedule of NIRA. Also the information collected did not involve processing for economic and sociological purposes. In addition, there was extensive evidence from the Indian government that was presented to the court to suggest that approximately half of

the money spent of welfare and other programmes did not reach the intended recipients. Also there was evidence that 'only 15 out of 100 rupees reaches the target person.' This was actually confirmed by a formal study (para 79 of judgment of Ashok Bhushan J). I point this out to show the nature and quality of the evidence presented in the **Puttaswamy** case. By contrast, there is virtually no evidence of any kind presented by the state in this case.

[229] The Aadhaar Scheme was voluntary and targeted at specific persons who needed government assistance. NIRA on the other hand is a compulsory national system that applies to all Jamaican and ordinary residents, without exception.

The nature of biometric systems

[230] I now turn to the allegations of constitutional violations but before doing that I will fulfill the promise made earlier to deal with biometric identification systems in more detail. For that I rely on the judgment of Dr Dhananajaya Chandrachud J in **Puttaswamy** (delivered September 26, 2018). From reading the judgments in this case Dr Chandrachud J, in my respectful view, demonstrated a greater sensitivity to the issues of privacy and freedom that is not as evident in the judgments of the majority or the other judges who delivered concurring judgments. His Lordship had a clear-eyed view of the dangers of a state or anyone having control over one's personal information and generally I preferred his approach to the issue over that of the other judges. At paragraph 118 of his Lordship's judgment it was observed that:

> *118 The term 'biometric' is derived from the Greek nouns 'βίος' (life) and 'μέτρον' (measure) and means 'measurement of living species.' Biometric technologies imply that "unique or distinctive human characteristics of a person are collected, measured and stored for the automated verification of a claim made by that person for the identification of that person." These systems thus identify or verify the identity or a claim of persons on the basis of the automated measurement and analysis of their biological traits (such as fingerprints, face and iris) or behavioural characteristics (such as signature and voice).*

[231] The learned judge stated at paragraphs 120 – 121:

> *120 There had been an initial increase in the usage of biometric technology in both developed and developing countries by both the private and the public sector. However, despite the increased adoption of biometric technologies by developed countries in the 1980s and 1990s, recent trends depict their reluctance to deploy biometric technology - or at least mass storage of biometric data - because of privacy concerns. Key instances included the scrapping of the National Identity Register and ID cards in the UK, and Germany's decision to reject a centralised database when deploying biometric passports. By contrast, in developing countries there is a rise in the deployment of biometric technology since it is being portrayed to citizens as a means to establishing their legal identity and providing them access to services, as well as a tool for achieving economic development. However, too often these goals are prioritised at the expense of their right to privacy and other human rights. Simon Davies, an eminent privacy expert, points out that it is not an accident or coincidence that biometric systems are most aggressively tried out with welfare recipients since they are not in a position to resist the State-mandated intrusion.*
>
> *There has been a particular increase in the use of biometric technology in identification programs in developing countries. This is because "biometrics include a wide range of biological measures which are considered sufficiently unique at a population level to allow individual identification with high rates of accuracy". Lack of formal identification and official identity documentation in the developing world is a serious challenge which impedes the ability of governments as well as development organisations to provide essential goods and services to the populations they serve. Further, identification is also essential to the gathering of accurate data which is required for monitoring the progress of government programmes. However, while biometric technology brings many advantages, the flip side is that the same technology can also lead to human rights violations:*
>
> > *"When adopted in the absence of strong legal frameworks and strict safeguards, biometric technologies pose grave threats to privacy and*

> *personal security, as their application can be broadened to facilitate discrimination, profiling and mass surveillance. The varying accuracy and failure rates of the technology can lead to misidentification, fraud and civic exclusion."*
>
> *121 The adoption of biometric technologies in developing countries in particular poses unique challenges since the implementation of new technologies in these countries is rarely preceded by the enactment of robust legal frameworks. Assessments of countries where a legal mechanism to regulate new technologies or protect data has followed as an afterthought have shown that there exists a huge risk of mass human rights violations where individuals are denied basic fundamental rights, and in extreme cases, even their identity.*

[232] I pause here to draw attention to paragraph 121 of Dr Chandrachund J's judgment. NIRA has been passed. It is now law but not yet brought into force and therefore not yet operational. The learned Attorney General says that its coming into force is awaiting the completion of the legal framework and from that standpoint this challenge is premature. Respectfully, I cannot agree. If the law is allowed to stand, not on the basis that it is compatible with the constitution but because there is some other law to come, that would be a serious dereliction of duty by the courts to deal with whether the enacted law is conformable with the constitution.

[233] Dr Chandrachud J continued at paragraphs 122 - 127:

> *122 Technology today brings with it tremendous power and is much like two sides of a coin. When applied productively, it allows individuals around the world to access information, express themselves and participate in local and global discussions in real-time in ways previously thought unimaginable.* ***The flip side is the concern over the abuse of new technology, including biometrics, by the State and private entities by actions such as surveillance and large-scale profiling.*** *This is particularly acute, given the fact that technological advancements have far outpaced legislative change. As a consequence, the safeguards necessary to ensure protection of human rights and data protection are often*

missing. The lack of regulatory frameworks, or the inadequacy of existing frameworks, has societal and ethical consequences and poses a constant risk that the concepts of privacy, liberty and other fundamental freedoms will be misunderstood, eroded or devalued.

123 Privacy has been recognized as a fundamental human right in various national constitutions and numerous global and regional human rights treaties. In today's digital age, the right to privacy is "the cornerstone that safeguards who we are and supports our on-going struggle to maintain our autonomy and self-determination in the face of increasing state power.

124 ***The proliferation of biometric technology has facilitated the invasion of individual privacy at an unprecedented scale. The raw information at the heart of biometrics is personal by its very nature****. The Aadhaar Act recognises this as sensitive personal information. Biometric technology is unique in the sense that it uses part of the human body or behaviour as the basis of authentication or identification and is therefore intimately connected to the individual concerned.* ***While biometric technology raises some of the same issues that arise when government agencies or private firms collect any personal information about citizens, there are specific features that distinguish biometric data from other personal data, making concerns about biometric technology of particular importance with regard to privacy protection****.*

125 There are two main groups of privacy- related interests that are directly pertinent to the contemporary discussion on the ethical and legal implications of biometrics. The first group falls under informational privacy" and is concerned with control of personal information. The ability to control personal information about oneself is closely related to the dignity of the individual, self-respect and sense of personhood. The second interest group falls under the rubric of 'physical privacy". This sense of privacy transcends the purely physical and is aimed essentially at protecting the dignity of the human person. It is a safeguard against intrusions into persons' physical bodies and spaces. Another issue is of property rights with respect to privacy, which concerns the appropriation and ownership of interests in human personality. In many jurisdictions,

the basis of informational privacy is the notion that all information about an individual is in some fundamental way their own property, and it is theirs to communicate or retain as they deem fit.

126 The collection of most forms of biometric data requires some infringement of the data subject's personal space. Iris and fingerprint scanners require close proximity of biometric sensors to body parts such as eyes, hands and fingertips. Even in the context of law enforcement and forensic identification, the use of fingerprinting is acknowledged to jeopardise physical privacy. Many countries have laws and regulations which are intended to regulate such measures, in order to protect the individual's rights against infringement by state powers and law enforcement. ***However, biometrics for the purpose of authentication and identification is different as they do not have a specific goal of finding traces related to a crime but are instead conducted for the purpose of generating identity information specific to an individual. This difference in purpose actually renders the collection of physical biometrics a more serious breach of integrity and privacy****. It indicates that there may be a presumption that someone is guilty until proven innocent. This would be contrary to generally accepted legal doctrine that a person is innocent until proven guilty and will bring a lot of innocent people into surveillance schemes.*

127 Concerns about physical privacy usually take a backseat as compared to concerns about informational privacy. The reason for this is that physical intrusion resulting from the use of biometric technology usually results from the collection of physical information. However, for some people of specific cultural or religious backgrounds, even the mental harm resulting from physical intrusion maybe quite serious. Another concern is that the widespread usage of biometrics substantially undermines the right to remain anonymous. People desire anonymity for a variety of reasons, including that it is fundamental to their sense of freedom and autonomy. Anonymity may turn out to be the only tool available for ordinary people to defend themselves against being profiled. Thus, it is often argued that biometric technology should not be the appropriate choice of technology as biometrics by its very nature is inconsistent with anonymity. Given the manner in which personal information can be linked and identified using biometric data, the

ability to remain anonymous is severely diminished. While some argue that it is not obvious that more anonymity will be lost when biometrics are used", this argument may have to be evaluated in light of the fact that there is no existing identifier that can be readily equated with biometrics. No existing identifier can expose as much information as biometric data nor is there any other identifier that is supposed to be so universal, long-lasting and intimately linked as biometrics. To say that the use of biometrics will not cause further loss of anonymity may thus be overly optimistic. Semi-anonymity maybe possible, provided that the biometric system is carefully designed from the inception.

Another significant change brought about by biometric technology is the precipitous decline of 'privacy by obscurity', which is essentially "a form of privacy afforded to individuals inadvertently by the inefficiencies of paper and other legacy recordkeeping." Now that paper records worldwide are giving way to more efficient digital record-keeping and identification, this form of privacy is being extinguished, and sometimes without commensurate data privacy protections put in place to remedy the effects of the changes." (emphasis added)

[234] It may legitimately be said that Dr Chandrachud J overstated the presumption of guilt in paragraph 126 but his Lordship's major point was that it is one thing to collect biometric data in the context of a criminal investigation and prosecution but quite another to have extensive biometric data collection outside of that context. The reason is that generally there is extensive and detailed provision regarding the collection and use of biometric information in the criminal law context. So far, in the context of general collection of biometric data outside of the criminal law context, it is likely to result in violations of fundamental rights unless there are very strict and rigorous safeguards because once there is a breach of the database the information taken is unlikely to be recovered in full. It must be remembered as well that in the modern world data do not have to be physically removed but simply copied and once copied there is no limit to the number of subsequent copies that can be made.

[235] This last extract raises the vexed question of who has rights in the data. Is it the data controller or is it the data subject? The individual until compelled by law had full control over his biometric and biographical data. NIRA is taking away this choice from not only adults but also all children. In fact, the parent of the child must apply for the registration of the child. Not only that, there is no opt out. Thus if the child wishes to opt out of the registration system that child has no option. That child has lost control over their biometric information for ever and a day.

[236] At paragraphs 128 – 130 his Lordship noted:

> *128 Biometrically enhanced identity information, combined with demographic data such as address, age and gender, among other data, when used in increasingly large, automated systems creates profound changes in societies, particularly in regard to data protection, privacy, and security. Biometrics are at the very heart of identification systems. There are numerous instances in history where the persecution of groups of civilians on the basis of race, ethnicity and religion was facilitated through the use of identification systems. There is hence an alarming need to ensure that the on-going development of identification systems be carefully monitored, while taking into account lessons learnt from history.*
>
> *129 It is important to justify the usage of biometric technology given the invasion of privacy. When the purpose of collecting the biometric data is just for authentication and there is little or no benefit in having stronger user identification, it is difficult to justify the collection of biometric information. The potential fear is that there are situations where there are few or no benefits to be gained from strong user verification / identification and this is where biometric technology may be unnecessary. (Example: When ascertaining whether an individual is old enough to go to a bar and drink alcohol, it is unnecessary to know who the person is, when all that is needed to be demonstrated is that the individual is of legal age). Fundamental rights are likely to be violated in case biometrics are used for applications merely requiring a low level of security.*
>
> *130 Biometric data, by its very nature, is intrinsically linked to characteristics that make us 'humans' and its broad scope brings*

> *together a variety of personal elements. It is argued that the collection, analysis and storage of such innate data is dehumanising as it reduces the individual to but a number. Ultimately, organisations and governmental agencies must demonstrate that there is a compelling legitimate interest in using biometric technology and that an obligatory fingerprint requirement is reasonably related to the objective for which it is required. One way of avoiding unnecessary collection of biometric data is to set strict legal standards to ensure that the intrusion into privacy is commensurate with and proportional to the need for the collection of biometric data.*

[237] This passage is highlighting the risk of the combined effect of technology with control over data. Unlike the majority in **Puttaswamy** (September 26, 2018) who seemed to have taken a rather benign view of this aspect of the matter Dr Chandrachud J destroyed the notion that merely because similar or identical information is already in the possession of the state that in and of itself makes taking of such information again legitimate. His Lordship clearly understood the implication of collecting biographical information, combining it with biometric then automating the process with supporting algorithms. Add to that the possibility of profiling. This scenario translates into great power over the lives of persons especially when that data and technology are in the hands of the state and powerful private actors as in Google, Amazon and the like. Of course, with the latter, the engagement is consensual or at the very least the person can opt out after sometime. What NIRA is proposing is control over vast amounts of data, no opt out and linking the data held in different silos by a unique identification number, thereby reducing anonymity even further and increasing the possibility of profiling and generating new information about the data subject.

[238] The combination of all that data with algorithms in the age of artificial intelligence makes it possible to now generate facts that would not otherwise be known about the individual and those facts are not relevant to the purpose of identification. We are now in the era of ‘self-learning’ machines, that is machines that can itself create new knowledge without any programming. These machines are able to do this from the data it already has. Respectfully, the majority in **Puttaswamy** (September 26, 2018) did not

seem to have a full understanding of this and its implications in the say that has been demonstrated by Dr Chandrachud J.

[239] I will now refer to non-judicial sources to support the view that collection of biometric data is not as benign as some have suggested. I am unable to improve upon the analysis of Ms Christina Moniodis:

> *The complexity of informational privacy is inherent in the nature of information itself: it is nonrivalrous, invisible and recombinant. These traits effectively blind judges to the harms at stake in data privacy cases.*
>
> *Firstly, information is a nonrival good in that there can be simultaneous users of the good; that is, one person's use of a piece of information does not make it less available to another. Moreover, data privacy invasions are difficult to detect because they can be invisible. Information can be accessed, stored, and disseminated without notice. The ability of information to travel at the speed of light enhances the invisibility of data access--that is, information collection can be the swiftest theft of all. Consequently, together, the invisible and nonrivalrous consumption of information allows for massive privacy invasions without any obvious harm to the invaded individuals.*
>
> *Furthermore, information is recombinant: that is, data output can be used as an input to generate more data output, and so forth. For instance, through a developing application known as Knowledge Discovery and Data Mining processes, data can be combined to "create facts" about an individual; in particular, the likelihood that an individual will engage in a certain type of behavior (sic). The creation of new knowledge complicates data privacy law as it involves information the individual did not possess and could not disclose, knowingly or otherwise. In addition, as our state becomes an ""information state" through increasing reliance on information--such that information is described as the "lifeblood that sustains political, social, and business decisions" --it becomes impossible to conceptualize all of the possible uses of information and resulting harms. Such a situation poses a challenge for courts whom are*

effectively asked to anticipate and remedy invisible, evolving harms.

B. Weakened Data Privacy Erodes Citizen-State Relations

Asking courts to remedy the invisible, evolving harms of data privacy invasions requires examining what the types of harms are. If the harms are difficult to perceive, it is tempting to see them as insubstantial. However, such an assumption ignores the effect informational privacy interests have on the relationship between citizen and state, especially the balance of power between the two. Almost forty years ago one court recognized that "the increasing complexity of our society and technological advances ... facilitate massive accumulation and ready regurgitation of far-flung data," presenting problems "not anticipated by the framers of the Constitution." The court further noted that "[t]hese developments emphasize a pressing need to preserve and redefine aspects of the right of privacy to insure the basic freedoms guaranteed by this democracy."

The connection between informational privacy and democratic freedoms stems from the prominent role data plays in governance and power. Harlan Cleveland argues that:

Government is information. Its employees are nearly all information workers, its raw material is information inputs, its product is those inputs transformed into policies, which are simply an authoritative form of information. So in a narrow sense, to consider government information policy is not far from considering the essence of government itself.

Moreover, the combination of technology with control of data flow has been described as a "tool of enslavement" for society if the power is abused. This dynamic can be observed in the classic case of a bribe--if X is aware of a potentially embarrassing or personal fact, or even myth, regarding Y, X can bribe Y in exchange for not using or disseminating the information pertaining to Y. The released Guantanamo prisoners who struggled for a country to allow them into their borders illustrates a more extreme case. The released prisoners' rejection reveals how merely associating an individual with a possible set of facts, even untrue facts, can significantly

impact an individual's liberty and future societal integration. Thus, data access can easily empower the receiver while dangerously degrading the individual to whom the data pertains.

Moreover, the reliance on data to understand individuals impacts our concept of personhood. Information and data flow are increasingly central to social and economic ordering as individuals become identified by an extensive set of information such as tax records, voting eligibility, and government-provided entitlements. One scholar argues that the ways in which our digital biographies are used results in growing dehumanization, powerlessness, and vulnerability for individuals. This phenomenon points to an emerging link between data collection and the construction of personhood. Unfortunately, the effect on personhood is reducing individuals to mere composites of transactional data, debasing our understanding of individual and citizenship. Such debasement also carries with it the risk of misrepresentation. Information is liable to distortion and can be taken out of context. For example, quick impressions and fragments of information are likely to "oversimplify and misrepresent our complicated and often contradictory characters." In effect, data collection and analysis can be a demoralizing process and can create a false image of an individual. Thus, broad government access to an individual's information can significantly upset the delicate balance of power in a democracy between citizen and state.

Informational privacy is a complex concept that is prone to elusive harms. The judiciary has struggled for over three decades to create a viable legal construct to define and consider such harms. The lack of a viable construct is troubling given the advanced data collection systems that continue to emerge. If the judiciary is going to play a role in understanding data privacy interests and balancing power between citizen and government, it is time to assess its doctrine. [45]

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[45] Moniodis, Christina P, Moving from Nixon to NASA: Privacy's Second Strand – A Right To Informational Privacy, 15 Yale J. L. & Tech 139, 153 -

[240] This extract highlights the need for examination of any provision that allows access to the database in order to determine whether privacy rights are violated and whether the safeguards are robust enough and provide adequate protection. The robustness of the existing framework will be examined in detail later.

[241] When Miss Moniodis refers to nonrivalrous she is referring to the economic concept of rivalrous which means that the good when consumed/used by one person cannot simultaneously be consumed/used by another. Thus nonrivalrous means that it can be consumed/used by several persons. Digitally stored identity information is nonrivalrous. The invisibility is readily understood and needs no explanation. This is why hackers don't need to remove data. If they need the information they simply copy it. Unless that possibility is eliminated hackers may well violate the system.

[242] Miss Moniodis refers to informational privacy as recombinant. What does she mean? She borrows this concept from chemistry. She means that the information or identity information can be broken down and recombined (hence recombinant) with other data. As the extract points out, this possibility can create new knowledge or information about an individual. This explains why the Aadhaar legislation went out of its way both in the statute and regulations to ensure in so far as possible that the verification system would only yield a yes/no answer to the requesting entity and no other data was transmitted. The majority judgments in **Puttaswamy** (September 26, 2018) suggest that third parties did not have access to the database and any request for verification was done in such a manner that there was no risk of third parties access. By contrast NIRA is proposing third party access.

[243] I will refer again to Nancy Liu.

> *Regardless of whether an individual voluntarily provides a biometric identifier or is forced to surrender it, they are nevertheless giving up information about themselves. Once collected, control over the biometric data is shifted from the data subject to the organisation that has access to the data. As biometric data are intimately linked with individuals in a relatively unique way, the data are usually considered 'personal'. Information privacy is therefore the most*

significant concern with respect to biometric technology. Losing control over personal data is the main challenge biometric technology poses to informational privacy. Biometric technology raises some of the same issues that arise when government agencies or private firms collect any personal information about citizens. However, such loss can occur in specific ways that distinguish biometric data loses involving other personal data, making concerns about technology of particular importance with regard to privacy protection. Therefore, it will also be relevant to explore the types of special legal problems that the technology poses, along with an analysis of various privacy implications resulting from the use of biometric technology. [46]

[244] Ms Liu informs the following:

A central principle of rules grounded in informational privacy is that the collection of personal information should be limited to those data that are necessary and relevant to a legitimate purpose. One of the primary privacy concerns with respect to the potential massive use of biometric technology is that more personal information that is necessary and relevant will be collected, used and disclosed. … The concern is that the excessive collection of biometric information will result in heightened monitoring of individuals. As mentioned … it is difficult to predict exactly what biometric technology may bring, but it is clear that it has broad potential to provide an extremely convenient and cost-effective method of gathering and analysing biometric data. The collection of biometric data therefore becomes the first threshold available for us to control the potential subsequent negative consequences of biometric technology.

From such data, it is possible to obtain health, racial and medical information about individuals which is not necessary for authentication or identification. This possibility also raises concern

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[46] Liu (n 3) p 72.

> *about the possible disclosure and/or compromise of such information, which are usually considered sensitive.* [47]

[245] From this passage informational privacy looms large. Ms Liu goes on to examine other concerns. She says for example that although companies and government agencies make the claim that they have only this or that information in their database, no one knows. There is no audit to determine the accuracy of the statement. She argues that biometric information can be gathered and stored easily and surreptitiously without the data subject's knowledge. This raises the issue of unauthorised collection and storage.[48]

[246] Miss Liu also speaks of unauthorised use and function creep. She notes unauthorised use is not restricted to the initial data collector but third parties with access can use the information in ways not known to the data subject. She makes the further point that biometric data can be linked to one unique individual they can be a powerful unique identifier.[49] I would add then when this unique identification just from the biometric data is combined with a unique identification number is seeded into multiple databases and the use of that unique number is tracked the 'biometric data not only allow individuals to be tracked, but create the potential for the collection of an individual's information and its incorporation into a comprehensive profile by linking various databases together.'[50]

The analysis of the claim

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[47] Liu (n 3) pp 72 – 73.

[48] Liu (n 3) pp 74 – 76.

[49] Liu (n 3) pp 76 – 77.

[50] Liu (n 3) p 76.

[247] All the violations alleged are on the basis of likely violations since the statute has not yet come into force and so the analysis has to be read with that understanding.

A. *Violation of the right to equality before the law*

The right to equality before the law.

(1) Section 13 (3) (g) states:

(g) the right to equality before the law;

(2) Mr Robinson alleges that sections 4, 20 and 41 of NIRA violate the right to equality before the law. The core argument is that by (i) compulsorily requiring Jamaican citizens and those ordinarily resident to enrol in the database (section 20) and by not requiring the same for foreigners (section 4); (ii) requiring Jamaicans and ordinary residents to produce the NIN or NIC when seeking to gain access to goods and services provided by public bodies (section 41) there is the risk that Jamaican citizens will be treated less favourably than foreigners who are not ordinarily resident since foreigners seeking to gain access to the same goods and services provided by public bodies are not required to enrol under the legislation or verify their identity in the manner required of Jamaicans and those ordinarily resident in Jamaica. Also failure to enrol is a criminal offence (section 20). Mr Hylton submitted that the risk of being denied goods and services provided by public bodies is quite probable because the public entity **must** ask for the NIN or NIC and the Jamaican and the ordinarily resident **must** produce either. Thus a non-Jamaican could access government goods and services and be facilitated in doing business without the public body being under a legal obligation to ask for and the foreigner is not under any **legal obligation** to produce any identification. It is this feature that has led to the complaint that a foreigner in terms of proof of identify is placed on a more favourable footing than that of a Jamaican national. Put differently, it may be merely unwise not to ask a

foreigner for proper identification whereas in respect of Jamaican it would be unlawful not ask for the NIC or the NIN.

(3) The learned Attorney General submitted that the legislation applies to Jamaicans and ordinary residents. It was also submitted that the legislation did not place create any subcategories of Jamaicans or ordinary residents and therefore it cannot be said that there has been an uneven hand in the application of the statute to the stated persons (**The State v Boyce** (2001) 65 WIR 283; **Bhagwandeen v Attorney General of Trinidad and Tobago** (2004) 64 WIR 402; **Matadeen and Another v Pointu and Others** [1998] 3 LRC 542).

(4) From the written and oral submissions of the learned Attorney General it did seem that it was accepted that the identification requirement for Jamaicans was quite rigorous (that is to say, biographical information and biometric information in the form of photograph or facial features or fingerprint, retina/iris scan, vein pattern, foot print, toe print and palm print) without any similar (not necessarily identical) requirement for foreigners.

(5) The submission of the learned Attorney General did not destroy the point made by Mr Hylton, namely, that there was a fundamental distinction between a **legal obligation** and an **administrative requirement**. I am of the view that there is a fundamental distinction between on the one hand a **legal obligation** imposed by an Act of Parliament on a public body to require every Jamaican and those ordinarily resident in Jamaica to produce a NIN or a NIC when seeking to gain access to goods and services offered by a public body and, on the other hand, no such **legal** obligation is imposed on public bodies by an Act of Parliament in respect of foreigners when those foreigners are seeking goods and services from very same the public bodies that Jamaicans are engaging in their quest for access to goods and services.

(6) The learned Attorney General submitted that this Charter right is not likely to be violated because there is no discrimination as between Jamaican nationals; it was said that all Jamaicans are treated the same and those ordinarily resident are treated the same as Jamaicans. The learned Attorney General also submitted that the foreigner would have satisfied the requirement in his or her country to be in possession of the identification document that he or she would have in his or her possession in Jamaica. The point being made by the learned Attorney General is that the proper comparison is between Jamaicans and Jamaicans and since all Jamaicans were treated the same under section 41 then there was no violation of the right to equal treatment.

(7) Very respectfully, that was not the point I understood Mr Hylton was making. Mr Hylton submitted that that is the wrong way to view the matter. According to Mr Hylton the proper comparison is between Jamaicans and ordinary residents on the one hand, and foreigners, on the other hand, when both sets of persons wish to gain access to goods and services provided by public bodies. Mr Hylton is saying that the statute deliberately tilts the playing field against Jamaicans and in favour of foreigners because of the **legal requirement** under the statute for public bodies to demand NIN and the person so asked must produce it.

(8) The extent of the right is more extensive than that submitted by the learned Attorney General. I agree with Mr Hylton that the proper comparators in this context are Jamaicans and foreigners who wish to gain access to goods and services provided by public bodies and not as the learned Attorney General suggested, one group of Jamaicans compared to another group of Jamaicans.

(9) The learned Attorney General submitted the Jamaican Parliament could not legislate in the same way for foreigners as it did for Jamaicans on this issue of enrolment. Respectfully, I don’t agree. No constitutional or other lawful

impediment has been identified that would make such legislation impermissible.

(10) The learned Attorney General relied on this passage from Lord Hoffman in **Matadeen** at page 552:

> *As a formulation of the principle of equality the court cited Rault J in Police v Rose [1976] MR 79 at 81:*
>
> *'Equality before the law requires that persons should be uniformly treated, unless there is some valid reason to treat them differently.'*
>
> *Their Lordships do not doubt that such a principle is one of the building blocks of democracy and necessarily permeates any democratic Constitution. Indeed, their Lordships would go further and say that treating like cases alike and unlike cases differently is a general axiom of rational behaviour. It is, for example, frequently invoked by the courts in proceedings for judicial review as a ground for holding some administrative act to have been irrational: see Professor Jeffrey Jowell QC 'Is Equality a Constitutional Principle?' [1994] Current Legal Problems 1 at 12-14 and De Smith, Woolf and Jowell Judicial Review of Administrative Action (5th edn, 1995) paras 13-036 to 13-045.*
>
> *But the very banality of the principle must suggest a doubt as to whether merely to state it can provide an answer to the kind of problem which arises in this case. Of course persons should be uniformly treated, unless there is some valid reason to treat them differently. But what counts as a valid reason for treating them differently? And, perhaps more important, who is to decide whether the reason is valid or not? Must it always be the courts? The reasons for not treating people uniformly often involve, as they do in this case, questions of social policy on which views may differ. These are questions which the elected representatives of the people have some claim to decide for themselves. The fact that equality of treatment is a general principle of rational behaviour does not entail that it should necessarily be a justiciable principle--that it should always be the judges who have the last word on whether the principle has been observed. In this, as in other areas of constitutional law, sonorous judicial statements of*

uncontroversial principle often conceal the real problem, which is to mark out the boundary between the powers of the judiciary, the legislature and the executive in deciding how that principle is to be applied.

(11) The difficulty with this passage is that in terms of its suggested applicability by the learned Attorney General is that in Jamaica equality before the law is not just an ideal but a constitutional right guaranteed by section 13 (2) of the Charter which makes it a justiciable right. The justiciability of the right is guaranteed by section 19 (1) which states that any person who is alleging violation of the guaranteed rights and freedoms 'may apply to the Supreme Court for redress.' While acknowledging Lord Hoffman's views on the matter I say that in Jamaica whenever someone alleges in a constitutional claim that there is a violation of the equal treatment guarantee by either legislative action by the Parliament or by executive action it is only the judiciary that can decide that issue. To hold otherwise would be a denial of the possibility of a remedy provided for by section 19 (1), (3) of the Charter.

(12) Once a right has been elevated to constitutional status different and fundamental considerations apply. That right has now been lifted up and placed over and above rights created by ordinary Acts of Parliament. In ordinary non-constitutional judicial review, the functionary may be allowed some leeway to decide how to execute a particular policy. However, when it comes to the constitutionality of a law or action everything changes. Therefore, if Lord Hoffman was reducing constitutional rights to that of rights created by ordinary legislation then I have to depart from his Lordship's analysis. I am not of the view that his Lordship sufficiently recognised the nature of constitutional rights and why the court, must at all times, be the final arbiter of whether the right is violated.

(13) Respectfully, in Jamaica, equality before the law is now a constitutional right and has been made justiciable by sections 13 (2) and 19 of the Charter and yes, when it is made the subject of litigation, the court must answer the

questions raised regardless of how difficult they are. On the question of social policy, the courts are not questioning social policy but determining legality of the law passed to give effect to social policy. The question, then, if Lord Hoffman is correct, is this: in a constitutional democracy which institution other than the courts has been established to determine the constitutionality of executive and/or legislative action?

(14) That passage cited by the learned Attorney General does not answer the point being made. There does not seem to be any valid reason for the legislation to discriminate in the way that it has done. No valid reason has been advanced by the learned Attorney General for creating a regime that is likely to see a foreigner being able to do business with public bodies with less robust or inferior forms of identification than Jamaicans thereby erecting a barrier to Jamaicans in their own country when compared to foreigners. Thus when the learned Attorney General submitted that identification would be required from foreigners what she was really saying in this context was that foreigners may be asked to produce identification as a matter of good administrative practice and not because of a legal obligation imposed by an Act of Parliament. Respectfully, that does not answer the issue raised on this aspect of the case.

(15) The vice of section 41 of NIRA is that it creates an absolute standard with no exceptions. It does not say that the person should produce a NIN or NIC but if the person is able to satisfy the public body that he/she is who he/she claims to be then the person shall be facilitated in procuring the goods and services provided by the particular public body. The section says the public body ‘shall require’ and the registered individual ‘shall comply.’ These words do not admit of any exception. Hence, the question is, what if the person does not comply? The answer must be, because of the mandatory nature of the wording without exception, that he/she cannot be facilitated in securing the goods and services of the particular public body that makes the demand of him/her. The foreigner is at no such risk as a matter of law.

(16) Section 41 of NIRA is likely to violate section 13 (3) (g) of the Charter on the ground that it unfairly discriminates against Jamaicans when compared with foreigners who are seeking to gain access to goods and services provided by public bodies. Section 41 does not go on to say that should the Jamaican have other forms of reliable identification then the public body is still to facilitate access to goods and services offered by that body. If section 41 is directed at ensuring that the person seeking to gain access to goods and services of a public body is who he or she claims to be then there is no rational reason to exclude other forms of reliable identification. It cannot be that the only way a person can identify himself is by way of the NIN which in turn requires enrolment. The public body is not given any discretion in relation to Jamaicans but undoubtedly has such a discretion in relation to foreigners.

(17) Another problem with section 41 is that it does not define goods and services. Does section 41, for example, apply to pension entitlements and other goods and services that are legally due to the person who is seeking to claim them? Is that person to be denied a legal entitlement because of the absence of a NIN or NIC? I say this to say that the majority in **Puttaswamy** (September 26, 2018) specifically addressed this and stated that the Aadhaar system should not affect persons' legal entitlements.

(18) If section 41 was seeking to ensure that the right person gets the goods and services, then the phraseology is too absolute and excludes the persons who can in fact identify themselves by other means. The affidavit of Mrs Lynch Stewart makes the case on this point. If the idea is that there is need to ensure that the persons who are to receive benefits from the state are in fact the persons who receive them why not target those persons and encourage them to secure some form of identification?

(19) Sections 4 of NIRA is not likely to violate section 13 (3) (g) of the Charter. Section 4 does not by itself impose any requirement on Jamaicans. It simply

states the class of persons to which the statute applies. The challenge to section 4 on this ground fails.

(20) The challenge to section 20 on the ground of unequal treatment succeeds because it is discriminating putting Jamaicans and ordinary residents in a worse position when compared with foreigners when seeking to access goods and services from the same government entities. No reasonable justification has been advanced for this distinction.

B. *The right to life, liberty and security of the person and protection from search of person, property, respect for and protection of private and family life, privacy of home, protection of privacy of other property and of communication.*

(1) The proposition is that sections 15, 20 and the Third Schedule of NIRA are likely to violate section 13 (3) (a), (3) (j) (i), (ii) and (iii) of the Charter. It also said that sections 27 (1) and 39 of NIRA are likely to violate section 13 (3) (j) (ii) and (iii). Mr Robinson alleges further that sections 6 (1) (e) and 43 (1) are likely to violate sections 13 (3) (j) (ii), (iii) as provided for in section 16 of the Charter.

(2) Section 13 (3) (a) of the Charter which provides:

> *The rights and freedoms referred to in subsection (2) are as follows-*
>
> *(a) the right to life, liberty and security of the person and the right not to be deprived thereof except in the execution of the sentence of a court in respect of a criminal offence of which the person has been convicted;*

(3) Section 13 (3) (j) provides:

> *(j) the right of everyone to*
>
> *(i) protection from search of the person and property;*

(ii) respect for and protection of private and family life, and privacy of the home; and

(iii) protection of privacy of other property and of communication;

(4) Let me say at the outset that I adopt the taxonomy established by the Supreme Court of India regarding the right to privacy in the **Puttaswamy** case (August 24, 2017). I accept that the wording of the right in Jamaica embraces privacy of the physical person, informational privacy, and privacy of choice.

(5) I also adopt the formulation of the majority in **Puttaswamy** (September 26, 2018) regarding the analytical framework for determining whether a biometric and biographical data collection system meets constitutional standards. Of course that analysis is done in the context of the specific wording of the constitution under consideration (see paragraph 150 and 151 of these reasons for judgment).

(6) The essence of Mr Hylton's submission is that section 20 of NIRA compels every Jamaican citizen and every person ordinarily resident in Jamaica to enrol in the database or face criminal prosecution. The risk of prosecution is not a once and for all matter but continuous because non-registration is a continuing offence and so a single prosecution does not mean that the person will not be prosecuted again and again if he or she still refuses to enrol. The legal obligation to enrol is not extinguished by a prosecution. The enrolment requires the person to submit biographic information under Part A and core biometric information under B1 of the Third Schedule of NIRA, both of which have been set out above.

(7) The submission also added that when what has been stated in the immediately preceding paragraph is combined with section 15, and viewed against the backdrop of sections 21 and 41 that the cumulative effect of these provisions is to create the possibility that a person who does not enrol in the database may be denied the 'full raft of Government services and benefits.'

This latter point is based on the requirement that public bodies must ask for and the registrable persons must produce a NIN or NIC when seeking good or services from such bodies. The submission and analysis of the arguments made under the challenge on the ground of unequal treatment are borne in mind and need not be repeated.

(8) The learned Attorney General, in response, pointed out that the phraseology of this Charter right bears strong similarity to article 9 of the International Convention on Civil and Political Rights [51] and article 5 of the European Convention on Human Rights. [52]

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[51] 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

[52] 1. Everyone has the right to liberty and security of person.

No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(9) The learned Attorney General submitted that the provisions of the Conventions cited which bear some similarity to the Charter right in question have been understood to refer to physical liberty. The submission, as understood by me, is that there should not be arbitrary deprivation of physical liberty (**Creagna v Romania** [2012] ECHR 329, (2013) 56 EHRR 11, 56 EHRR 11 and **Engel v Netherlands** 1 EHRR 647, [1976] 1 EHRR 647, [1976] ECHR 3, (1979) 1 EHRR 647, (1976) 1 EHRR 647).

(10) In responding to the submissions, especially that of the learned Attorney General it is necessary to appreciate that there is jurisprudence that indicate

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(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and the charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

that the right to privacy is multifaceted. Privacy involves (a) bodily, mental and emotional integrity; (b) anonymity; and (c) protecting personal information. Privacy in a free and democratic society recognises that the individual has control over whether his/her biographic and/or demographic information is shared and under what circumstances the sharing takes place. Privacy in a free and democratic society recognises that a person's biometric information is theirs and that they retain control over that information by virtue of their inherent dignity as free autonomous beings. Thus compulsory taking of any biometric data is a violation of the right to privacy – privacy of the person, informational privacy. The compulsory nature of NIRA strongly suggests that privacy of choice has been removed. The only question remaining is whether there is justification within the meaning of the Jamaican Charter or the violation falls within those sections of the Charter that are exempt from charter rights and freedoms. Even in public spaces all privacy is not lost. The public does not expect that their biometric information will be taken by anyone and used in a manner not authorised by them. Thus, generally speaking, privacy rights cannot be evaded by using non-intrusive methods such as facial recognition software and other applications to collect biometric information and use without the permission of the person.

(11) In some contexts, it has been said that honest citizens have nothing to fear. That however is to misunderstand privacy rights in a free and democratic society. Free and democratic societies accept and act on the premise that the individual has the right to be left alone, to be anonymous as much as possible, and to retain control over their home, body, mind, heart and soul. This is part of the inherent dignity of human beings.

(12) Privacy is therefore a very profound and foundational right that permeates and enhances all other human rights. It is this idea that enabled the Supreme

Court of the United States, [53] the Supreme Court of India, and the Supreme Court of Canada to establish firmly and securely the existence of privacy rights even though none of the fundamental rights provisions in those countries contained an express right to privacy.

(13) The companion and equally foundational right in a free and democratic society is freedom. The individual is free to decide what he/she does with their privacy and information. As shall be seen in the Canadian cases, freedom involves more than the absence of physical restraint; it involves 'personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance.'

(14) The mandatory nature of NIRA raises the question of whether that fact of mandatory registration in and of itself amounts to a prima facie breach of any Charter right and if there has been such breach whether the state has justified that encroachment. The criminal sanction goes to whether that means of enforcement is likely to cause harm disproportionate to any benefit to be gained and also whether it was the least harmful measure that could be used to achieve the objective of enrolment. I shall now analyse the mandatory requirement for enrolment first.

(15) It needs to be said, at the outset of this analysis, that the cases cited by the learned Attorney General are not the last word on the matter. There is authority from the Supreme Court of Canada that suggests that the expression 'life, liberty and security of the person' (the opening words of section 13 (3) (a) of the Jamaican Charter) has a more expansive meaning than that suggested by the learned Attorney General. I am referring to the Canadian cases on this point because Mr Robinson is claiming that privacy rights also exist under

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[53] The United States Supreme Court does not recognise informational privacy.

section 13 (3) (a) of the Jamaican Charter and not just under section 13 (3) (j) (i), (ii) and (iii). Our section 13 (3) (a), like the Canadian Charter, uses the expression 'life, liberty and security of the person.'

(16) In **Blencoe v British Columbia (Human Rights Commission)** 190 DLR (4th) 513 the Supreme Court of Canada reaffirmed previous decisions that had decided that section 7 [54] of the Canadian Charter was not confined to the penal context.

(17) Bastarache J had this to say about section 7 at pages 537 - 539:

> *49* ***The liberty interest protected by s. 7 of the Charter is no longer restricted to mere freedom from physical restraint. Members of this Court have found that "liberty" is engaged where state compulsions or prohibitions affect important and fundamental life choices. This applies for example where persons are compelled to appear at a particular time and place for fingerprinting*** *(Beare, supra); to produce documents or testify (Thomson Newspapers Ltd. v. Canada (Director of Investigation & Research), [1990] 1 S.C.R. 425 (S.C.C.)); and not to loiter in particular areas (R. v. Heywood, [1994] 3 S.C.R. 761 (S.C.C.)).* ***In our free and democratic society, individuals are entitled to make decisions of fundamental importance free from state interference****. In B. (R.) v. Children's Aid Society of Metropolitan Toronto (1994), [1995] 1 S.C.R. 315 (S.C.C.), at p. 368, La Forest J., with whom L'Heureux-Dubé, Gonthier and McLachlin JJ. agreed, emphasized that* ***the liberty interest protected by s. 7 must be interpreted broadly and in accordance with the principles and values underlying the Charter as a whole and that it protects an individual's personal autonomy****:*

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[54] Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

> *... liberty does not mean mere freedom from physical restraint. In a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance.*

50 In R. v. Morgentaler, [1988] 1 S.C.R. 30 (S.C.C.), Wilson J., speaking for herself alone, was of the opinion that s. 251 of the Criminal Code violated not only a woman's right to security of the person but her s. 7 liberty interest as well. ***She indicated that the liberty interest is rooted in fundamental notions of human dignity, personal autonomy, privacy and choice in decisions regarding an individual's fundamental being****. She conveyed this as follows, at p. 166:*

> *Thus, an aspect of the respect for human dignity on which the Charter is founded is the right to make fundamental personal decisions without interference from the state. This right is a critical component of the right to liberty. Liberty, as was noted in Singh, is a phrase capable of a broad range of meaning. In my view, this right, properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance.*

The above passage was endorsed by La Forest J. in B. (R.), supra, at para. 80. This Court in B. (R.) was asked to decide whether the s. 7 liberty interest protects the rights of parents to choose medical treatment for their children. The above passage from Wilson J. was applied by La Forest J. to individual interests of fundamental importance in our society such as the parental interest in caring for one's children.

51 In Godbout c. Longueuil (Ville), [1997] 3 S.C.R. 844 (S.C.C.), at para. 66, La Forest J., writing for L'Heureux-Dubé J. and McLachlin J. (as she then was), reiterated his position that the right to liberty in s. 7 protects the individual's right to make inherently private choices

and that choosing where to establish one's home is one such inherently personal choice:

> *The foregoing discussion serves simply to reiterate my general view that the right to liberty enshrined in s. 7 of the Charter protects within its ambit the right to an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference. I must emphasize here that, as the tenor of my comments in B. (R.) should indicate, I do not by any means regard this sphere of autonomy as being so wide as to encompass any and all decisions that individuals might make in conducting their affairs. Indeed, such a view would run contrary to the basic idea, expressed both at the outset of these reasons and in my reasons in B. (R.), that individuals cannot, in any organized society, be guaranteed an unbridled freedom to do whatever they please. Moreover, I do not even consider that the sphere of autonomy includes within its scope every matter that might, however vaguely, be described as "private". Rather, as I see it, the autonomy protected by the s. 7 right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence. As I have already explained, I took the view in B. (R.) that parental decisions respecting the medical care provided to their children fall within this narrow class of inherently personal matters. In my view, choosing where to establish one's home is, likewise, a quintessentially private decision going to the very heart of*

personal or individual autonomy. [Emphasis added.]

(18) If this passage is correct, and I am of the view that it is, and it is applicable to the Jamaican Charter, then it means that the right to 'life, liberty and security of the person' extends beyond physical restraint of the person and includes protection against any forced intrusion on the part of the state. The scope of the right under section 13 (3) (a) is therefore quite extensive. It is extensive as indicated earlier.

(19) The mandatory requirement under NIRA will require the person to appear at some place at some time for not only giving of biographical information but also giving biometric information and this, according to **Blencoe**, falls within the liberty interest protected by the phrase 'life, **liberty** and security of the person' (emphasis added). The very compulsion to give biometric information engages the liberty interest. Thus on the face of it section 13 (3) (a) of the Jamaican Charter is likely to be violated if the law is brought into force in its present state. The person is being deprived of the choice of determining whether he/she wants to part with biometric information. The person is also being forced to submit his/her body to a specific place and time for the biometric information to be collected. The freedom of movement of the person is constrained just by being required to go to specific place to give the information required under NIRA. The very act of taking the biometric information itself is an interference with the body of the person.

(20) The learned Attorney General submitted that the information required from the citizen is already given in other circumstances. In my view the difference here is that prior to this there was no single number linking all the data together across government databases. What is being proposed here is a unique identifier but for that to work there must be extensive biometric data collection that is then linked to the biographical information so that there will be sufficient data stored so that when a query is made of the database it will be

able to single out the specific individual whose particulars are being verified. This also explains why the citizen, and ordinary resident is required to provide any previous number such as National Insurance Scheme (NIS) and the like. This submission by the learned Attorney General did not sufficiently appreciate the power that is now going to be given to the state once all data of the data subject are linked across data bases and those data bases are automated as well as subjected to analysis driven by algorithms. All sorts of new information not previously contemplated can be generated and that new information will not have been consented to by the data subject. If one considers that should data gets in the hands of third parties who can then use their algorithms for further analysis then it is not hard to see why there are high standards for biometric data collection, retention, and use by state agencies.

(21) But not only is section 13 (3) (a) of the Jamaican Charter likely to be violated but also section 13 (3) (j) (i) which confers protection from the search of the person. I will also, at this point, refer to the Canadian Supreme Court's approach to 'unreasonable search' under Canada's section 8 of the Canadian Charter in order to make the point that compulsory taking of finger prints is a search of the person. The point that will be made is that under Canadian jurisprudence privacy rights arose under both sections 7 and 8. To get to unreasonable search there must be a search and it is only after there is a search that the nature of the search can be determined. I am saying this to say that the presence of the adjective 'unreasonable' in Canada's section 8 and its absence from Jamaica's section 13 (3) (j) (i) does not erode the value of the cases because the core issue is whether compulsory taking/demanding of personal information can amount to unreasonable search. The Canadian Supreme Court has said yes and so do I. I now present the jurisprudence and my analysis of them. Like Batts J I am of the view that an unreasonable law can never ever be demonstrably justifiable in a free and democratic society.

(22) I also will examine how the Canadian Supreme Court dealt with the privacy right via the right against unreasonable search and seizure. By so

doing the scope of the right under section 13 (3) (j) (i) will be outlined. This is not exhaustive. In **Hunter v Southam Inc** [1984] 2 S.C.R. 145 the court had to consider section 8 of the Canadian Charter of Fundamental Rights and Freedoms. Its terms, at the time of the litigation, were:

> *Everyone has the right to be secure against unreasonable search and seizure.*

(23) Do note that this provision does not confer a right of privacy in express terms. This case began the Supreme Court of Canada's journey to recognising a right to privacy despite the absence of any specific provision expressly conferring the right to privacy. Also it will be shown that the concept of search is not confined to the physical examination of the person or his/her home or business but extends to the taking of finger prints and any information that is given under compulsion of law.

(24) In 1993 in **R v Plant** [1993] 3 SCR 281 the Canadian Supreme Court speaking through Sopinka J:

> *In fostering the underlying values of dignity, integrity and autonomy, it is fitting that s. 8 of the Charter should seek to protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual.*

(25) It is to be noticed that his Lordship made this strong statement in respect of biographical information. I would want to think that this position would apply to biometric information.

(26) The next important case in this journey is **R v Dyment** 55 DLR (4^{th}) 503. In that case a doctor took a blood sample from a patient in an emergency room at a hospital. The blood was taken for medical purposes without the patient's consent. At the time the doctor took the sample, the patient was

bleeding and suffering from concussion. The doctor took the sample purely for medical purposes. The sample was given to the police who had the blood analysed. The analysis revealed that it contained substances that impaired the ability of the defendant to operate a car properly. He was convicted for operating a car while under the influence of drugs. The issue was whether the blood sample given to the police amounted to an unlawful seizure and search under section 8 of the Canadian Charter. The court held that initial taking by the doctor was lawful but when handed over to the police that receiving by the police amounted to an unlawful search and therefore could not be adduced in evidence. La Forest J had this to say at pages 512 - 514:

> *From the earliest stage of Charter interpretation, this Court has made it clear that the rights it guarantees must be interpreted generously, and not in a narrow or legalistic fashion; see R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, at p. 344. The function of the Charter , in the words of the present Chief Justice, then Dickson J., in Hunter v. Southam Inc., [1984] 2 S.C.R. 145, at p. 155 "is to provide ... for the unremitting protection of individual rights and liberties". It is a purposive document and must be so construed. That case dealt specifically with s. 8 .* ***It underlined that a major, though not necessarily the only, purpose of the constitutional protection against unreasonable search and seizure under s. 8 is the protection of the privacy of the individual****; see especially pp. 159-60.* ***And that right, like other Charter rights, must be interpreted in a broad and liberal manner so as to secure the citizen's right to a reasonable expectation of privacy against governmental encroachments****. Its spirit must not be constrained by narrow legalistic classifications based on notions of property and the like which served to protect this fundamental human value in earlier times.*
>
> *Indeed, it may be confusing means with ends to view these inherited rights as essentially aimed at the protection of property. The lives of people in earlier times centred around the home and the significant obstacles built by the law against governmental intrusions on property were clearly seen by Coke to be for its occupant's "defence" and "repose"; see Semayne's Case (1604), 5*

Co. Rep. 91 a, 77 E.R. 194, at p. 91 b and p. 195 respectively. Though rationalized in terms of property in the great case of Entick v. Carrington (1765), 19 St. Tr. 1029, 2 Wils. K.B. 275, 95 E.R. 807, the effect of the common law right against unreasonable searches and seizures was the protection of individual privacy. Viewed in this light, it should not be cause for surprise that a constitutionally enshrined right against unreasonable search and seizure should be construed in terms of that underlying purpose unrestrained now by the technical tools originally devised for securing that purpose. However that may be, this Court in Hunter v. Southam Inc. clearly held, in Dickson J.'s words, that the purpose of s. 8 "is ... to protect individuals from unjustified state intrusions upon their privacy" (supra, p. 160) and that it should be interpreted broadly to achieve that end, uninhibited by the historical accoutrements that gave it birth. He put it this way, at p. 158:

> *In my view the interests protected by s. 8 are of a wider ambit than those enunciated in Entick v. Carrington. Section 8 is an entrenched constitutional provision. It is not therefore vulnerable to encroachment by legislative enactments in the same way as common law protections. There is, further, nothing in the language of the section to restrict it to the protection of property or to associate it with the law of trespass. It guarantees a broad and general right to be secure from unreasonable search and seizure.*

It should also be noted that s.8 does not merely prohibit unreasonable searches and seizures. As Pratte J.A. observed in Minister of National Revenue v. Kruger Inc., [1984] 2 F.C. 535 (C.A.), at p. 548, it goes further and guarantees the right to be secure against unreasonable search and seizure.

The foregoing approach is altogether fitting for a constitutional document enshrined at the time when, Westin tells us, society has come to realize that privacy is at the heart of liberty in a modern state; see Alan F. Westin, Privacy and Freedom (1970), pp. 349-50. Grounded in man's physical and moral autonomy, privacy is essential for the well-being of the individual. For this reason alone, it is worthy of constitutional protection, but it also has profound significance for the public order. The restraints imposed on

government to pry into the lives of the citizen go to the essence of a democratic state.

Claims to privacy must, of course, be balanced against other societal needs, and in particular law enforcement, and that is what s. 8 is intended to achieve. As Dickson J. put it in Hunter v. Southam Inc., supra, at pp. 159-60:

> *The guarantee of security from unreasonable search and seizure only protects a reasonable expectation. This limitation on the right guaranteed by s. 8 , whether it is expressed negatively as freedom from "unreasonable" search and seizure, or positively as an entitlement to a "reasonable" expectation of privacy, indicates that an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement.*

(27) And later on La Forest J held at pages 514 - 515:

As noted previously, territorial claims were originally legally and conceptually tied to property, which meant that legal claims to privacy in this sense were largely confined to the home. But as Westin, supra, at p. 363, has observed, "[t]o protect privacy only in the home ... is to shelter what has become, in modern society, only a small part of the individual's daily environmental need for privacy". Hunter v. Southam Inc. ruptured the shackles that confined these claims to property. Dickson J., at p. 159, rightly adopted the view originally put forward by Stewart J. in Katz v. United States, 389 U.S. 347 (1967), at p. 351, that what is protected is people, not places. This is not to say that some places, because of the nature of the social interactions that occur there, should not prompt us to be especially alert to the need to protect individual privacy.

This Court has recently dealt with privacy of the person in R. v. Pohoretsky, [1987] 1 S.C.R. 945. The case bears some resemblance to the present one, but there the doctor had taken the

blood sample from a patient, who was in an incoherent and delirious state, at the request of a police officer. In holding this action to constitute an unreasonable search and seizure, my colleague Lamer J. underlined the seriousness of a violation of the sanctity of a person's body. It constitutes a serious affront to human dignity. As the Task Force on Privacy and Computers, supra, put it, at p. 13:

> *... this sense of privacy transcends the physical and is aimed essentially at protecting the dignity of the human person. Our persons are protected not so much against the physical search (the law gives physical protection in other ways) as against the indignity of the search, its invasion of the person in a moral sense.*

(28) La Forest J moved to the area of information privacy and had this to say at page 515:

Finally, there is privacy in relation to information. This too is based on the notion of the dignity and integrity of the individual. As the Task Force put it (p. 13): "This notion of privacy derives from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit." In modern society, especially, retention of information about oneself is extremely important. We may, for one reason or another, wish or be compelled to reveal such information, but situations abound where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected. Governments at all levels have in recent years recognized this and have devised rules and regulations to restrict the uses of information collected by them to those for which it was obtained; see, for example, the Privacy Act, S.C. 1980-81-82-83, c. 111.

One further general point must be made, and that is that if the privacy of the individual is to be protected, we cannot afford to wait to vindicate it only after it has been violated. *This is inherent in the notion of being secure against unreasonable searches and seizures.* ***Invasions of privacy must be prevented,***

and where privacy is outweighed by other societal claims, there must be clear rules setting forth the conditions in which it can be violated. This is especially true of law enforcement, which involves the freedom of the subject*. Here again, Dickson J. made this clear in Hunter v. Southam Inc. After repeating that the purpose of s. 8 of the Charter was to protect individuals against unjustified state intrusion, he continued at p. 160:*

> *That purpose requires a means of preventing unjustified searches before they happen, not simply of determining, after the fact, whether they ought to have occurred in the first place. This, in my view, can only be accomplished by a system of prior authorization, not one of subsequent validation. [Emphasis in original.]*

He was there speaking of searches, but as I will endeavour to show, the statement applies equally to seizures. (emphasis added)

(29) Between 1998 and 2014 the Canadian Supreme Court refined its analysis of the informational privacy right to such an extent that it could boldly proclaim in **R v Spence** [2014] 2 SCR 212:

> *Privacy is admittedly a "broad and somewhat evanescent concept": Dagg v. Canada (Minister of Finance), [1997] 2 S.C.R. 403 (S.C.C.), at para. 67. Scholars have noted the theoretical disarray of the subject and the lack of consensus apparent about its nature and limits: see, e.g., C. D. L. Hunt, "Conceptualizing Privacy and Elucidating its Importance: Foundational Considerations for the Development of Canada's Fledgling Privacy Tort" (2011), 37 Queen's L.J. 167, at pp. 176-77.* ***Notwithstanding these challenges, the Court has described three broad types of privacy interests — territorial, personal, and informational — which, while often overlapping, have proved helpful in identifying the nature of the privacy interest or interests at stake in particular situations****: see, e.g., Dyment, at pp. 428-29; Tessling, at paras. 21-24.* ***These broad descriptions of types of privacy interests are analytical tools, not strict or mutually-exclusive categories.***

The nature of the privacy interest does not depend on whether, in the particular case, privacy shelters legal or illegal activity. The analysis turns on the privacy of the area or the thing being searched and the impact of the search on its target, not the legal or illegal nature of the items sought. To paraphrase Binnie J. in Patrick, the issue is not whether Mr. Spencer had a legitimate privacy interest in concealing his use of the Internet for the purpose of accessing child pornography, but whether people generally have a privacy interest in subscriber information with respect to computers which they use in their home for private purposes: Patrick, at para. 32.

We are concerned here primarily with informational privacy. In addition, because the computer identified and in a sense monitored by the police was in Mr. Spencer's residence, there is an element of territorial privacy in issue as well. However, in this context, the location where the activity occurs is secondary to the nature of the activity itself. Internet users do not expect their online anonymity to cease when they access the Internet outside their homes, via smartphones, or portable devices. Therefore, here as in Patrick, at para. 45, the fact that a home was involved is not a controlling factor but is nonetheless part of the totality of the circumstances: see, e.g., Ward, at para. 90.

To return to informational privacy, it seems to me that privacy in relation to information includes at least three conceptually distinct although overlapping understandings of what privacy is. These are privacy as secrecy, privacy as control and privacy as anonymity.

Informational privacy is often equated with the secrecy or confidentiality. For example, a patient has a reasonable expectation that his or her medical information will be held in trust and confidence by the patient's physician: see, e.g. McInerney v. MacDonald, [1992] 2 S.C.R. 138 (S.C.C.), at p. 149.

Privacy also includes the related but wider notion of control over, access to and use of information, that is, "the claim of individuals, groups, or institutions to determine for themselves when, how and to what extent information about them is communicated to others": A. F. Westin, Privacy and Freedom (1970), at p. 7, cited in Tessling, at para. 23. La Forest J. made this point in Dyment. The

understanding of informational privacy as control "derives from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit" (Dyment, at p. 429, quoting from Privacy and Computers, the Report of the Task Force established by the Department of Communications/Department of Justice (1972), at p. 13). Even though the information will be communicated and cannot be thought of as secret or confidential, "situations abound where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected" (pp. 429-30); see also R. v. Sanelli, [1990] 1 S.C.R. 30 (S.C.C.), at p. 46.

There is also a third conception of informational privacy that is particularly important in the context of Internet usage. This is the understanding of privacy as anonymity. In my view, the concept of privacy potentially protected by s. 8 must include this understanding of privacy.

The notion of privacy as anonymity is not novel. It appears in a wide array of contexts ranging from anonymous surveys to the protection of police informant identities. A person responding to a survey readily agrees to provide what may well be highly personal information. A police informant provides information about the commission of a crime. The information itself is not private — it is communicated precisely so that it will be communicated to others. But the information is communicated on the basis that it will not be identified with the person providing it. Consider situations in which the police want to obtain the list of names that correspond to the identification numbers on individual survey results or the defence in a criminal case wants to obtain the identity of the informant who has provided information that has been disclosed to the defence. The privacy interest at stake in these examples is not simply the individual's name, but the link between the identified individual and the personal information provided anonymously. As the intervener the Canadian Civil Liberties Association urged in its submissions, "maintaining anonymity can be integral to ensuring privacy": factum, at para. 7.

Westin identifies anonymity as one of the basic states of privacy. Anonymity permits individuals to act in public places but to preserve

> *freedom from identification and surveillance: pp. 31-32; see A. Slane and L. M. Austin, "What's In a Name? Privacy and Citizenship in the Voluntary Disclosure of Subscriber Information in Online Child Exploitation Investigations" (2011), 57 Crim. L.Q. 486, at p. 501. The Court's decision in R. v. Wise, [1992] 1 S.C.R. 527 (S.C.C.), provides an example of privacy in a public place. The Court held that the ubiquitous monitoring of a vehicle's whereabouts on public highways amounted to a violation of the suspect's reasonable expectation of privacy. It could of course have been argued that the electronic device was simply a convenient way of keeping track of where the suspect was driving his car, something that he was doing in public for all to see. But the Court did not take that approach.*

(30) So there it is. All this in a Charter without an express right to privacy. How much more so that these observations are apposite to a Charter that has an express privacy provision. Section 8 of the Canadian Charter has been interpreted to mean that it also protects a biographical core of personal information that the person may wish to maintain and control from dissemination to the state. It has also been understood that section 8 deals not only with reasonable search and seizure but protects the privacy of the individual. Unsurprisingly, section 8 has been extended to informational privacy. His Lordship stated that if societal claims are to outweigh privacy claims then there must be 'clear rules setting forth the conditions in which it can be violated' and this 'is especially true of law enforcement which involves the freedom of the subject.' Thus from humble beginnings section 8 of the Canadian Charter has led to three broad types of privacy interests – territorial, personal, and informational – which are not hermetically sealed from each other. Can there be any rational reason why these ideas cannot be used to inform the approach to section 13 (3) (j) (i) of the Jamaican Charter?

(31) There is no doubt that the Jamaican legislature was influenced by developments in Canada and wanted to make sure that the right to privacy was not arrived at by judicial interpretation and so took the decision to make it an express right. This being so the obligation of the court is to enforce that

right to its fullest extent subject only to any restraint established by the constitution.

(32) It is now well established that privacy is an indispensable component of a free and democratic society. In this juncture of human civilisation, informational privacy has emerged as a fundamental human right except in the United States.

(33) It is to be noted that the Jamaican privacy provision does not have the word ‘unreasonable’ in section 13 (3) (j) (i). This omission is not saying that all searches are prohibited but rather that it is emphasising how extensive the legislature intended the right to privacy to be. Thus if the Canadian Supreme Court could legitimately come to the conclusion that it did based on the wording of the Canadian Charter’s section 8 surely when the Jamaican section 13 (3) (j) (i), (ii) and (iii) is considered, the only rational conclusion is that the Jamaican Charter is saying to all concerned that privacy rights must be taken very seriously. The privacy right, as the Canadian jurisprudence as well as that of the Indian Supreme Court indicates, is an absolutely foundational right (upon which many other rights rest) and includes the right to be left alone, that is to be as anonymous as you wish to be, unless there is some compelling reason for coercive measures being used to demand of Jamaican citizens that they must give up private and personal biometric information to anyone including the state.

(34) Every Jamaican has the reasonable expectation that he or she ought to be able to decide whether to provide finger prints or an iris scan to a government agency. When this choice is taken away the Jamaican no longer has the freedom to decide what information he or she wishes to share.

(35) From the cases cited there can be no doubt that compulsory taking of biographical and biometric data is likely to violate section 13 (3) (j) (i) because such an act is a search within the meaning of the provision. The citizen and

ordinary resident are compelled by law to part with biometric data. Section 20 removes privacy of choice. Section 20 violates section 13 (3) (j) (i) of the Charter.

(36) I now turn to examine section 13 (3) (j) (ii) to see if that right is likely to be violated. In **S v Marper** [2008] ECHR 1581 while accepting that finger prints did not contain as much information as either cellular samples or DNA profiles, nonetheless it was still personal data and any retention of it is sufficiently intrusive to constitute interference with private life. The accumulation of biometric information linked to biographical information and the reference numbers under Part D of the Third Schedule and any other information in the Database can provide substantial information about an individual. The nature and amount of this personal information means that the mere retention of this kind of information amounts to an interference with the individual's private life. Thus while it may be argued that none of the parcels of information by itself is significant but when aggregated and made subject to analysis they can produce a profile of the individual in a manner that a single parcel of information would not be able to do.

(37) When all this information is required of every single member of a family and such information is retained permanently it is easy to see that this mass collection and retention of data must have an impact on family life and so violates section 13 (3) (j) (ii) of the Jamaican Charter. Section 20 violates section 13 (3) (j) (ii) of the Charter.

(38) From what has been said about privacy it is my conclusion that mandatory collection of biographical and biometric data as required by section 20 is a violation of the citizen's right to protection from search under section 13 (3) (j) (i) and right to respect for and protection of private life under section 13 (3) (j) (ii). The citizen's personal space is invaded. His/Her privacy has been invaded. His personal information taken against his will. Choice has been removed irrevocably in this area of life. The right to anonymity has been virtually

eliminated. Once the violation has occurred thereafter the burden is on the violator to justify it.

(39) The learned Attorney General identified five justifications for overriding the privacy rights of Jamaicans at paragraph 158 of the written submissions. These are:

(a) providing means of establishing identifications;

(b) assisting in the distribution of goods and services to those who are entitled to receive them;

(c) prevention and detection crime;

(d) assisting in compilation of statistical information on citizens;

(e) fulfilling international obligations demanded by the Financial Action Task Force.

(40) At paragraphs 167-169 of the learned Attorney General's submissions is the proposition that Jamaicans have many numbers and all that is being done is a consolidation of the numbers in one. The numbers identified by the submissions are:

(a) birth certificate number;

(b) tax registration number;

(c) passport number;

(d) voter identification number;

(e) national insurance number.

(41) The learned Attorney General referred to a number of statutes dating from 1897 to 2015 under which it was submitted certain data were

required to be collected. Eight statutes were listed. [55] The first observation to make is that the jurisprudence in relation to privacy was not as well developed in the 1800s as it is now. The second point is that other than the statutes relating to births and deaths and revenue, the other six are based on voluntary participation. In relation to the birth and death registration statute no biometric data of any kind are required. Thirdly, until the new Charter of Rights there was no explicit right to privacy, or at least any right as extensive as this one is. Even the statute regarding the collection of statistics was voluntary because no one was compelled to participate in the censuses done by the Statistical Institute of Jamaica (Statin). Fourthly, there was no total aggregation of data across the various information silos in public bodies that would enable the state to develop a profile of each citizen in the databases. Fifthly, the fact that there is existing legislation that requires some data is no answer. Those statutes have not been brought up for scrutiny under the new Charter. Until that day comes they are presumed to conform to the dictates of the new Charter.

(42) The submission by the learned Attorney General that the mandatory registration will facilitate the compilation of statistical information is really a shortened form of what was stated in the preamble which spoke of collecting information relating to commercial, industrial, social, economic and general activities which can only be done if there is actual tracking of citizens through the NIN or NIC when used in relation to public bodies. How else could the data be collected other than by the mandatory production as required by section 41 when Jamaicans and ordinary residents seek to benefit from goods and

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[55] The Marriage Act, 1897; The Registration (Births and Death) Act, 1889; The Passport Act, 1935; The Statistics Act, 1949; The Representation of the People (Interim Electoral Reform Act, 1979; The Revenue Administration Act; The Electoral Commission (Interim) Act, 2006, The Road Traffic Act, 2015.

services offered by public bodies? If this is not so, where would the data come from? Simply registering to get a number in and of itself provides no data about the actual activity of citizens and certainly cannot easily provide a link across data sets that the government has. This explains why under the Third Schedule, where available, the various numbers that citizens obtain from various government agencies must be in the database.

(43) This conclusion is supported by Dr Chandrachud J in **Puttaswamy** (September 26, 2018) at paragraph 119:

> *119 The idea that parts of our body can be used to identify our unique selves is not new. Prints of hand, foot and finger have been used since ancient times because of their unique characteristics. Before the advent of biometric systems, however, human characteristics were compared in a manual way. Today's biometric systems hence differ from manual verification methods in that technology allows for automated comparison of human characteristic(s) in place of a regime of manual verification that existed earlier. It must be understood that biometric systems themselves do not identify individuals. For identification, additional information which is already stored in databases is needed since biometric systems can only compare information which is already submitted. Integral to such a system is the matching of a claim of identity with biometric data collected and stored earlier.*
>
> *In general, biometric applications are referred to as systems which allow one to authenticate claims. The verb 'to authenticate' can be described as 'making authentic, legally valid'. Originally, fingerprints were the most commonly known and used biometric traits, but with improvements in technology, multiple sources of biometric information have emerged. These include data related to facial features, iris, voice, hand geometry and DNA. Each trait is collected using different technologies and can be used for different purposes separately or in combination, to strengthen and improve the accuracy and reliability of the identification process.*
>
> *In general, biometric information is developed by processing extractable key features of an individual into an 'electronic digital*

template', which is then encrypted and stored in a database. When an individual connects with the system to verify his/her identity for any purpose, the information is used by matching the 'electronic digital template' saved with the biometric information presented, based on which comparison, the individual's identity will be confirmed or rejected. The intended purpose of biometric technology is to confirm the identity of individuals through a "one to one" identification check. This system compares a source of biometric data with existing data for that specific person.

(44) The justifications as explained by the learned Attorney General do make it clear that NIRA is more than just identification and verification. There has to be some additional data collection to generate the data that would then be passed to Statin.

(45) Again by way of contrast with the **Aadhaar** case where extensive evidence was placed before the court to justify what was being done, what has happened here is a sole affidavit to which is exhibited a White Paper. **Aadhaar** was 'enacted with an object of providing **Aadhaar** number to individuals for identifying an individual for delivery of benefits, subsidies and services (para 137 Ashok Bhushan J). NIRA is exceptionally wide; applies to all persons regardless of circumstances.

(46) If there were any lingering doubts about the proposed use of the Database such doubts are completely removed by section 10 (2) (a) (v) of NIRA. It reads.

The Board shall

(a) establish policies and procedures for-

(v) the harmonisation and incorporation into the Database of information required to be collected by the Authority under this Act from other databases kept by public bodies

(47) It is my respectful view that the reasons advanced by the learned Attorney General have not made a case for mandatory enrolment by adults backed by criminal sanctions.

(48) The compulsory taking of biometric information from minors is not justified. The registration of birth and death of a child does not require mandatory taking of biometric information. It is one thing to register the birth of a child but quite another to take the biometric information of that child and lock that child into a system with no possibility of opting out. This is such a violation of privacy that there must be strong justification and none has been presented. There is no evidence that there are serious problems with the registration of births and deaths of children. The state can still have information on births and deaths, still collect statistical information. Declaring the mandatory nature of the scheme unconstitutional on the ground of violation of privacy does not prevent the state from getting information it needs about births, deaths, marriages and developing a system of identification.

(49) The most remarkable thing is that no submission was made to indicate how, for example, a voluntary scheme would prevent the state from providing reliable, safe and secure identification to its citizens or ordinary residents who wish to be part of the scheme.

(50) So far as I have been able to discern the only advantage of a mandatory scheme is the speed of enrolment and that one is more likely to capture more citizen's information since the necessary assumption is that the vast majority of citizens would abide by the law. Are these reasons compelling enough to justify violation of privacy rights? The answer is no.

(51) In any event even if the scheme were voluntary having regard to what will be said on the issue of storage of the data the scheme would run afoul of the constitution.

(52) I conclude that section 20 is unconstitutional because it imposes mandatory collection of biographical and biometric information on all Jamaicans and no compelling need has been demonstrated for this requirement. This is a disproportionate means to achieve the objective of providing each citizen with reliable identification. The measure is a violation of privacy rights guaranteed by section 13 (3) (a), (j) (i), (ii).

(53) Section 15 is not unconstitutional. It simply establishes the Authority and that even in combination with other provisions does not make the provision unconstitutional.

(54) Any identification verification system can only function if there is a database storing the particulars of the data subject against which the person's identity is confirmed. Section 15 establishes the entity that has the 'original' against which the identification submitted is checked. That does not make section 15 in violation of the Charter.

(55) Initially, I was of the view that the Third Schedule was not unconstitutional but on further reflection I have come to the conclusion that it is for these reasons. It has already been established that the compulsory taking of the data is a violation of privacy rights and in the absence of justification becomes unconstitutional.

(56) One of the issues that arises is whether more information than is necessary is being taken under the Third Schedule. This is connected to the idea of data minimisation, that is, the data controller should not collect more information than is necessary for the purpose sought to be fulfilled. If one of the main objectives of NIRA is to provide a means of safe, reliable and secure identification, the question is what is the minimum data required for that? That answer would have to come by way of evidence and not submissions. Mrs Lynch Stewart's affidavit did not address that issue. Consequently, the state has not shown that the amount of information required is proportionate to the

objective. As Batts J has indicated every person has a right to bodily integrity and except there is strong justification he or she cannot be forced to part with their biometric and biographical information merely because the state says so. Freedom and democracy carry with them the idea that human beings have an inherent right to bodily integrity which must be respected by all. Excess information creates the risk of function creep which would jeopardise privacy rights.

(57) It is to be observed that in **Puttaswamy** (September 26, 2018) the majority were only to conclude that the data collected was the minimum necessary **after evidence was presented at the Supreme Court** (para 446 (f)). No such evidence has been presented in this case.

(58) Section 27 (1) is not unconstitutional because there is no evidence of what type of information will be specified by the regulation to be included on the NIC.

(59) Section 39 violates of section 13 (3) (j) (ii) because it permits third parties to have access to the Database for verification purposes. It has not been shown that that access is necessary. Section 39 (2) which has been set out above, as a matter of pure grammar, must be saying that the requesting entity is permitted to access the Database. The 'its' in the expression 'its access' could only be referring to the requesting entity. The 'its' is the pronoun replacing the compound noun 'requesting entity.' The restriction then is directed to the requesting entity to ensure that any identity information obtained by it 'through its access to the Database is only used for verification purposes.' No reason appears in the written submissions and definitely none in the oral submissions explaining why an entity requesting authentication of identification would be permitted to 'access to the Database' as distinct from simply asking the Authority to verify the information submitted to it. The word 'Database' with its capital 'D' is referring to the database kept by the Authority and no other database.

(60) Section 40 (1) suffers from the same vice and makes it plain that access to the Database may be granted by the Authority. Section 40 was not made the subject of constitutional challenge but I refer to it because it reinforces the point that under section 39 the requesting entity has access to the Database. Section 40 (1) states that the Authority 'shall maintain records of the access provided to a requesting entity for verification purposes.' What compelling objective can there be for granting access to a requesting entity?

(61) I now turn to the enforcement mechanism of the criminal law selected by the legislature. The learned Attorney General made the submission that the compulsory taking of biometric information and combined with biographical information under pain of criminal prosecution is not an interference with bodily integrity because there is no assault and therefore not unconstitutional. The absence of an assault does not lessen the interference with bodily integrity because under NIRA the state is relying on the threat of criminalisation to force the citizen to give up significant biometric information.

(62) To the extent that the individual, under threat of criminal prosecution that carries the reduced risk of imprisonment, is forced to provide biographical, biometric, and demographic data a violation of section 13 (3) (a) and (j) (i) (ii) is likely to occur because the citizen is deprived of the right and freedom to exercise control over his personal information with consequential loss of privacy. This situation is a search within section 13 (3) (a). The data collected is a violation of privacy. In my view the violation here is so plain that there is no need to get into the refined arguments of reasonable expectation of privacy.

(63) No reason was advanced on the choice of criminal sanctions other than it was a policy choice. I conclude that the means of enforcement is disproportionate to the objective sought because it deprives the citizen of any choice regarding his or her desire to seek the state's identification number of card. As stated above it was not argued that any other system would prevent the state's objective from being met. The criminalisation assumes even greater

significance where the statute does not rule out the possibility of profiling citizens.

(64) The final point made by Mr Hylton on the privacy right violation is that the safeguards in NIRA for the protection of the data are inadequate.

(65) The learned Attorney General has sought to meet this aspect of the challenge in two ways. First, she submits that the legal architecture is not yet complete in that a data protection law has not yet been passed and no regulations have been made under NIRA. Second, the provisions of NIRA as they presently stand are part of the legal framework and are adequate but in the event that they are not, they should not be struck down because the full legal framework has not been passed. Third, there are various provisions that (a) create criminal offences for unlawful use of the information in the Database; and (b) circumscribe the circumstances under which disclosure can be made. Now to the case law.

(66) In **S and Marper** the judgment of the court stated at paragraphs 103 – 104:

> *The protection of personal data is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life, as guaranteed by Article 8 of the Convention. The domestic law must afford appropriate safeguards to prevent any such use of personal data as may be inconsistent with the guarantees of this Article (see, mutatis mutandis, Z v. Finland, cited above, § 95). The need for such safeguards is all the greater where the protection of personal data undergoing automatic processing is concerned, not least when such data are used for police purposes. The domestic law should notably ensure that such data are relevant and not excessive in relation to the purposes for which they are stored; and preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored (see Article 5 of the Data Protection Convention and the Preamble thereto and Principle 7 of Recommendation No. R (87) 15 of the Committee of Ministers*

regulating the use of personal data in the police sector). The domestic law must also afford adequate guarantees that retained personal data were efficiently protected from misuse and abuse (see notably Article 7 of the Data Protection Convention). The above considerations are especially valid as regards the protection of special categories of more sensitive data (see Article 6 of the Data Protection Convention) and more particularly of DNA information, which contains the person's genetic make-up of great importance to both the person concerned and his or her family (see Recommendation No. R (92) 1 of the Committee of Ministers on the use of analysis of DNA within the framework of the criminal justice system).

104. The interests of the data subjects and the community as a whole in protecting the personal data, including fingerprint and DNA information, may be outweighed by the legitimate interest in the prevention of crime (see Article 9 of the Data Protection Convention). However, the intrinsically private character of this information calls for the Court to exercise careful scrutiny of any State measure authorising its retention and use by the authorities without the consent of the person concerned (see, mutatis mutandis, Z v. Finland, cited above, § 96).

(67) In these passages a number of themes have emerged. First and fundamental is that domestic law must afford appropriate safeguards to prevent use of the data in a manner inconsistent with the guaranteed right. Second, the need for such safeguards is enhanced when the data undergoes automatic processing and even more so when the data can be used for police purposes. Third, the domestic law must ensure that the data are relevant and not excessive in relation to the purpose for which they are stored. Fourth, the form of data storage must be such that it permits identification of the data subject for no longer than is necessary. Fifth, the domestic law must afford retained data efficient protection from misuse and abuse. Sixth, when it comes to DNA information, which reveals so much about a person's genetic makeup, the protection of the data is of utmost importance not only to the individual data subject but to his or her family since they, the family members, can be

identified as family members via DNA analysis. Seventh, the fact that the retained information was useful in crime prevent and detection was not a sufficient justification for not having strong protection for the DNA information.

(68) The Supreme Court of Mauritius in **Madhewoo** analysed the provisions in the Data Protection Act. The court was determining whether the safeguards in the statute were sufficient. The findings of the Supreme Court of Mauritius were not reversed by the Privy Council. Balancy J in the Mauritian Supreme Court held at page 34:

> *The above survey of the legal exemptions makes it manifestly clear that the personal data of individuals such as the plaintiff can be readily accessed in a large number of situations. What is even more alarming is the relatively low threshold prescribed for obtaining access to personal data. A striking illustration of that is the enactment in section 52 (iii) (supra) whereby access may be obtained merely by invoking that the disclosure of the data is necessary for the purpose of obtaining legal advice.*
>
> *What is even more objectionable is the absence of any safeguard by way of judicial control to monitor the access to personal data. The only instance where a Court Order is mentioned is under section 52 (i) (supra) and here too the basis upon which a Court Order may be granted is not set out at all.*
>
> *It is a fundamental principle of the rule of law that there can be no interference with the legal or constitutional rights of a citizen except on recognized grounds which require judicial control and sanction. This fundamental principle is well anchored in our legal traditions and framework. …*
>
> *In view of what we have stated above, it is inconceivable that there can be such uncontrolled access to personal data in the absence of the vital safeguards afforded by judicial control. The potential for misuse or abuse of the exercise of powers granted under the law would be significantly disproportionate to the legitimate aim which the defendants have claimed in order to justify the retention and storage of personal data under the Data Protection Act.*

(69) The state is under an obligation to have proper safeguards to protect the data. There is no one way by which the data can be protected. However, the judgments just referred to make it possible to suggest that the more sensitive the information collected and stored the more robust the protection must be.

(70) The Supreme Court of India added its voice to this idea that trespassing on the right to privacy mandates that they are adequate safeguards commensurate with the information in question. In **Puttaswamy** (August 24, 2017) R F Nariman J stated at paragraph 60:

> *This argument again need not detain us. Statutory provisions that deal with aspects of privacy would continue to be tested on the ground that they would violate the fundamental right to privacy, and would not be struck down, if it is found on a balancing test that the social or public interest and the reasonableness of the restrictions would outweigh the particular aspect of privacy claimed. If this is so, then statutes which would enable the State to contractually obtain information about persons would pass muster in given circumstances, provided they safeguard the individual right to privacy as well. A simple example would suffice. If a person was to paste on Facebook vital information about himself/herself, such information, being in the public domain, could not possibly be claimed as a privacy right after such disclosure. But, in pursuance of a statutory requirement, if certain details need to be given for the concerned statutory purpose, then such details would certainly affect the right to privacy, but would on a balance, pass muster as the State action concerned has sufficient inbuilt safeguards to protect this right – viz. the fact that such information cannot be disseminated to anyone else, save on compelling grounds of public interest.*

(71) Dr D Chandrachud J in **Puttaswamy** (August 24, 2017) writing for himself, Khehari CJI, Agrawal and Nazeer JJ stated at paragraph 183:

> *Privacy has been held to be an intrinsic element of the right to life and personal liberty under Article 21 and as a constitutional value which is embodied in the fundamental freedoms embedded in Part III of the Constitution. Like the right to life and liberty, privacy is not*

> *absolute. The limitations which operate on the right to life and personal liberty would operate on the right to privacy. Any curtailment or deprivation of that right would have to take place under a regime of law. The procedure established by law must be fair, just and reasonable. The law which provides for the curtailment of the right must also be subject to constitutional safeguards.*

(72) There can therefore be no doubt that there is sound jurisprudence that makes it plain that interference with privacy must have appropriate and adequate safeguards.

(73) Mr Hylton's written submissions focused more on the actual text of NIRA rather than the presence or absence of regulations. This is not to say that the presence or absence of regulations is unimportant. Mr Hylton's primary submission is captured at paragraph 123 of his written submissions. This is what was written:

> *The Act is also unconstitutional insofar as its provisions evince a failure to provide adequately for the protection of the personal data that it requires persons to submit to the Authority.*

(74) It was submitted that under section 39 (1) the Authority may grant access to the database by a requesting entity [56] that needs to use the verification services. The subsection also states the core biometric information is not to be supplied to the requesting entity. Section 39 (2) states that the requesting entity is to ensure that any 'identity information' obtained is 'only used for verification purposes.' Section 39 (4) provides for a criminal penalty on the requesting entity if the information is used for anything other than verification

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[56] Requesting entity means a public body or private entity that, or person who, submits the National Identification Number for identity information, of an individual to the Database for authentication.

purposes. The prescribed penalty is a maximum fine of $500,000.00 before a Parish Court.

(75) This provision does not go far enough to protect the Database. It does not place an affirmative duty on the third party to discard the data and metadata that would be generated through identify verification. To say that the requesting entity must is to ensure that the identity information is used only for verification is insufficient. In the absence of an affirmative duty to destroy the verification data why would the third party do that? Information about consumers is the gold of the digital age. Such a duty to destroy that data must be backed up by severe penalties so that if a breach is found then the consequences must be harsh.

(76) Mr Hylton contended that the maximum fine of $500,000.00 is so low that the requesting entity may make a calculated decision to breach the law because the fine is not sufficiently prohibitive and the gain to be made may be so great in relation to the fine that the risk is worth taking. I agree with Mr Hylton on this point.

(77) I have already examined section 39 from the standpoint of third party access and that analysis needs to be kept in mind at this juncture.

(78) While it may be said that the creation of a criminal offence offers protection I agree with Mr Hylton that the fine is not sufficiently high to be a deterrent. In my view it must be at a level that inflicts serious financial loss on the entity if the offence is uncovered and prosecuted. The nature of this offence is such that detection is going to be difficult in the absence of a whistleblower.

(79) Data misuse violations are not like murder where at the very least there is a missing person and that fact alone will precipitate, at the very least, curiosity as to the possible whereabouts of the person. The nonrivalrous nature of data makes misuse and abuse very easy. Violations can often go undetected for a

very long time. Hacking can take place and the entity hacked may not make such a disclosure. And once the data is taken there is hardly anything that can be done about the theft. The data can be sold or displayed on the internet. Mr Julian Assange of Wikileaks fame has forcibly brought to our collective consciousness this risk.

(80) Misuse and abuse of data, in many instances, are either accidentally uncovered, or made known by a whistleblower, and in rare instances, the misuser does something with the data that causes the alert ones among us to know that that particular misuse could only have occurred because there was access to the data. This is why there must be robust systems that minimise data theft. The punishment for data misuse and abuse must be such that there is a strong deterrent element in the data protection regime. The old saying prevention is better than cure applies in the context of data protection.

(81) In this case, if the third party is given access to the Database, as already contemplated by NIRA, then that fact alone undermines much of the other provisions cited by the learned Attorney General that she says offer sufficient protection.

(82) I would add to this, that there is no provision for auditing the Authority itself to see if it is complying with the law. The provisions of NIRA establishing the Board of Management contains no provision for this. Section 10 (1) states that 'the Board is responsible for overseeing the general administration of the Authority.' The Board is to 'establish policies and procedures' for a number of things set out in section 10 (2). The closest provision that might include an audit function to determine whether the Authority may be misusing, abusing or not using the data for statutory purposes is section 10 (2) (a) (vii) and (viii) which states that the Authority shall establish policies and procedures for

> *(vii) the preservation, protection and security of all information or data collected, obtained, maintained or stored in the Database;*

…

(ix) on-going research on developments and best practices in identity management.

(83) In **Puttaswamy** (September 26, 2018), there was extensive analysis of the actual text of the Aadhaar Act and regulations as well as how it operated in practice. The majority found, on the evidence, that there were sufficient safeguards. Even, with that the majority modified the statute in significant ways. This and other matters will be brought out by way of comparing and contrasting the Aadhaar Act and NIRA.

(84) The learned Attorney General pointed out NIRA has no regulations and is not operational. Therefore, I will only refer to those aspects of the majority's conclusion that dealt with non-operational issues. First, the Supreme Court of India explicitly found that the data collected was the minimum required for what the statute was designed to do (para 447 (1) (b) (i)). There is no evidence, which could have been given, from Mrs Lynch Stewart that the principle of data minimisation is reflected in the Third Schedule. There is no evidence that the biographical and biometric data collected are the absolute minimum required for the NIRA to function. Second, there was no collection of purpose or details of transactions (para 447 (1) (b) (i)). Under NIRA it is clear that the NIN and NIC will be used to collect data that would enable tracking of 'social, economic and general activities of the citizens of Jamaica and individuals who are ordinarily resident in Jamaica.' Third, the information collected remained in silos (para 447 (1) (b) (i)). Under NIRA it is proposed that data across all government databases are to be linked and thus the legal architecture will facilitate profiling of persons and inevitably tracking through their transactions with public bodies. None of this is possible under the Aadhaar system. Fourth, the authentication process in Aadhaar was not online which meant that the entity requesting the information did not have access to the database (para 447 (1) (b) (i)). NIRA explicitly speaks of an entity requesting authentication having access to the Database. Fifth, there was a

finding that enabled the majority to uphold the statute was that there were two oversight institutions provided for in the statute (para 447 (b) (iv)). Sixth, '[d]uring authentication no information about the nature of the transaction … is obtained (para 447 (b) (v)). Under NIRA for the Database to yield evidence of 'social, economic and general activities of the citizens of Jamaica and individuals who are ordinarily resident in Jamaica' there must be evidence captured regarding the nature of the transaction. Seventh, entities requesting authentication were not allowed to **store** biometrics captured during the authentication process (para 447 (b) (vi)). NIRA does not say that the requesting entity cannot store any identification data it may have acquired from the Authority during the authentication process. Section 39 (2) of NIRA speaks only to how the information is used but does not prohibit storing of the information once obtained. There seems to be an inconsistency between section 39 (2) and (3) (b). Section 39 (2) states that the requesting entity is to use the information obtained through access to the Database for verification process only but yet in section 39 (3) (b) there is mention of the requesting entity informing the data subject of the **uses** 'to which the information received through its access to the Database may be put by the requesting entity.' If section 39 (2) contemplates only one type of use, namely, verification, why is section 39 (3) (b) speaking of uses (the plural) which itself clearly implies the permissibility of storage and use other than verification? As pointed out earlier, the penalty for such misuse is a paltry JA$500,000.00; a clear invitation to misuse and abuse by a cash right requesting entity which after doing a cost/benefit analysis may well conclude that it will absorb the fine as simply the cost of doing business. Eighth, the court read into section 33 (1) of the Aadhaar Act a right to an opportunity to be heard before information captured was shared (para 447 (d) (iii)). NIRA has no such right. Under section 40 (1) the data subject under NIRA has the right to be provided with a record of requests made to the Authority for verification. Ninth, the Aadhaar scheme was voluntary and directed at a specific group for a very, very specific and limited purpose and there was not criminal sanction for not enrolling. NIRA applies to

all Jamaicans and ordinary residents, for every purpose and backed by criminal sanction. Tenth, the Aadhaar system made provision for the benefit to be received once there was other means of identification if the person did not have an Aadhaar number (para 447 (2) (l) (ii); on this point see also Dr Chandrachud J at para 46). NIRA does not contemplate any such possibility. Eleventh, the majority held that enrolment of children required consent of parents and on attaining age of majority shall be given the opportunity to opt out. NIRA has none of this (para 447 (3) (b)). Twelfth, the majority held that the Aadhaar number could not be made a prerequisite for school admission because each child between 6 - 14 under the Indian Constitution has a right to education and no child is to be denied any benefit if the child has no Aadhaar number. Further the benefit is to be provided once there is proper identification (para 447 (3) (c) (f)). The comparative provision under Jamaica's Charter is section 13 (3) (k) (ii). The majority of the Indian Supreme Court read the restriction on Aadhaar into the legislation. Twelfth, to deal with the situation of false negatives, the majority indicated that suitable provision be made for alternative identification because fingerprints and irises can indeed change over a period of time (para 447 (2) (l)). NIRA has no provision for this eventuality thus resulting in rejection. Thirteenth, the majority found that parts of section 57 of the Aadhaar Act were unconstitutional on the basis that authorising by 'any body corporate or person' to take advantage of authentication purposes 'for any purpose' was too broad because it would enable 'commercial exploitation of an individual biometric and demographic information by private entities' (para 477 (4) (h)).

(85) Section 39 (2) of NIRA has no restriction on the purposes for which verification may be sought. It simply says that the identity information is be used only for verification purposes. The real question is verification for what purpose? When one bears in the mind the definition of requesting entity under NIRA is clear that it includes not only corporate bodies but natural persons as well as unincorporated bodies for it says 'private entity.' The compound noun

‘private entity’ is not a legal term of art and neither is it defined in the statute. An unincorporated body, usually organisations like youth clubs, fall readily within the expression ‘private entity.’

(86) Regarding data protection Dr Chandrachud J differed from the majority. His Lordship said at paragraph 339 (14) (g):

> *While the Act creates a regime of criminal offences and penalties, the absence of an independent regulatory framework renders the Act largely ineffective in dealing with data violations. The architecture of Aadhaar ought to have, but has failed to embody within the law the establishment of an independent monitoring authority (with a hierarchy of regulators), along with the broad principles for data protection. This compromise in the independence of the grievance redressal body impacts upon the possibility and quality of justice being delivered to citizens. In the absence of an independent regulatory and monitoring framework which provides robust safeguards for data protection, the Aadhaar Act cannot pass muster against a challenge on the ground of reasonableness under Article 14.*

(87) What is important to note is that the majority and Dr Chandrachud J proceeded on the premise that oversight of the data controller was necessary. The difference was that the majority thought that the existing structure was sufficient and Dr Chandrachud J thought that it was not. While respecting and understanding the view of the majority I prefer Dr Chandrachud J on this aspect. I adopt the following paragraph from his Lordship’s judgment at paragraph 236 and apply with such modifications are necessary for application to NIRA. His Lordship stated:

> *An independent and autonomous authority is needed to monitor the compliance of the provisions of any statute, which infringes the privacy of an individual. A fair data protection regime requires establishment of an independent authority to deal with the contraventions of the data protection framework as well as to proactively supervise its compliance. The independent monitoring authority must be required to prescribe the standards against which*

compliance with the data protection norms is to be measured. It has to independently adjudicate upon disputes in relation to the contravention of the law. Data protection requires a strong regulatory framework to protect the basic rights of individuals. The architecture of Aadhaar ought to have, but has failed to embody within the law the establishment of an independent monitoring authority (with a hierarchy of regulators), along with the broad principles for data protection. The principles should include that the means of collection of data are fair and lawful, the purpose and relevance is clearly defined, user limitations accompanied by intelligible consent requirements are specified and subject to safeguards against risks such as loss, unauthorised access, modification and disclosure. The independent authority needs to be answerable to Parliament. In the absence of a regulatory framework which provides robust safeguards for data protection, the Aadhaar Act does not pass muster against a challenge on the ground of Article 14. The law fails to meet the norms expected of a data protection regime which safeguards the data of 1.2 billion Indians. The absence of a regulatory framework leaves the law vulnerable to challenge on the ground that it has failed to meet the requirements of fair institutional governance under the rule of law.

(88) The point I take from this passage is the need for a strong independent and autonomous body which has the power to examine the operations of the Authority and report to an institution that is independent of the Authority. It should have the power to impose sanctions on the Authority itself or individual members of the Authority, where appropriate, who are found in serious breach of the law. Not every breach rises to the level of a crime.

(89) Sections 48 to 54 are the provisions setting the other criminal offences and penalties under NIRA. Section 48 creates the offences of (a) impersonating or attempting to impersonate a registered individual; (b) allowing or inducing another person to use or attempt to use a NIC to impersonate a registered individual; and (c) impersonating or attempting to impersonate another by providing false information. This offence does not deal with the misuse or abuse of the data collected by the Authority.

(90) Section 49 criminalises any person who collects or attempts to collect identity or demographic information when not authorised to do so.

(91) Section 50 creates the offence of wilfully providing false information to the Authority or wilfully obstructing or impeding the Authority.

(92) Section 51 seeks to prevent any person from making, producing, manufacturing, printing, binding or distributing any document purporting to be a NIC or use anything to produce a document purporting to be a NIC.

(93) Section 53 criminalises the provision of false information to the Authority while section 54 criminalises wilful destruction of, tampering with a NIC. There is also an offence under section 54 of unlawfully depriving or dispossessing a NIC holder.

(94) None of these offences punishes access to the Database. They are directed at protecting the data collection process, the manufacturing/destruction or tampering with a NIC, and unlawful dispossession.

(95) Section 52 creates offences of unlawfully and intentionally (a) gaining access to the Database; (b) modifying the content of the Database; (c) intercepting any function of the Database. The provision criminalises any unlawful and intentionally causes (a) degradation, failure, interruption or obstruction of any programme or data in the Database; or (b) denial of access to, or impairment of the function of, any program or data in the Database.

(96) The penalty for a section-52-offence is a maximum of 25 years in prison and an unlimited fine. Section 52 does not deal with misuse and abuse by the Authority itself.

(97) Google, Facebook and other entities of that nature have shown the value of data, personal and otherwise. Control over personal data gives power to the data controller. Once that data are taken there is no ‘untaking’ even if the

misuser is identified and punished. We also know that even finding the misuser can be quite challenging given that data can move seamlessly across national boundaries.

(98) There is a further point made by Mr Hylton and it is convenient to place it here. This has to do with the risk of the Authority obtaining DNA information from the Custodian of DNA information under the DNA Evidence Act, and having received that DNA information, disseminating it without proper safeguards. This is how Mr Hylton envisaged such a possibility.

(99) One of the challenges made by Mr Hylton is that under section 45 there is the real possibility (and I would add probability) that a person's DNA profile, if in possession of the Authority, can be disclosed without a court order. That is to say, DNA, the most important biometric of any human being does not receive the same level of protection as other biometric data which are, in comparison to DNA, of lesser significance though quite important. DNA information can reveal the most intimate aspects of persons. It can tell what diseases they are suffering from, any hereditary condition they may have, the likely treatment modality. The can be said of irises.

(100) This is how counsel suggested that it can occur. Mr Hylton submitted that under section 6 (1) (e) the Authority is to develop policies, procedures and protocols for the collection, use and sharing of information contained in the Database. There is no adjective qualifying or limiting the noun 'information.' Also, 'information' is not defined in the statute. The only expressions where 'information' is a part of are 'biographic information', 'biometric information', 'demographic information' and 'identity information.' Sheer logic compels the conclusion that information is the genus and therefore the expression biographic, biometric information, demographic and identity information are species that make up the genus but these species are not exhaustive since information being the genus necessarily is wider than the specific types of information named. If the statute makes that distinction that it

seems that it is contemplated that other types of information may be or will be in the Database.

(101) Section 41 which requires a public body to demand and the person to produce a NIN or NIC is a likely source of the other information in the Database. These additional data are neither biometric, demographic, nor biographical. The data would be or may be based on the use by the citizen at the public body. Once the NIN is seeded throughout and across public body databases this unique identifier moves from simply being a source of providing proper identification to a means of linking the individual across databases. The preamble to the statute makes it exceptionally clear that is the view that the Database is to be the source of information for 'the collection, compilation, analysis, abstraction, … information relating to the commercial, industrial, social, economic and general activities [of Jamaicans and ordinary residents].' There is no specific provision that prohibits profiling by the Authority itself. Section 17 (e) reinforces this by saying that the Authority may use or cause the information in the Database for, among other things, 'compiling and reporting statistical information derived from analysing the information stored in the Database.' But reporting to whom and in what form and for what purpose? The statute does not say that only Statin can get this information.

(102) This Database is part of what is called the National Identification System which the Authority is to promote, establish and regulate (section 3 (a)). The definition of National Identification System does not say 'means' but rather 'includes' the items listed in the definition. This means that the definition is not exhaustive since the word 'includes' is not a word of limitation but a word of expansion which means that the Database may or will contain information other than information for identification purposes. Thus NIRA is not just an identification system.

(103) According to Mr Hylton, the DNA Evidence Act has been amended by NIRA to permit the Custodian of DNA information under the DNA Evidence

Act to disclose information in the DNA Register to the Authority at the request of the Authority solely for the purpose of verifying the identity of an individual. NIRA does not say what the Authority is to do with the DNA it has received from the DNA Custodian. There is no prohibition against NIRA keeping that DNA after the identification has been made. Indeed, where else would such information be kept but in the Database or as part of what is called the National Identification System which according to the definition is not exhaustively defined? Such DNA is excluded from the definitions of biographical, biometric or core biometric information under NIRA then it necessarily means that DNA that comes into the possession of NIRA via the DNA Evidence Custodian would now be classified as information to which section 6 (1) (e) applies.

(104) According to Mr Hylton, even with the definition in NIRA of the expression 'identity information', DNA is excluded because that phrase means 'biographical information and biometric information of an individual' and it has been established that the definition biographical and biometric information does not include DNA and therefore is within the genus 'information.' This means that there is no prohibition against the Authority disclosing DNA information in its possession because section 43 (1) only prohibits the Authority from disclosing 'identity information' except in the instances enumerated in the subsection, and not information. Further because DNA in the possession of the Authority is not within the definition of 'identity information' it follows that regime established by section 43 (2) that requires the Authority to seek a judicial order to disclose 'identity information' does not apply to DNA that the Authority obtains from the DNA Evidence Custodian.

(105) I would add that there is no prohibition against the Authority getting DNA information about any individual. There is nothing in NIRA that states that the Authority can only have in its possession the things specified in the Third Schedule.

(106) This means, Mr Hylton suggested, that DNA should it come into the possession of the Authority its disclosure is protected solely by the discretion of the Authority without any judicial oversight. Mr Hylton submitted that under section 43 (1)(e) the Authority is authorised to disclose identity information stored in the database 'where the Act authorises disclosure.'

(107) I had indicated that there was another issue that arose which would be dealt with under the right to privacy. I now deal with that issue. The entire legislation and the statement of purpose of the legislation make it plain that the NIN and the NIC are not just for verification of identification. Before this statute, as Mrs Lynch Stewart herself has noted, there were other forms of identification such as passports, driver's licences, and the voter identification cards (paragraph 23 of affidavit). All these other forms of identification are voluntary transactions. No Jamaican is compelled by any Act of Parliament to obtain any of these other forms of identification. There is no evidence that the system of producing these forms of identification has become so compromised that they are valueless, yet section 41 of NIRA says that the Jamaican must have a NIN or NIC in order to be facilitated in securing goods and services from public body as defined in NIRA.

(108) Section 41 as presently worded requires the NIN or NIC on each engagement with a public body for the purpose of getting goods and services even if the person has other forms of valid, reliable, and uncompromised identification. As Mr Hylton QC submitted, in this context, the purpose of asking for the NIN or the NIC if the person has other forms of identification could not be only for the purpose of identification or verification but must be for keeping track of the person's activities at least at times when they engage with public bodies to obtain goods or services. This submission is supported by section 10 (2) (a) (v) which has been set out and referred to already. That provision indicates that the Board of Management of the Authority is to establish policies and procedures to harmonise and incorporate information from other databases.

(109) Mrs Lynch Stewart said as much in paragraph 16 of her affidavit when she said the national identification system 'will enhance the Government's capacity to implement a coherent e-government and 'joined – up Government' strategy. This way of explaining the matter was not explained. The language must be given meaning since it has been placed before the court. NIRA is about massive data collect, storage, retrieval and use of data on Jamaicans. NIRA applies to all Jamaicans without exception. This must mean babies, toddlers, children, teenagers, young adults, adults regardless of age. It applies to persons in retirement homes, homes for the indigent, those in prison.

(110) The preamble states that the identification system is to 'facilitate the collection, compilation, analysis, abstraction and publication of statistical information relating to the commercial, industrial, social, economic and general activities and conditions of the citizens of Jamaica'. The question that arises is how can economic and general activity be collected from a system that simply collects identification information and nothing else?

(111) When Part A of the Third Schedule is examined and the information that must be given is perused, there is absolutely nothing there from which the economic and general activity of the Jamaican can be determined. Under Part C of the Third Schedule where demographic information is optional the closest one gets collection of information that may permit collection of economic and general activity relates to education, profession, and occupation of the enrolled person. This additional information is purely voluntary and cannot be compelled. Part D of the Third Schedule compulsorily demands a variety of numbers - the TRN, driver's licence, passport number, NIS number, birth entry number, PATH number, national identification number. elector identification number, number if registered under the Disabilities Act and the national health fund number.

(112) My understanding of Mrs Lynch Stewart's evidence at paragraph 16 when read in the context of her entire affidavit is that at present there is nothing linking all these numbers that Jamaicans have and so there is no 'joining up' of all these numbers. Put another way, these numbers exist in their own silos and there is at present no easy cross referencing. If the idea is that all these are to be linked and meaningful use is made of the data generated by the linking of the NIN to the databases, then it makes perfect sense to compel production of the NIN or NIC at every public body at which the Jamaican requires goods and services regardless of the reliability of the other forms of identification provided. But again the existence of a single number in and of itself cannot permit anyone to collect data on economic activity or general activity of any single Jamaican unless there is a mechanism to collect such data generated by the use of the NIN or NIC.

(113) One can see the great breadth of NIRA. By contrast, one of the striking differences between the Aadhaar scheme that was at issue in the **Puttaswamy** case is that in that case the legislation was very clear that its only purpose was to provide reliable identification and nothing more. There was no evidence in that case that it was ever the intention of the Indian government to use the data it collected for anything other than identification. There is no provision in NIRA that prevents aggregation of information by the state on the activities of Jamaicans who wish to take advantage of goods and services offered by public bodies.

(114) There is no express provision preventing the Authority from storing data regarding the purpose for which the requesting entity is seeking authentication. There is no explicit ban on the collection of metadata other than metadata related to the process of authentication.

(115) I therefore conclude that section 39 of NIRA creates the high risk of data misuse and abuse by third party access to the Database. No reason was advanced by the learned Attorney General justifying third party access to such

sensitive information as distinct from verification. Section 39 does not have sufficient protection against misuse and abuse by third parties. There is no rational connection between permitting third party access and the objectives of the law as set out in the preamble. If third parties need to have identification verified, surely that can be done without granting them access to the database. Section 39 is likely to violate section 13 (3) (j) (ii) and if brought into force in its present state will violate Mr Robinson's right to privacy under section 13 (3) (j) (ii) and is therefore unconstitutional.

(116) Mr Hylton QC made one further point. Mr Hylton QC submitted that under section 6 (1) (e) the Authority as part of its functions is to develop policies for sharing the information collected under section 15. He submitted that the word 'information' was a euphemism for the personal information because that is what is stored in the database. He submitted that the sharing under section 6 (1) (e) would be regulated by the Authority's policies and not by a stricter regime such as judicial oversight exercisable on stated criteria.

(117) In effect, Mr Hylton QC was saying that as part of the protection regime for this kind of data there is no proper accountability mechanism for the Authority. It develops its own policy for sharing.

(118) At this point since no policy has been published it is impossible to say whether or not the policy developed will be compatible with the constitution. The key thing here is the content of the policy and that is still an unknown. What I will say is that if the statute is brought into force and there is no policy then prima facie there would be a violation of the right to privacy because as the law has made clear where sensitive information is collected or given there must be adequate safeguards. I am not prepared at this stage to say that section 6 (1) (e), as it presently stands, is unconstitutional.

(119) There is a final point I wish to make on this issue of adequate protection. It was not argued by the parties but it was a point that loomed large

in the discussion of the Supreme Court of India's **Puttaswamy** case (September 26, 2018). That decision was relied on by both parties for different points. However, it would be remiss of me not deal with the issue of a court order for disclosure of data on the basis of national security.

(120) Under section 43 (2) of NIRA the Authority may apply to the court, without notice to the affected person, for an order for disclosure of the identity of the data subject on four grounds including that of national security. The term national security is not defined in the legislation. The problem here is that there is a body of jurisprudence from India and elsewhere that suggests that national security issues are policy matter and not legal matters. The body of jurisprudence strongly indicates matters of national policy are not justiciable. If this is correct law, then the inclusion of the ground of national security would be like a Trojan Horse.

(121) In **Puttaswamy** (September 26, 2018). I will cite the judgment of Ashok Bhushan J. I now cite paragraphs 239 – 244:

> *Attacking on subsection (2) of Section 33, it is contended that although (i)disclosure of information has been permitted in the interest of the national security but there is no definition of national security, (ii) there is no independent oversight disclosure of such data on the ground of security, (iii)the provision is neither fair nor reasonable. Section (2) of Section 33 is disproportionate and unconstitutional.*
>
> *240. Section 33 subsection (2) contains two safeguards. Firstly, disclosure of information is to be made in the interest of national security and …*
>
> *This Court in Ex. Armymen's Protection Services P.Ltd. Vs. Union of India (UOI) and Ors., 2014 (5) SCC409**,** has held that what is in the interest of national security is not a question of law but that it is matter of a policy.*

(122) If this is correct then it suggests that the national security standard threshold is easily met and therefore offers no protection in reality.

(123) What I can say is that all this discussion has highlighted the fact that protection offered by the statute is not sufficient to secure comprehensive data of the kind proposed to be collected and stored for generations to come.

C. *The right to vote*

(1) Section 13 (3) (m) reads:

> *(m) the right of every citizen of Jamaica-*
>
> > *(i) who is qualified to be registered as an elector for elections to the House of Representatives, to be so registered; and*
> >
> > *(ii) who is so registered, to vote in free and fair elections;*

(2) The learned Attorney General, indicated, and I agree, that this alleged violation was not pleaded in the fixed date claim form. It only arose in the affidavit of Mr Robinson and in oral submissions. The fixed date claim form was not amended to include this violation. This means that no decision can be rendered on this because it was not properly raised by Mr Robinson.

D. *The right to a passport*

(1) Section 13 (3) (n) states:

> *(n) the right of every citizen of Jamaica to be granted a passport and not to be denied or deprived thereof except by due process of law;*

(2) Mr Robinson's complaint is that sections 15 and 60 of NIRA are likely to violate the right to a passport by requiring a NIN as a precondition for being issued with a passport. [57]

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[57] Section 3 of the Passport Act is to be amended to read:

(3) Other than the desire to have all Jamaicans linked to a single number no compelling reason has been advanced by the evidence and the submissions of the learned Attorney General of why every Jamaican needs a NIN in order to exercise the now constitutional right to a passport and if they don't apply are at risk of criminal prosecution. The amendment makes it clear that the requirement does not apply to passports issued before NIRA comes into force.

(4) There is no evidence that the issuing of passports has become so compromised that an additional layer of identification is needed. In fact, until this requirement there could not have been many persons who thought that a passport was an unreliable means of identification. There is no evidence of how many, if any, of multiple applications for passports there have been to warrant what is in effect, a compulsory requirement to obtain a NIN as a

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(4) Every Jamaican passport shall include the National Identification Number of the holder of the passport.

(5) In this Act, National Identification Number means the National Identification Number assigned under the National Identification and Registration Act to the holder of the passport.

(6) For the avoidance of doubt, nothing in subsection (4) shall be construed to apply to a passport issued before the appointed day bringing into force the amendments to the Passport Act set out in the Sixth Schedule to the National Identification and Registration Act, 2017.

The Passport Regulations, 1962 are amended as follows

Paragraph 14 1. In sub-paragraph (2), insert immediately after the word "nationality" the words ", the National Identification Number assigned under the National Identification and Registration Act to the holder of the passport".

2. In sub-paragraph (6) (b), insert immediately after the words "date of birth," the words "the National Identification Number assigned under the National Identification and Registration Act to the holder of the passport,".

precondition for exercising a constitutional right. There is no evidence that passports have been issued to persons who turned out to be someone else. I am not saying that this has not occurred but there is no evidence of that or the extent of it assuming such evidence is available to warrant violating the right to passport.

(5) The right to a passport has been granted to every citizen and they are not to be denied or deprived except by due process of law. Due process is not simply the existence of law. The concept covers the content of a law as well as any procedure. What is of concern is whether the law itself as well as any procedure is fair, just, and proportional to the objective sought to be achieved.

(6) The first requirement for denial or deprivation of a passport is that there must be a law. But that is only the starting point. The fact that a law has been passed is necessary but not sufficient. Where the law seeks to compromise a constitutional right that law must itself be shown to be 'demonstrably justified in a free and democratic society.' The best argument seems to be administrative convenience. Respectfully, that is not a sufficient reason to violate a constitutional right. If that were permitted then no constitutional right could survive administrative convenience. Administrative convenience, would fall within what Dickson CJ calls in **Oakes** trivial reasons and is not sufficiently important to compromise a constitutional right. Thus in the absence of evidence of why it is necessary to make the possession of a NIN a precondition for securing a passport then the claimant must succeed and the amendment to the Passport Act requiring a NIN as a precondition to enjoy the constitutional right to a passport is unconstitutional.

(7) On the question of whether there is a violation of section 13 (3) (r) of the Jamaican Charter, I am of the view that that provision is not violated. It is true that section 13 (3) (n) and section 13 (3) (r) use the expression 'due process.' It must be noted that section 13 (3) (r) has a qualifying clause and so the whole provision reads 'the right to due process **as provided by section 16**.'

Section 16 of the Jamaican Charter refers to a person charged with a criminal offence whereas section 13 (3) (n) has no such reference. Therefore, NIRA does not violate section 13 (3) (r) nor is it likely to do so and so Mr Robinson fails on this part of the claim.

E. *The right to freedom of the person*

(1) Section 13 (3) (p) states:

(p) the right to freedom of the person as provided in section 14; [58]

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[58] 14.-(1) No person shall be deprived of his liberty except on reasonable grounds and in accordance with fair procedures established by law in the following circumstances-

(a) in consequence of his unfitness to plead to a criminal charge;

(b) in execution of the sentence or order of a court whether in Jamaica or elsewhere, in respect of a criminal offence of which he has been convicted;

(c) in execution of an order of the Supreme Court or of the Court of Appeal or such other court as may be prescribed by Parliament on the grounds of his contempt of any such court or of another court or tribunal;
(d) in execution of the order of a court made in order to secure the fulfilment of any obligation imposed on him by law;

(e) for the purpose of bringing him before a court in execution of the order of a court;
(f) the arrest or detention of a person
(i) for the purpose of bringing him before the competent legal authority on reasonable suspicion of his having committed an offence; or

(ii) where it is reasonably necessary to prevent his committing an offence;
(g) in the case of a person who has not attained the age of eighteen years, for the purpose of his care and protection;
(h) the detention of a person-
(i) for the prevention of the spreading of an infectious or contagious disease constituting a serious threat to public health; or

(ii) suffering from mental disorder or addicted to drugs or alcohol where necessary for his care or treatment or for the prevention of harm to himself or others; or
(i) the arrest or detention of a person
(i) who is not a citizen of Jamaica, to prevent his unauthorized entry into Jamaica; or

(ii) against whom action is being taken with a view to deportation or extradition or other lawful removal or the taking of proceedings relating

(2) The submission is that sections 4, 20 and 41 of NIRA are likely to violate this provision of the Charter. This breach, as the learned Attorney General pointed, was not pleaded in the fixed date claim form and so no remedy can be granted by virtue of this provision of the Charter.

F. *The right to freedom of property rights*

(1) Section 13 (3) (q) reads

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(2) Any person who is arrested or detained shall have the right

(a) to communicate with and be visited by his spouse, partner or family member, religious counsellor and a medical practitioner of his choice;

(b) at the time of his arrest or detention or as soon as is reasonably practicable, to be informed, in a language which he understands, of the reasons for his arrest or detention;

(c) where he is charged with an offence, to be informed forthwith, in a language which he understands, of the nature of the charge; and

(d) to communicate with and retain an attorney-at-law.

(3) Any person who is arrested or detained shall be entitled to be tried within a reasonable time and

(a) shall be

(i) brought forthwith or as soon as is reasonably practicable before an officer authorized by law, or a court; and

(Ii) released either unconditionally or upon reasonable conditions to secure his attendance at the trial or at any other stage of the proceedings; or

(b) if he is not released as mentioned in paragraph (a)(ii), shall be promptly brought before a court which may thereupon release him as provided in that paragraph.

(4) Any person awaiting trial and detained in custody shall be entitled to bail on reasonable conditions unless sufficient cause is shown for keeping him in custody.

(5) Any person deprived of his liberty shall be treated humanely and with respect for the inherent dignity of the person.

(q) protection of property rights as provided in section 15; [59]

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[59] 15.-(1) No property of any description shall be compulsorily taken possession of and no interest in or right over property of any description shall be compulsorily acquired except by or under the provisions of a law that

(a) prescribes the principles on which and the manner in which compensation therefor is to be determined and given; and

(b) secures to any person claiming an interest in or right over such property a right of access to a court for the purpose

(i) establishing such interest or right (if any);

(ii) determining the compensation (if any) to which he is entitled; and

(iii) enforcing his right to any such compensation.

(2) Nothing in this section shall be construed as affecting the making or operation of any law so far as it provides for the taking of possession or acquisition of property

(a) in satisfaction of any tax, rate or due;

(b) by way of penalty for breach of the law, whether under civil process or after conviction of a criminal offence;

(c) upon the attempted removal of the property in question out of or into Jamaica in contravention of any law;

(d) by way of the taking of a sample for the purposes of any law;

(e) where the property consists of an animal, upon its being found trespassing or straying;

(f) as an incident of a lease, tenancy, licence, mortgage, charge, bill of sale, pledge or contract;

(g) by way of the vesting or administration of trust property, enemy property, or the property of persons adjudged or otherwise declared bankrupt or insolvent, persons of unsound mind, deceased persons, or bodies corporate or unincorporate in the course of being wound up;

(h) in the execution of judgments or orders of courts;

(i) by reason of its being in a dangerous state or injurious to the health of human beings, animals or plants;

(j) in consequence of any law with respect to the limitation of actions;

(k) for so long as may be necessary for the purposes of any examination, investigation, trial or inquiry or, in the case of land, the carrying out thereon

(i) of work of soil conservation or the conservation of other natural resources; or

(ii) of agricultural development or improvement which the owner or occupier of the land has been required and has, without reasonable and lawful excuse, refused or failed to carry out.

(3) Nothing in this section shall be construed as affecting the making or operation of any law so far as it

(a) makes such provisions as are reasonably required for the protection of the environment; or

(2) Mr Robinson alleges that sections 30 (states that the NIC is the property of the Authority) and 36 (4) (the holder of the NIC is to return it if he or she no longer falls within the category of persons that need to be registered under section 4 of NIRA) of NIRA violates this Charter right.

(3) Section 15 of the Charter speaks to property of any description. Now the data that is to be collected will undoubtedly constitute information which itself is a species of property which can be disposed of like any other species of property.

(4) In the context of this case it appears that the way in which the argument has to be put is that the biometric and biographical information or some parts of either would be placed on the card and to that extent the information acquired from the applicant would be acquiring data that when put together

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(b) provides for the orderly marketing or production or growth or extraction of any agricultural product or mineral or any article or thing prepared for the market or manufactured therefor or for the reasonable restriction of the use of any property in the interests of safeguarding the interest of others or the protection of tenants, licensees or others having rights in or over such property.
(4) Nothing in this section shall be construed as affecting the making or operation of any law for the compulsory taking of possession in the public interest of any property, or the compulsory acquisition in the public interest of any interest in or right over property, where that property, interest or right is held by a body corporate which is established for public purposes by any law and in which no monies have been invested other than monies provided by Parliament.

(5) Where an order is made under any law which provides for the compulsory acquisition of property, the court may have regard to

(a) any hardship that may reasonably be expected to be caused to any person by the operation of the order; or
(b) the use that is ordinarily made of the property, or the intended use of the property.

(6) In this section "compensation" means the consideration to be given to a person for any interest or right which he may have in or over property which has been compulsorily taken possession of or compulsorily acquired as prescribed and determined in accordance with the provisions of the law by or under which the property has been so compulsorily taken possession of or acquired.

can amount to property which itself can be disposed of like any other form of property.

(5) While I understand the point about property, it seems to me the context of this case suggests that the compulsory taking of biometric and biological information is best dealt with as a privacy matter. I am not prepared to accept that there is enough evidence from the claimant that this Charter right has been violated in the way it was presented and so this aspect of the claim fails.

G. *The right to due process*

(1) Section 13 (3) (r) provides

(r) the right to due process as provided in section 16; [60]

(2) Mr Robinson alleges that his right to due process is likely to be violated by sections 6 (1) (e) (imposed duty on Authority to develop policies, procedure and protocols for collection, processing, use and sharing of information of

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[60] 16.-(1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

(2) In the determination of a person's civil rights and obligations or of any legal proceedings which may result in a decision adverse to his interests, he shall be entitled to a fair hearing within a reasonable time by an independent and impartial court or authority established by law.

(3) All proceedings of every court and proceedings relating to the determination of the existence or the extent of a person's civil rights or obligations before any court or other authority, including the announcement of the decision of the court or authority, shall be held in public.

(4) Nothing in subsection (3) shall prevent any court or any authority such as is mentioned in that subsection from excluding from the proceedings, persons other than the parties thereto and their legal representatives

(a) in interlocutory proceedings;

(b) in appeal proceedings under any law relating to income tax; or

database), 15 (establishes the Authority), 43 (1) (non-disclosure of identity information stored in the database) and 60 (amending existing laws listed in the Sixth Schedule) of NIRA. When section 16 of the Charter is examined it is plain that it is dealing with due process in the context of court proceedings (civil and criminal). Sections 6 (1) (e), 15 and 60 of NIRA do not violate section 13 (3) (r) of the Charter.

CONCLUSION

[248] Proportionality is the test for constitutionality of legislation. The **Oakes** test is the test to be applied. Privacy under the Charter includes bodily privacy, informational privacy, and privacy of choice.

[249] Sections 6 (1) (e) and 43 (1) of NIRA violates sections 13 (3) (j) (ii) of the Charter. They do not provide sufficient safeguards against misuse and abuse of the data collected. There is no independent oversight body that is mandated to conduct an audit of the Authority and take action where it is found that employees individually or the Authority as an institution has violated NIRA.

[250] Compulsory taking of biographical and biometric data is a violation of privacy rights under section 13 (3) (a), (j) (i), (ii) of the Charter. Therefore, section 20 of NIRA violates 13 (3) (a), (j) (i), (ii) of the Charter. There is no evidence that the data required under the Third Schedule is the minimum necessary to identify persons and so there is no evidence that the right to privacy has been violated as little as possible. There is no evidence that the concept of data minimisation, which is taking no more than is necessary to meet the objective was applied in the drafting of the Third Schedule and the Third Schedule violates section 13 (3) (a), (j) (i), (ii) of the Charter. This means that there is no justification presented for requiring the data under the Third Schedule.

[251] Section 39 of NIR violates section 13 (3) (j) (ii) of the Charter. It enables third party access to the Database without adequate safeguards against misuse and abuse by the third party. In addition, no justification has been advanced showing why third parties need to have access to the Database.

[252] Section 41 of NIRA violates section 13 (3) (g) of the Charter. This is so because the mandatory **legal** obligation by Jamaican and ordinary residents to produce a NIN or NIC when seeking to access goods and services from public bodies while not placing the same legal obligation on foreigners to produce some form of identification amounts to unequal treatment. No plausible justification was advanced and so the state has failed to justify the violation.

[253] Section 60 and the Sixth Schedule to the extent that they make a NIN a prerequisite to holding a passport violates section 13 (3) (n) of the Charter. The requirement of a NIN is disproportionate and so harms the right to a passport. No justification has been put forward except perhaps administrative convenience and that is not a sufficient reason to violate the provision.

[254] Sections 4, 15, 23, 27, 30, and 36 (4) do not violate any provision of the Charter.

REMEDY

[255] Lamer CJ in **Schachter v Canada** [1992] 2 SCR 679, 696 – 697 held:

> *Severance is used by the courts so as to interfere with the laws adopted by the legislature as little as possible. Generally speaking, when only a part of a statute or provision violates the Constitution, it is common sense that only the offending portion should be declared to be of no force or effect, and the rest should be spared.*
>
> *27 Far from being an unusual technique, severance is an ordinary and everyday part of constitutional adjudication. For instance if a single section of a statute violates the Constitution, normally that section may be severed from the rest of the statute so that the whole statute need not be struck down. To refuse to sever the offending part, and therefore declare inoperative parts of a legislative enactment which do not themselves violate the Constitution, is surely the more difficult course to justify.*
>
> *28 Furthermore, as Rogerson has pointed out (in "The Judicial Search for Appropriate Remedies Under the Charter: The Examples of Overbreadth and Vagueness" in Sharpe, ed., Charter Litigation (1987) at pp. 250-52), it is logical to expect that*

severance would be a more prominent technique under the Charter than it has been in division of powers cases. In division of powers cases the question of constitutional validity often turns on an overall examination of the pith and substance of the legislation rather than on an examination of the effects of particular portions of the legislation on individual rights. Where a statute violates the division of powers, it tends to do so as a whole. This is not so of violations of the Charter where the offending portion tends to be more limited.

29 Where the offending portion of a statute can be defined in a limited manner it is consistent with legal principles to declare inoperative only that limited portion. In that way, as much of the legislative purpose as possible may be realized. However, there are some cases in which to sever the offending portion would actually be more intrusive to the legislative purpose than the alternate course of striking down provisions which are not themselves offensive but which are closely connected with those that are. This concern is reflected in the classic statement of the test for severance in Attorney-General for Alberta v. Attorney-General for Canada, [1947] A.C. 503, at p. 518:

> *The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is ultra vires at all.*

30 This test recognizes that the seemingly laudable purpose of retaining the parts of the legislative scheme which do not offend the Constitution rests on an assumption that the legislature would have passed the constitutionally sound part of the scheme without the unsound part. In some cases this assumption will not be a safe one. In those cases it will be necessary to go further and declare inoperative portions of the legislation which are not themselves unsound.

31 Therefore, the doctrine of severance requires that a court define carefully the extent of the inconsistency between the statute in question and the requirements of the Constitution, and then declare

> *inoperative (a) the inconsistent portion, and (b) such part of the remainder of which it cannot be safely assumed that the legislature would have enacted it without the inconsistent portion.*

[256] This is still good law. It was reaffirmed by the Supreme Court of Canada in **Wakeling v Attorney General of Canada** [2015] and **R v Appulonappa and others** [2015] 3 SCR 59. In Jamaica there is the dictum of Lord Diplock on this point in **Hinds v The Queen** (1975) 24 WIR 326, [1976] 1 All ER 353, [1976] 2 WLR 366, [1977] AC 195. His Lordship stated at page 24 WIR 343:

> *The final question for their Lordships is whether they are severable from the remaining provisions of the Act so that the latter still remain enforceable as part of the law of Jamaica…The test of severability has been laid down authoritatively by this Board in Attorney-General for Alberta v. Attorney-General for Canada [1947] A.C. 503, 518:*
>
> *'The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is ultra vires at all.'"*
>
> *…*
>
> *In their Lordships' view what remains after the elimination of the Full Court Division still constitutes a practical and comprehensive scheme for dealing with firearm offences which it can be assumed that Parliament would have enacted if it had realised that it could not confer upon a Full Court Division the jurisdiction which it purported to confer upon that Division by s 5 (2).*

[257] In this last paragraph from Lord Diplock the principle applied is whether what is left after severance would still constitute a coherent law such that Parliament would still have enacted the remaining part.

[258] The principles to be derived from these passages taken together are as follows:

(i) There is a difference between provisions of a statute violating specific provisions of a constitution and a statute that violates the separation of powers doctrine;

(ii) in the former, severance of the offending provisions is the more usual remedy whereas in the latter, it is often, though not inevitably the case that the statute as a whole is invalid;[61]

(iii) where the offending portions can be severed from the rest of the statute then that option should be followed;

(iv) however, in some instances the offending provisions are so bound to the rest of the statute that what is left cannot survive. Where this is the case then the entire statute is declared to be invalid;

(v) in other instances, it may be that remainder of the law after severance while coherent may still be in violation of the constitution and in that event the entire law should be declared invalid;

(vi) where the court has found that provisions are in violation of the constitution, in order to determine which is the more appropriate course, the court must examine very carefully and determine the extent to which the challenged provisions violate the constitution and declare those provisions void and of no effect. Having done so the court must seek to determine whether what is left would have been enacted by the legislature and should only strike down the entire statute if it concludes that remainder of the statute

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[61] In Hinds v The Queen ((1975) 24 WIR 326, [1976] 1 All ER 353, [1976] 2 WLR 366, [1977] AC 195, the statute violated the separation of powers doctrine in addition to other violations but there was severance. This demonstrates that violation of the separation of powers doctrine does not inevitably lead to the statue being struck down.

would not have enacted or is so tied to the offending parts that the remaining portions cannot stand.

[259] This approach is consistent with the separation of powers doctrine. Severance recognises the fact that the law was passed by the Parliament and is seeking to uphold.

[260] The important question in this case is, whether there should be severance, or striking down the entire law, now that some parts have been found to be in violation of the constitution.

[261] It should be noted that both sides declined to address the court on this issue and left it to the discretion of the court. In my view, this is undesirable and full submissions should have been made on the point. I have come to the conclusion that the rest of the statute cannot stand after the violating provisions are severed because of my conclusion that the regime as it presently stands does not offer sufficient protection for the sensitive data that is to be collected under the statute. This means that even if the scheme were a voluntary one more robust protection would be required.

[262] My colleagues and I have arrived at the same conclusion by different routes. They have said that the remaining part of the law is so bound to the severed provision that the National Identification and Registration Act should be declared unconstitutional, null, void and of no effect.

Sykes CJ

BATTS J

INTRODUCTION

[263] "*No chains around my feet,*
but I am not free,
I am down here in captivity,
in this concrete jungle".

These words, put to music by the Hon. Robert Nesta Marley O.M. (deceased), reflect the sentiment of many inner city dwellers. They suggest that independence, from British colonial rule, has not produced hoped for economic social or political liberation. Jamaican policymakers have, with varying prescriptions and mixed success, endeavoured to address those concerns.

[264] The **National Identification and Registration Act (hereinafter referred to as NIRA),** is to be seen in that context. The law is intended to implement a system of compulsory national registration and identification. Jacqueline Lynch-Stewart, Chief Technical Director Planning Monitoring and Evaluation Division in the Office of the

Prime Minister, summarised the reasons for the policy imperative (see paragraph 7, of her Affidavit filed on the 6th June, 2018):

> *"In 2016 the Most Honourable Prime Minister Andrew Holness, Prime Minister of Jamaica (the Prime Minister), directed the Unit to review the Project as a matter of priority, because of his administration's pressing need to improve the ease with which persons in Jamaica do business in the age of a digital society, to protect revenue of the country and address the culture of informality within the nation, which has been negatively affecting the capacity of the state to ensure that scarce public resources are appropriately distributed and the rule of law and public order are upheld and maintained. The informal culture was highlighted by the Prime Minister as inhibiting government from providing for and protecting people in Jamaica."*

The Claimant contends that, notwithstanding these laudable motives, sections of NIRA breach fundamental rights of every Jamaican and are therefore unconstitutional. He asks for declarations to that effect.

[265] The issue is one of momentous import. Core values are allegedly being impacted by the state because of activity deemed necessary to provide for and protect its citizens. In this context, it is appropriate to remind ourselves that, the rights contained in the Constitution are the product of 400 years of struggle, conflict and sacrifice by the people of Jamaica. In **Gary Hemans v Attorney General of Jamaica** [2013] JMSC Civil 75 I said:

> *"Beginning in the 15th century the forefathers of the majority of persons in this nation we now call Jamaica were brought here in chains. They were forcibly taken from their country of birth. Families were separated and humans enslaved to serve firstly Spanish colonizers and then later English economic interests. The system of enslavement continued until it was abolished by an Imperial Act of British Parliament in 1833. Abolition came after two maroon wars, hundreds of violent slave revolts and agitation by human rights activists called at the time "Abolitionists". The planters were financially compensated after abolition for the loss of their "property". The newly freed men received no compensation. In*

> *Jamaica civil strife and further rebellion resulted in the free men attaining the right to vote on a basis of Universal Adult Suffrage in 1944. Another 20 years passed before the British lowered the Union Jack and Jamaicans became fully responsible for their economic, social political and international affairs. Central to its position as an independent nation is the Constitution. That document among other things guarantees inalienable rights to Jamaicans. Its ultimate form and content was influenced by developments internationally not least of which were the creation of the United Nations and the Universal Declaration of Human Rights. It is the duty of this court to protect the rights guaranteed by the Constitution."*

[266] It is, as the Honourable Attorney General reminded us, the remit of the Executive to develop policy. However, policy must not run afoul of the Constitution. The Constitution is the law against which all other laws are judged. It is the duty of the court to determine if the provisions of Acts of Parliament, designed to implement policy, are lawful. The court, when doing so, is not moved by the virtue of the policy. In **Hinds and other v R** [1976]1 All ER 353 Lord Diplock stated at page 361 (e):

> *"The purpose served by this machinery for "entrenchment" is to ensure that those provisions which were regarded as important safeguards by the political parties in Jamaica, minority and majority alike, who took part in the negotiations which led up to the constitution, should not be altered without mature consideration by the Parliament and the consent of a larger proportion of its members than the bare majority required for ordinary laws. So in deciding whether any provisions of a law passed by the Parliament of Jamaica as an ordinary law are inconsistent with the Constitution of Jamaica, neither the courts of Jamaica nor their Lordships' Board are concerned with the propriety or expediency of the law impugned. They are concerned solely with whether those provisions, however reasonable and expedient, are of such a character that they conflict with an entrenched provision of the Constitution and so can be validly passed only after the Constitution has been amended by the method laid down by it for altering that entrenched provision."*

[267] In the year 2011 Chapter III of the Constitution of 1962, which contained the Bill of Rights, was repealed and replaced using the appropriate constitutional amendment procedure. The record shows that the change was supported by both sides in the Houses of Parliament. The new Chapter III has advantages over the old because of its simplified language, its expanded statement of rights, and because the "exceptions", or the circumstances in which legislation otherwise offensive to rights may be passed, reduced. Section 13(2) reads:

> *"13 (2) Subject to sections 18 and 49, and to subsections (9) and (12) of this section, and* ***save only as may be demonstrably justified in a free and democratic society****-*
>
> *(a) This Chapter guarantees the rights and freedoms set out in subsections (3) and (6) of this section and in sections 14, 15, 16 and 17; and*
>
> *(b) Parliament shall pass no law and no organ of the state shall take any action which abrogates, abridges or infringes those rights."* (emphasis added*)*

[268] The words highlighted introduce a new benchmark. The test of constitutionality of legislation now involves two stages, namely;

> a) A determination as to whether the law abrogates, abridges or infringes a guaranteed right; and
>
> b) Secondly, if it does, is the abrogation, abridgment or infringement demonstrably justified in a free and democratic society.

The burden is on the party seeking to uphold the law to establish the second limb of the test. In this regard I adopt, without reservation, the admirable analysis by my Lord Chief Justice at paragraphs 99 to 106 of his judgment, the draft of which I was privileged to see. Importantly, and a point not readily grasped, the test is not whether the law is demonstrably justified in Jamaica. The justification must be in a generic context; in "*a free"* means any free and democratic state. In other words, is the abrogation,

infringement or abridgment consistent with one's status as a *"free and democratic"* society? Viewed in this way the issues for resolution in this case pose no real difficulty.

[269] Finally, by way of introduction, a view has gained credence in some quarters that fundamental human rights may mean different things in different societies. I do not agree. A society may or may not articulate a right in its Constitution. It may even articulate rights in a different way. However, where the right is stated in similar terms then it has the same meaning everywhere. The right to freedom of the person, for example, is the same in the north as it is in the south, in the east as in the west. That is why the fundamental right is universal. It explains why there could be a Nuremburg trial and why an International Court of Criminal Justice exists. The right does not change with colour or culture. It is the same inalienable human right. This, in the case of Jamaica's Constitution, is underscored by the fact that it is the generic free and democratic society which is now the benchmark. It is not freedom and democracy as defined or prescribed in Jamaica.

THE CLAIM

[270] The following relief is sought by the Claimant in his Fixed Date Claim Form filed on the 8th May, 2018:

(i) Declarations that sections 4; 6(1)(e);15; 20;23; 27(1); 30; 36(4); 39; 41; 43(1); 60 and the third and sixth schedules, of "NIRA" are in breach of the Constitution;

(ii) A declaration that neither the manner nor the extent, of the abrogation abridgement or infringement of the rights, are demonstrably justified in a free and democratic society;

(iii) Alternatively, a declaration that the said provisions are likely to contravene constitutional rights of the Claimant, other Jamaican citizens, and persons ordinarily resident in Jamaica;

(iv) An order that the said sections of the Act are void and of no effect and/or should be struck down; and

(v) Such further and other relief as this Honourable Court deems appropriate or which may be necessary to give effect to the declarations sought.

[271] He has brought the claim as a citizen and resident of Jamaica, a member of the House of Representatives, representing the constituency of St. Andrew South East, and as the General Secretary of the People's National Party. His counsel Mr Michael Hylton QC, at paragraph 5 of his written submissions, helpfully noted the impugned sections of the "NIRA" alongside the relevant provisions of the Constitution:

(i) Sections 15 and 20 are alleged to breach section 13 (3) (a) which guarantees life liberty and security of the person.

(ii) Section 4 is allegedly in breach of section 13 (3) (g) which guarantees equality before the law.

(iii) Sections 6, 15, 20, 39 and 43 are alleged to breach section 13 (3) (j) which guarantees freedom from search, right to private and family life and privacy of other property and communication.

(iv) Section 41 is allegedly in breach of sections 13 (3) (m) which guarantees the right to vote, section 13 (3) (n) which guarantees a right to a passport and, section 13 (3) (p) which guarantees freedom of the person "as provided in section 14".

(v) Section 15 is allegedly in breach of section 13 (3) (q) which guarantees protection of property rights as provided in section 15.

(vi) Sections 6 and 60 and the schedules are allegedly in breach of section 13 (3) (r) which guarantees due process of law "as provided in section 16".

[272] The Claimant has said that he does not oppose the establishment of a national identification system. What he opposes are specific provisions of "NIRA" which breach fundamental rights and freedoms guaranteed under the Constitution. His case was ably

and comprehensively presented. I hope I do no disservice, to that presentation, in the summary which follows.

[273] It was submitted that Section 4, when read with sections 20 and 41(1) of NIRA, breaches or alternatively, its implementation is likely to breach, the right to equality before the law guaranteed by section 13(3)(g) of the Constitution. NIRA treats Jamaican citizens and persons ordinarily resident in Jamaica on unequal terms, when compared to foreigners. This is because Section 4 of the Act outlines its applicability to Jamaican citizens and permanent residents only. That section reads;

> *"4 (1) This Act applies to-*
>
> *(a) all citizens of Jamaica; and*
>
> *(b) individuals who are ordinarily resident in Jamaica*
>
> *2) This Act shall not apply to persons who are entitled to immunities and privileges under the Diplomatic Immunities and privileges Act."*

[274] The Claimant says that his right to equality before the law, as well as those of other Jamaican citizens and permanent residents, will be violated by;

a) the requirement in section 20 of NIRA for all registrable individuals to enrol in the database and,

b) the requirement in section 41 of NIRA for the production of a national identification number or national identification card as a precondition for the delivery of goods and services from public bodies.

[275] A non-citizen or non-resident of Jamaica, accessing these services or purchasing property in Jamaica, will not be subject to the requirements of NIRA. The Claimant alleges that the unequal treatment, between citizens and residents of Jamaica on the one hand and non-residents and foreigners on the other, constitutes unequal treatment under law.

[276] It was further submitted that sections 15 and 20 of NIRA as well as its third schedule are in breach of the right to liberty, security of the person and protection of privacy guaranteed by section 13(3)(a) of the Constitution. Section 20(1) of NIRA requires every registrable individual to apply to be enrolled in a database. The term "*registrable individual*" is defined in section 2 of NIRA as *"…any citizen or person who is ordinarily resident in Jamaica*". Section 20 has various provisions for the enrolment of registrable individuals by the **National Identification and Registration Authority** (hereinafter referred to as ***"the Authority"***). These include collaboration with members of the public and private sectors on verification of accuracy of data and for sharing of information and data in the database. The collection of this data is to lead to the generation of a **national identification number** (hereinafter referred to as ***"NIN"***) which will in turn result in the issuing of a **national identification card** (hereinafter referred to as ***"NIC"***). Section 20(11) criminalises *inter alia* the refusal or failure to enrol in the database:

> *20 (11) Every person who refuses or fails, without reasonable excuse to apply to the Authority for enrolment in the Database in accordance with this section commits an offence and shall be liable on conviction to the penalty specified in relation to that offence in the Fourth Schedule.*

[277] The Claimant says that enrolment requires submission to the Authority of the most intimate and sensitive biometric data, being immutable personal identifiers, for storage and indefinite retention in Government owned electronic mechanisms. The NIC or NIN are prerequisites to access goods and services from public authorities. Counsel says that a person with conscientious objections to enrolment is placed in a difficult position wherein he or she either refuses to enrol, thereby facing criminal proceedings, or enrols in disobedience of his religious or other belief. Counsel says this suppresses the ability to observe political or religious or other doctrinal belief.

[278] It is further submitted that the mandatory and coercive provisions, regarding submission of personal biometric data, violate the right to privacy and protection of other property pursuant to section 13 (3) (j) (iii) of the Constitution. The coercive provisions

also infringe the rights to liberty and security of the person pursuant to section 13 (3) (a) of the Constitution. Counsel says that in addition to facing criminal proceedings an individual may also be invisible to the state. The provisions divest a person of his inherent dignity under section 13 (1) (b) of the Constitution and constitutes degrading treatment within the meaning of sections 13 (3) (o) and 13 (6) of the Constitution. Compounded with this is the state's ability to cancel a person's enrolment which would cause a financial burden to the aggrieved person in seeking recourse.

[279] Queen's Counsel submits further that section 41 is in breach of the right to vote, the right to a passport and the right to freedom of the person. Section 41 makes submitting a NIN or a NIC a prerequisite to access to public goods and services. The section also permits private sector entities to require registered individuals to submit a NIN or NIC to facilitate the delivery of goods or services.

[280] It was submitted that section 41, and the manner in which it is likely to be implemented, constitutes a violation of section 13 (3) (m) of the Constitution. That section guarantees the right of every citizen, who is qualified to be registered as an elector for elections to the House of Representatives to be so registered and who is so registered, to vote in free and fair elections. Counsel states that section 41 also breaches section 13 (3) (n) of the Constitution which guarantees the right of every citizen in Jamaica to be granted a passport and not be deprived thereof except by due process of the law. It is submitted that the breach of this right also results from the application of sections 15 and 60 of NIRA as well as its 6th schedule. At paragraph 8(h) of his affidavit filed on 8th May, 2018 the Claimant states that to the extent that section 60 relates to the 6th schedule, and therefore to the Passport Act, it is contrary to the due process clause. It makes the right to a passport contingent on the submission to the unconstitutional violation of the right to bodily integrity required by section 20 of NIRA. Counsel submits that the failure to enrol in the database will prevent a person from obtaining a passport. Queen's Counsel also submitted that the withholding of goods and services from persons not in possession of a NIN or a NIC constitutes degrading treatment. Section 41 of NIRA therefore infringes the dignity of these persons. Dignity he says inheres in the right to security of the person.

[281] Mr Hylton submits further that the wide discretion given to the Authority with regard to cancellation from the register, see Section 21 of NIRA, compounds the breaches mentioned. Cancellation would cripple the ability of persons to function in society. Their only recourse being an appeal pursuant to section 47 of NIRA. The cost of which may be prohibitive to many Jamaicans.

[282] It is also the case for the Claimant that section 43 permits the Authority to disclose information held in the database. This offends the right to privacy (Section 13 (3) (j)) and cannot be justified in a free and democratic society. It was submitted further that the indefinite retention of information in the database carries with it an undeniable and continuing risk to the protection of the right to privacy. The Minister's power to give directions to the Authority will, it is submitted, replace judicial oversight. Similarly, the power to grant access to the database to a requesting entity is also a breach of the right to privacy. There is no equivalent to the Data Protection Act a companion legislation passed in India. Counsel says that NIRA fails to provide adequately for the protection of personal data.

[283] It was submitted that the coercive provisions regarding the submission of personal biometric data, including inter alia the submission of fingerprints, palm prints, toe prints and retina scans, also breach the right to privacy. NIRA does not make judicial oversight, or the owner's consent, mandatory before data collected is shared. Furthermore, section 6(1) of NIRA allows disclosure to be regulated solely by the Authority's policies, thereby again circumventing judicial intervention.

[284] Queen's Counsel submitted that the Defendant bears the burden of proving that the offending provisions in NIRA are demonstrably justified in a free and democratic society. He urged the court to apply the Canadian Supreme Court decision of **R v Oakes** [1986] 1 S.C.R. 103. He referenced also the Privy Council decision of **Madhewoo v The State of Mauritius** [2015] SCJ 177 which interpreted the Constitution in a generous and purposive manner. That court did not give a narrow or restrictive meaning to the word "search". Accordingly, the court ruled that the provisions of the legislation, which mandated the compulsory taking and recording of fingerprints,

constituted an interference with the protection from search of the person guaranteed in the Constitution under consideration.

[285] Queen's Counsel submitted that the objectives of NIRA cannot be said, in a free and democratic society, to bear a rational connection to the measures adopted by it. There is no pressing need for the unconstitutional provisions. The measures utilized have not been carefully designed to achieve the objective in question. The Claimant says that this requirement is plainly not met because of the Defendant's own admission that the appropriate systems, protocols, necessary safeguards, procedures, programmes and other policies required by the law have not been developed. The Claimant also submits that the refusal of the Government to send the Bill to a Joint Select Committee of Parliament supports his contention that the careful design requirement has not been met.

[286] It is alleged also that the risk of "function creep" gives rise to a serious risk of abuse of governmental power. The Claimant says that the government took into account a number of irrelevant considerations in enacting NIRA including;

i. The comparison with existing identification systems which do not feature the mandatory enrolment provision, criminal penalty and access to goods requirement

ii. The requirements placed on Jamaican nationals when visiting other countries.

iii. The erroneous suggestion that NIRA is modelled in part on the European General Data Protection Regulation when they are polar opposites. NIRA enables collection and verification of the most sensitive core personal data whereas the European legislation seeks to limit and regulate its use.

[287] The Claimant says that there are other ways of securing the objectives intended by NIRA. Counsel for the Claimant says that, in the absence of specific evidence of the government's deliberations on the issue of proportionality, the only conclusion is that the measures are disproportionate.

THE DEFENCE

[288] The Defendant contends that all of the sections being challenged by the Claimant are constitutional and should stand. In relation to some sections the answer to the submission of unconstitutionality has been that the sections are reasonably justified in a free and democratic society. The Defendant submits that there is a presumption that laws passed by Parliament are valid and that the presumption of constitutionality applies. In support of that submission the Honourable Attorney General, who appeared in person, relied on the authorities of **Hinds and Others v R** (1975) 24 W.I.R. 326; **Faultin v Attorney General of Trinidad and Tobago** (1978) 30 WIR 351 ; and the consolidated claims: **The Jamaican Bar Association v The Attorney General and the Director of Public Prosecutions; Ernest Smith & Co. (a firm) and Others v The Attorney General of Jamaica and Others; Hugh Thompson and Gifford Thompson & Bright v The Attorney General of Jamaica and the Director of Public Prosecutions** SCCA Nos. 96, 102 &108/ 2003 (Judgment delivered 14th December 2007. The Defendant says that as a presumption of constitutionality applies the burden falls on the Claimant to rebut it.

[289] The learned Attorney General submitted that the principle of equality before the law is that the law should not treat persons differently where they are the subject of the same legislation. She says that if persons are the subject of the same legislation and a distinction is made which is unjustifiable, or does not meet the threshold of any derogation (if found), then the law would have failed to ensure that the subjects were equal before the law. The protection afforded by the Constitution is against arbitrary or less favourable treatment under the same law. The authority of **State v Boyce (Brad)** (2001) 65 WIR 283, a Court of Appeal decision from Trinidad and Tobago, was relied on in support of that submission. That court decided that the grant of a right of appeal to the Crown in criminal proceedings did not amount to unequal treatment under the law, even though, the basis on which it could appeal differed from the basis granted to a defendant. At page 303 the court stated:

> *"The provision in s 4(b) of the Constitution which deals with the concept of equality before the law and the protection of the law has been considered by this court on numerous occasions. What is*

> *required before finding in favour of a breach of s 4(b) is that the parties must be similarly circumstanced and there must be an uneven hand in the application of the same law."*

The Attorney General also made reference to the words of Bernard J in **Smith and Another v L.J. Ltd** (1981) 32 WIR 395, where he opined;

> *"In consequence, the burden is upon the aggrieved party to show that the enactment is violative of the Republican Constitution…. In so far as official acts are concerned, the nub of the matter is, in my view, that the section both guarantees and is intended to ensure that where parties are similarly placed under the law they are entitled to like treatment under that law…"*

The learned Attorney General also relied on the Privy Council decision of **Matadeen v Pointu** [1998] 3 LRC 542. She submitted that a law is not unconstitutional if it relates to one set of persons and not others provided the distinction is based on reasonable grounds. Queen's Counsel says this was the position taken in **State v Boyce (Brad)** (cited above). The Claimant, it is said, must show that he has been or would have been treated differently from some other similarly circumstanced person or persons in the application of the same law.

[290] The Honourable Attorney General acknowledges that section 4 of NIRA applies only to Jamaican citizens and permanent residents and does not apply to persons who are entitled to immunities and privileges under the Diplomatic Immunities and Privileges Act and foreigners. It was submitted that to the extent that section 4 of the Act does not apply to persons who are not citizens of Jamaica, who are not ordinarily resident in Jamaica and who are entitled to immunities and privileges under the Diplomatic Immunities and Privileges Act, the Claimant's right to equality before the law has not been breached. It was submitted that the example of unequal treatment, between a foreigner and a national or a citizen when purchasing property, misconstrues the purpose of the Act. The court was invited to take into account the policy behind the Act. The Attorney General says that the Act is merely seeking to simplify the delivery of goods or services, by facilitating access to goods or services through a sole identifier. It

was submitted that persons to whom NIRA does not apply will have to utilize other forms of identification to do business in Jamaica.

[291] It was submitted that any difference in treatment relates to the form of identification which is required to facilitate the delivery of goods or services provided by public authorities. The Defendant says that, to that end, only registrable individuals are required to submit a NIN or NIC to facilitate the delivery of goods or services. She says that similarly an individual to whom the Act does not apply has to comply with the requirements, legislative or otherwise, which govern access to and delivery of goods or services by public authorities. The Attorney General says that the difference in treatment is reasonably justifiable because NIRA has a legitimate aim and there exists a reasonable relationship of proportionality between the means employed and the aim sought to be realized.

[292] The Honourable Attorney General submitted further that, although the Act applies to Jamaican citizens and persons who are ordinarily resident in Jamaica but does not apply to foreigners or persons entitled to immunities and privileges under the Diplomatic Immunities and Privileges Act, the distinction is based on reasonable grounds. It is therefore constitutional. The Defendant says that the rationale surrounding the Act involves questions of social policy. This informed Jamaica's elected representatives on the distinction in treatment. The Attorney General says that the Act is intended to provide a valid source of identification for Jamaican citizens or persons ordinarily resident in Jamaica. Foreigners, and persons who are entitled to immunities and privileges under the Diplomatic Immunities and Privileges Act, would naturally be excluded. In support of this submission reference was again made to the Privy Council decision in **Matadeen v Pointu** (cited above at paragraph 288) and in particular the following dictum at page 552:

> *"Indeed, their Lordships would go further and say that treating like cases alike and unlike cases differently is a general axiom of rational behaviour. It is, for example, frequently invoked by the courts in proceedings for judicial review as a ground for holding some administrative act to have been irrational…*

> *But the very banality of the principle must suggest a doubt as to whether merely to state it can provide an answer to the kind of problem which arises in this case. Of course persons should be uniformly treated, unless there is some valid reason to treat them differently. But what counts as a valid reason to treat them differently? And, perhaps more important, who is to decide whether the reason is valid or not? Must it always be the courts? The reasons for not treating people uniformly often involve, as they do in this case, questions of social policy on which views may differ. These are questions which the elected representatives of the people have some claim to decide for themselves. The fact that the equality of treatment is a general principle of rational behaviour does not entail that it should necessarily be a justiciable principle – that it should always be the judges who have the last word on whether the principle has been observed. In this, as in other areas of constitutional law, sonorous judicial statements of uncontroversial principle often conceal the real problem, which is to mark out the boundary between the powers of the judiciary, the legislative and the executive in deciding how that principle is to be applied."*

[293] The Defendant acknowledges that the Act makes it an offence to refuse to apply to enrol. They say however that this is not a unique concept as the Revenue Administration Act criminalizes neglect or failure to apply for a registration number. The Defendant says that the rationale for the creation of the offence is to enforce compliance and that convictions under NIRA will not form part of a person's criminal record and the punishment is non-custodial.

[294] The position of the Attorney General is that the rights alleged to have been breached are not absolute. She says that section 13(2) of the Constitution clearly indicates that these rights are subject to the exceptions in section 13 subsections (9) and (12). She submitted further that section 13(3) provides for an exception in circumstances where the action in question was done *"in the execution of the sentence of a court in respect of a criminal offence of which the person has been convicted*." Although conceding, that non-compliance with the Act results in a criminal sanction, the Attorney General says that there is no breach of the right to liberty and security. This is

because imprisonment does not result from the conviction for the criminal offence created by section 20(11).

[295] The Honourable Attorney General says that NIRA does not breach the right to protection from search of a person or his property, the right to private and family life and privacy of his or her home, or the right to privacy of other information and of communication. The privacy claims engaged in the instant case relate to informational privacy. No aspect of the Claimant's home is encroached by the Act so as to engage privacy in the territorial sense. The learned Queen's Counsel says further that there is no interference with bodily integrity as the Act does not result in subjection to any assault, physical interventions or treatment, forced examinations, or entry to body.

[296] It was submitted in the alternative that, should the Court form the view that other aspects of the right to privacy are engaged, the interference is demonstrably justified. The Attorney General says that there is a valid basis for the interference as it pursues a legitimate objective. She says that access to the information collected is limited and that there are measures for judicial oversight of disclosure in the criminal context. The NIRA does not allow for direct access to information by the police but rather requires judicial approval. She said further that there are no provisions which would allow the police to retain on an indefinite basis any information they receive.

[297] The learned Attorney General submitted that the state has a legitimate interest in collecting information on its citizens in various circumstances. It was submitted that this view is supported by the US Supreme Court in the case of **Whalen v Roe** 429 US 589 (1977). It was there decided that the collection of data combined with provisions for its protection did not infringe any constitutional rights. There is, she submits, no breach where there is a legitimate government interest and adequate protection against disclosure. In referring to the decision of the Indian Supreme Court in **Justice K S Puttaswamy (Retd.) and Anor. v Union of India and Anor** Writ Petition (Civil) No. 494 of 2010, Queen's Counsel submitted that to be lawful interference with the right to informational privacy should be, in accordance with law, made after fair procedures are applied and, serve a legitimate purpose. Justifiable bases on which the state may

interfere with the right to privacy were said to include national security, the distribution of state goods, protection of revenue and research.

[298] The Honourable Attorney General agreed that the taking and storage of fingerprints interferes with the right not to be subjected to search and also interferes with the private life of individuals. She says however that the sections of NIRA that impact these rights pursue a legitimate purpose and are demonstrably justified in a free and democratic society. The objectives of NIRA she says are sufficiently important to justify interference with the privacy rights of citizens. It is aimed at providing a method by which citizens can prove their identity in a manner which is secure. According to her NIRA will assist the state to distribute goods and services to those who are entitled to receive same. It will also assist in the detection and prevention of crime. It is subject to judicial scrutiny of the use of the information. The regime will also assist in the compilation of statistical information on citizens, a process which already exists and has long existed through the Statistical Institute of Jamaica and the Planning Institute of Jamaica. The Defendant says that these objectives have been accepted as legitimate aims by various courts across the world.

[299] The Honourable Attorney General says that the information will only be used for the stated purpose and that disclosure will be limited and protected. The collection, retention, and use of information by the government under the NIRA will not lead to a significant change in the experience of Jamaicans. This is because there already exists a number of different arrangements in which the government collects, retains, and makes use of information on its citizens. Any impairment on the right to privacy is minimal because the regime introduced by the Act represents a consolidation of various forms of existing identification including the Taxpayer Registration Number (TRN), National Insurance Scheme (NIS), voter's identification number, passport number and birth certificate number. She added that storage and retention of information is appropriate to protect the biographical and biometric data of the individual because access to the information is limited. There are also added provisions for the Board of Management and the Authority to secure the database. Criminal sanctions attach to unlawful use of the database and there exists secrecy obligations for staff. The

Defendant says that the numerous objectives pursued by the legislation outweigh the minimal interference with the citizen's right to their personal information.

[300] The Honourable Attorney General submitted that the requirement to enrol in the database, and thereby obtain a NIN and NIC, does not amount to a breach of the constitutional right to be granted a passport. The production of a NIN or a NIC will simply become part of the application process under the statutory scheme of the Passport Act. The Defendant says that the right under section 13(3)(n) of the Constitution is limited by the application process requirements under the Passport Act. The Attorney General says that this limitation is legitimate and proportionate. The Defendant says all the information required in order to process a passport application consists of biometric information needed by an individual to enrol in the database. The Defendant submitted that if the Claimant is correct in his assertion then all the other application requirements under the Passport Act would equally offend his right to be granted a passport. It is important to recognize the nature and object of a passport which requires a need for the Government of Jamaica to verify the identity of all potential holders of passports. The Defendant submits that the additional requirement will not make the application process any less a legitimate and proportionate limitation on the right under section 13 (3) (n). The Defendant says that currently a birth certificate along with two photographs, one of which must be verified, is needed for a passport application.

[301] As it relates to the right not to be subject to degrading treatment the learned Attorney General says that this right is aimed at addressing the class of treatment that is similar to torture, inhumane or degrading treatment. In other words, she says, it would involve treatment that is of a sufficiently grave and serious nature that rises to the level of cruelty and results in suffering. There is, she says, nothing in the provisions of section 23 (1) and 41 of NIRA which could result in treatment similar to torture, inhumane or degrading treatment. She further said that based on the nature of the treatment which is the subject of the right, the Claimant would have to adduce evidence in order to substantiate his claim, mere speculation would not be sufficient.

[302] The Attorney General says that the Claimant has produced no evidence of how section 23 of the NIRA contravenes the right of the Claimant and his constituents to freedom from discrimination on the ground of place of origin. The Defendant says that section 23 merely speaks to the process by which an individual obtains a NIN and that there is nothing in the provision or its implementation which discriminates against individuals. In relation to the allegation of less favourable treatment of Jamaican nationals and residents, as against non-citizens and non-residents, the Defendant submitted that the term place of origin does not equate to nationality. The Defendant says that for the purposes of the NIRA, particularly section 41, an individual's place of origin would be Jamaica. Counsel submitted that the provisions of section 41 or its implementation do not discriminate against an individual on the basis of place of origin instead it allows for the conduct of business across ministries, departments and agencies using a sole identifier.

[303] The Defendant submitted that, if the court finds that NIRA makes provision for differential treatment to persons who are not citizens or residents, that differential treatment is not prohibited. The government is entitled to facilitate the delivery of goods and services to persons in a manner that may treat those persons differently. It was submitted that the important factor is that persons who fall within the same classification are treated in a similar or like manner. The Attorney General says that persons ordinarily resident in Jamaica and citizens fall within the same classification because they are part of and contribute to the Jamaican society. The government should therefore be in a position to provide specific benefits to this category. Persons who are not Jamaican citizens or ordinarily resident in Jamaica fall within a different category. The Defendant says that within that classification different considerations apply and the government may treat this category in a different manner. The government has no obligation to provide these benefits to persons. It is within the right of the government having regard to all considerations, regarding the fiscal space within which it operates and related matters, to take these types of decisions.

[304] The Defendant submitted, as regards the alleged breach of section 13(3) (r), that in order for the right to a fair hearing to be engaged section 16(2) of the Constitution

makes it clear that there must be legal proceedings in existence. It was submitted that legal proceedings are not relevant to the process of information collection as contained in section 6 (1) (e). Consequently, the right to a fair hearing was not engaged. The Defendant says, in respect of section 43, that subsection 2 provides clearly for the limited instances in which the information may be disclosed. The right to due process is not therefore infringed.

[305] As regards the alleged infringement of property rights, the Defendant submitted that, a party seeking to invoke it must bring his case within the acquisition of an interest in or right over property which belongs to him. The Defendant contends that there is no constitutional right to a NIC such as to make that right a property right. The Attorney General submitted further that, to the extent that the biographic and biometric information in Parts A and B of the Third Schedule are informational property, this information is non depletable. The collection and storage of it in the database does not therefore constitute a taking or deprivation in order to bring it within section 13 (3)(q) of the Constitution. All individuals enrolled in the database will still retain all information referred to in Parts A and B of the Third Schedule of NIRA. The Defendant says that the Authority will therefore not be taking any information within the meaning of the Constitution. Similarly, as there is no deprivation of property in relation to the demographic information in part C and the reference numbers in part D of the Third Schedule to NIRA, there is no breach. The Defendant says further that no Jamaican citizen or ordinary resident has a property right in any of the demographic information in part C, or the reference numbers in part D of NIRA, such as to engage the right.

[306] The learned Attorney General submitted that section 41 does not engage the right to freedom of the person. No evidence has been led that the provisions of section 15 and 41 contravene section 13(3)(m) of the Constitution. It was submitted that the NIRA does not require the use of the NIN or NIC to allow a person to vote. The Defendant also submitted that the right to vote should not be considered as a good or service and therefore, as the Electoral Commission of Jamaica is not facilitating the provision of a good or service when it is performing its functions, the right to vote does not apply.

[307] It was also submitted, by the Honourable Attorney General, that the architecture of NIRA is incomplete as regulations have not been promulgated. These will ensure the protection of constitutional rights. It is therefore premature to assume that the regulations will not be in accord with constitutional protections. It was submitted that the new regime will develop through regulations and judicial refinement. She submitted that the court should not pre-empt the Executive by ruling that the regime is unconstitutional.

[308] The learned Attorney General submitted also that the Claimant has not led any evidence in support of the alleged breach of constitutional rights. Reference was made to the authority of **Banton and others v Alcoa Minerals of Jamaica Incorporated and Others** (1971) 17 WIR 275 and in particular the words of The Honourable Mr Justice Parnell J, at pages 30 to 31, who said an aggrieved person must show;

> 1. *"That he has a justiciable complaint; that is to say, that a right personal to him and guaranteed under Cap III of the Constitution has been or is likely to be contravened. For example, what is nothing more than naked politics dressed up in the form of a right is not justiciable and cannot be entertained;*
>
> 2. *.....*
>
> 3. *.....*
>
> 4. *That the controversy or dispute which has promoted the proceedings is real and that what is sought is redress for the contravention of the guaranteed right and not merely seeking the advisory opinion of the court on some controversial, arid, or spent dispute."*

The Attorney General submitted that the Claimant's assertion of a breach was tantamount to naked politics dressed up in the form of a right and should not be entertained. Alternatively, it was submitted that in the absence of any evidence demonstrating a breach or a likely breach of the Constitution the Claimant's assertion is premature and the Claimant is in effect seeking the advisory opinion of the court on some controversial dispute.

[309] The Honourable Attorney General submitted that Jamaica does not have a national identification database that can reliably verify the identity of its citizens. This view she says was expressed in Chapter 3 of the White Paper on the National Identity System. The White Paper (exhibit JLS 1 pages 6-10) indicates that there are various identification systems designed to meet the objectives of respective organizations some of which are the product of legislation. The identification systems are not connected or inter-related and provide limited scope for data sharing and authentication of personal identity. It was submitted that this results in a gap which makes it possible for individuals to acquire multiple identity documents in different names. The Attorney General has asked the court to take judicial notice that the provision of goods or services in the public sector is contingent on some form of identification which is either required by legislation or otherwise.

[310] The Defendant says that White Paper No. 01/2016, exhibit JLS 1, highlights the following considerations as giving rise to the need for a national identification system:

a) Social and financial exclusion of the poorest due to lack of basic legal identity documents;

b) Fraud and double-dipping within social benefit programmes; and

c) Identity fraud.

[311] The learned Attorney General submitted that the implementation of a national identification system will result in Jamaican citizens, and persons who are ordinarily resident in Jamaica, being treated more favourably in relation to access to goods or services by public bodies. It will simplify the documentation that citizens and persons ordinarily resident need to have on their person for identification purposes. It is asserted that currently not all vulnerable persons eligible for social welfare benefits are able to access them. One of the reasons for this is that some persons do not have the required documentation such as a TRN, a passport or a birth certificate, see Chapter 3 of the White Paper (exhibit JLS 1). The Defendant says that the use of the NIC and NIN will result in benefits which extend even beyond the provision of goods and services. It will

result also in financial and social inclusion. They say that NIRA when implemented will improve the government's capacity to better identify the needs of all citizens of Jamaica and individuals ordinarily resident in Jamaica and improve planning, per Jacqueline Lynch Stewart at paragraph 20 of her affidavit filed on the 6th June 2018. The implementation of the Act will facilitate the collection, analysis, abstraction and publication of statistical information relating to the commercial, economic and general activities and conditions of citizens of Jamaica and individuals who are ordinarily resident in Jamaica. There is, the Defendant says, a reasonable relationship of proportionality between the means employed and the aim sought to be realized. It is submitted that in order to address the systemic issues which impact on social and financial inclusion and crime, the mandatory nature of section 41(1) is essential for the aims of NIRA to be achieved.

[312] Finally, it was submitted that the means used by NIRA are reasonable and justified in a free and democratic society. The measures adopted were carefully designed to meet the objectives previously highlighted. These measures involve the creation of the database, the generation of the NIN, and the production of a NIC. The Honourable Attorney General says that the collection of biographic and biometric information is a rational measure to achieve the objective of providing a secure system of national identification. It allows for protection against fraud and identity theft. She says that the generation of a NIN is the means through which different government records can be linked thereby making government transactions across government ministries, departments and agencies more robust. It will result in faster identity verification, reduced customer wait times, and greater productivity and efficiency.

ANALYSIS AND DECISION

[313] It is important to first do an overview of the legislation subject to this dispute and the specific sections in question. The Act in its preamble states that NIRA is:

> *"an Act to establish a body called the National Identification and Registration Authority for the promotion, establishment and regulation of a National Identification System that facilitates the*

enrolment of all citizens of Jamaica and individuals who are ordinarily resident in Jamaica and the verification of identity information and the authentication of a National Identity Number and a National Identity Card; to provide for the establishment, maintenance and operation of a databank to be called the National Civil and Identification Database; for the assignment of a National Identification Number to each individual whose particulars are included in the Database; for the issue of National Identification Cards and certain certificates to individuals whose particulars are included in the Database; to facilitate the collection, compilation, analysis, abstraction and publication of statistical information relating to the commercial, industrial, social, economic and general activities and condition of the citizens of Jamaica and individuals who are ordinarily resident in Jamaica; and for connected matters."

NIRA applies to persons who are citizens of Jamaica as well as persons who are ordinarily resident in Jamaica; that is individuals legally residing in Jamaica for at least six months in a calendar year immediately preceding the date of enrolment. Persons in these categories are referred to as registrable individuals. The Act does not apply to persons who are entitled to immunities and privileges under the Diplomatic Immunities and Privileges Act.

[314] NIRA, as stated in paragraph 275 above, establishes ***the Authority***. Its functions, as stated in Section 6 (1) of NIRA, include *inter alia:*

(i) Administering the National Identification System

(ii) Establishing, maintaining and operating the database;

(iii) Establishing and maintaining an improved and modernized system of civil registration and keeping public records through appropriate means

(iv) Developing appropriate systems and protocols for security, secrecy and necessary safeguards for the protection and confidentiality of identity information and demographic information in the database

(v) Developing policies, procedures and protocols for the collection, processing, use and sharing of information

contained in the Database consistent with data protection best practices.

The database, to be established maintained and operated under the NIRA, will be a consolidated national databank known as the **National Civil and Identification Database** (hereinafter referred to as ***"NCID"***). The Authority will oversee the collection and collation of identity information and demographic information regarding registrable individuals for storage in the databank.

[315] The NCID serves the following purposes (as outlined in section 16):

a) *"Provide a convenient method for individuals to prove identity information about themselves to others who reasonably require proof of that information;*

b) *Provide a secure and reliable facility for ascertaining, recording, maintaining and preserving identity information and demographic information relating to individuals as is required to be entered into it;*

c) *Facilitate the generation and issuance of National Identification Cards and such other forms of identity documents, as required;*

d) *Enable the processing of information to facilitate the verification of identity information and authentication of the National Identification Number and National Identification Card;*

e) *Enable the generation of statistical information as may be required by the Statistical Institute of Jamaica established under the Statistics Act and the Planning Institute of Jamaica established under the Planning Institute of Jamaica Act; and*

f) *Enable the reproduction of identity information and demographic information in legible form as may be required from time to time."*

[316] The database is intended to be used for the following purposes as outlined in section 17:

1) Identifying registrable individuals;

2) Generating National Identity Cards and number;

3) Compiling and reporting statistical information;

4) Providing a medium to verify identity information and authentication of the NIN and the NIC; and

5) Facilitating a secure and reliable method for ascertaining, obtaining, maintaining and preserving information on registrable individuals.

[317] NIRA makes compulsory the enrolment of every registrable individual. It empowers the Authority to take such steps as may be necessary to enrol all registrable individuals. The Authority is mandated to take such steps, as may be necessary, to verify and thereby satisfy itself of the accuracy of the identity information provided by registrable individuals. The Authority may also use any lawful means available to obtain particulars if a registrable individual fails to provide the information to the Authority within the time specified by the Authority. The Act states in section 20 (7) that no identity information about a registrable individual shall be entered into the database unless the information has been verified by the Authority. Information provided in this regard may be included in the database, by virtue of the provisions of the Third Schedule, if the Authority considers the inclusion appropriate having regard to the purposes of the database in relation to the particular registrable individual. It is important to note that any person who refuses or fails without reasonable excuse to apply to the Authority for enrolment commits a criminal offence under section 20 (11). A conviction under the Act does not form part of the criminal record of the offender.

[318] The National Identity Card (NIC) will be provided to persons enrolled in the database free of cost. Section 38 (2) states that the Authority may verify information of a registered individual, in such form and manner, subject to such conditions and on payment of such fees, as may be specified in the Regulations. Under section 39 of NIRA a requesting entity may also request the verification of identification. The Authority may grant the request but shall not disclose core biometric information. The NIC or NIN

is mandatory for access to goods and services from public bodies. Private entities are expressly permitted to require its production in order to facilitate the delivery of goods and services. The production of this unique identification will not be required during a period of public emergency, as defined by section 20 of the Constitution, or in any situation that poses a threat to health or life.

[319] Disclosure of identity information stored in the database may be made under circumstances, listed in section 43 (1) of NIRA. These are:

> a) *"pursuant to a request of the individual whose information is being disclosed;*
>
> b) *to facilitate the identification of the bodies of unknown deceased persons;*
>
> c) *to facilitate the finding or identification of missing persons;*
>
> d) *Subject to subsection (2), pursuant to an order of the Court;*
>
> e) *where the Act authorizes disclosure."*

[320] Section 43 (2) of NIRA makes provision for the Court to grant orders for disclosure of identity information on an ex parte application by the Authority. An order may be granted on the ground that the disclosure is necessary-

> a) *"For the prevention or detection of crime*
>
> b) *In the interest of national security*
>
> c) *Where there is a public emergency; or*
>
> d) *To facilitate an investigation under the Proceeds of Crime Act."*

[321] In addition to the provisions for disclosure of identity information, the Act also facilitates the disclosure of demographic information. The Authority may disclose demographic information to enable the generation of statistical information which may be required by the Statistical Institute of Jamaica. Additionally, core biometric

information may be disclosed pursuant to a court order or with the authorisation of the registered individual. Section 45 of NIRA states:

> *"45 (1) Subject to subsection (2), where access to core biometric information in the Database is reasonably required for the purpose of a criminal investigation or criminal proceedings, an officer not below the rank of Senior Superintendent of Police may apply to the Supreme Court for an order authorizing the Authority to disclose the core biometric information to the officer.*
>
> *(2) An application for an order under subsection (1) shall be made ex parte to a Judge in Chambers.*
>
> *(3) A Judge shall not make the order under this section unless he is satisfied that-*
>
> *a. It is necessary in the interests of national security or for the investigation of a criminal offence;*
>
> *b. other investigative procedures-*
>
> *i. have not been or are unlikely to be successful in attaining the information sought to be acquired.*
>
> *ii. are too dangerous to adopt in the circumstances*
>
> *iii. having regard to the urgency of the case, are impracticable; or*
>
> *c. it would be in the best interest of the administration of justice to make the order.*
>
> *(4) An application for an order under this section shall be in writing and be accompanied by an affidavit deponing to the following matters-*

a) name and rank of the police officer and the division to which the police officer is assigned;

b) the facts or allegations giving rise to the application;

c) such other information as is necessary for the Judge to make the order.

(5) Biometric information acquired by means of an order under this section shall be dealt with in accordance with section 4A and 4B of the Fingerprints Act."

[322] Section 57 of NIRA provides for the making of Regulations. These have not yet been promulgated but may in the future relate to inter alia;

a) the procedures and practices relating to collection and verification of information.

b) the procedures and processes for data storage, data management, security protocols and technological safeguards for information stored in the database.

c) the registration and approval of and process for access to the Database.

d) the preservation, custody and safekeeping of documents under the Act, including the archiving of the National Identification Numbers of deceased persons and other categories of individuals into a separate database.

Section 60 of the NIRA effected amendments to 16 pieces of legislation as outlined in the sixth schedule to the Act.

[323] A comprehensive system of national identification may be commendable. It may facilitate public administration and may assist in the detection of crime. However, this court is not called upon to decide the merits or demerits of the proposed system. The only question for this court is whether the legislation infringes the Constitution of Jamaica. The Constitution is a living instrument. Its terms are however informed by and predicated upon principles and precepts learned or adopted in times past. If society deems those precepts redundant then, in order to legislate in a manner that

contravenes them, a constitutional amendment is required. There is in this case no effort to amend the Constitution and therefore, presumably, no intent to change the established constitutional norms.

[324] I agree with the Honourable Attorney General that legislation is presumed to be constitutional. This is because Parliament is presumed to act lawfully and hence to pass legislation which accords with the Constitution. However, as was decided in **Ladore v Bennett** [1939] AC at p 482 and, applied by Lord Diplock in **Hinds v R** [1976] 1 All ER 353 at page 368 j :

> *"The presumption is rebuttable. Parliament cannot evade a constitutional restriction by a colourable device."*

[325] The Constitutional regime in Jamaica has changed since the decision in **Hinds**. The **Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act (2011)** repealed and replaced Chapter 3 of the Constitution, as to which see paragraph 266 above. The new provisions bear a close resemblance to the Canadian Charter. The judgment of Dickson CJ in the oft cited Canadian case of **R v Oakes** (cited above at paragraph 283) has been applied by our courts when interpreting the meaning of the phrase "demonstrably justified in a free and democratic society". Sykes J, (as he then was), noted in **Gerville Williams and Others v The Commissioner of the Independent Commission of Investigations and Others** [2012] JMFC Full 1 that it has not been settled whether the presumption of constitutionality will be replaced by the test in **Oakes** or some similar formulation. The approach of the court in **Gerville Williams** was to consider the presumption of constitutionality at the outset and then examine whether the sections allegedly breached satisfied the **Oakes** test. This approach was also adopted by the Full Court in **The Jamaican Bar Association v The Attorney General and the General Legal Council** (referenced at paragraph 287 above).

[326] I am of the view that the approaches are reconcilable. The **Oakes** test has two limbs. The first answers the question whether the legislation impacts the right. In examining that question the court presumes that the legislature did not intend to

contravene the right. This is why the burden is on the Claimant at that stage. If the Claimant overcomes the first limb in **Oakes**, the burden then switches to the Defendant when the second limb of the test is to be considered. That is, it is for the Defendant to prove that the infringement is demonstrably justified in a free and democratic society.

[327] In **Oakes** CJ Dickson in outlining the criteria for determining what constitutes reasonable justification in a free and democratic society stated (at page 138):

> *"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': R v Big M Drug Mart Ltd., supra, at p. 352.The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.*
>
> *Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves 'a form of proportionality test'; R v Big M Drug Mart Ltd., supra, at p. 352. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question; R v Big M Drug Mart Ltd, supra, at p. 352. Third, there must be a 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".*

> *With respect to the third component, it is clear that the general effect of any measure impugned under s. 1 will be the infringement of a right or freedom guaranteed by the Charter; this is the reason why resort to s.1 is necessary. The inquiry into effects must, however, go further. A wide range of rights and freedoms are guaranteed by the Charter, and an almost infinite number of factual situations may arise in respect of these. Some limits on rights and freedoms protected by the Charter will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society."*

[328] The Jamaican Constitution, unlike the Canadian, does not use the phrase "reasonable and demonstrably justified". Section 13 (1) says it must be "demonstrably justified" in a free and democratic society. It seems to me that something cannot be demonstrably justified unless it is reasonable. On the other hand, not everything reasonable may be demonstrably justified. We lose nothing therefore by omitting the word reasonable. Reasonableness is also incorporated into the test of constitutionality in India. That country's Supreme Court recently decided issues not dissimilar to those before us. In the matter of **Justice K.S. Puttaswamy (Ret'd) and another v Union of India and others** Writ Petition (Civil) No. 494 of 2012 (cited by both parties before us) the Indian Supreme Court applied a modified **Oakes** test. Although not bound by the decision I regard it as highly persuasive. I will therefore pause to examine the judgments in **Puttaswamy.**

[329] The majority in **Puttaswamy** first reviewed the German "proportionality" test of constitutionality (para 120). They then summarised the **Oakes**' test thus (para 122):

> *"In Contrast, Canadian Supreme Court has chartered different course while using proportionality test. R v Oakes [1986] 1 SCR 103 (popularly known as Oakes test) has held that the objective must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom"; there must be a rational connection between measure and objective ;the means must impair as little as possible the right or freedom in question ; and finally ,there must be a 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" .Under this test arguably more issues are addressed at the earlier stages .Instead of accepting any legitimate goal ,Oakes requires a goal "of sufficient importance to warrant overriding a constitutionally protected right or freedom."*

[330] The Indian Supreme Court ultimately adopted and applied the approach suggested by an earlier decision of that court in **Modern Dental College & Research Centre v State of Madhya Pradesh** [2016] 7 SCC 353 which identified four subcomponents of proportionality which need to be satisfied:

> a) A measure restricting a right must have a legitimate goal (legitimate goal stage)
>
> b) It must be a suitable means of fulfilling this goal (suitability or rational connection stage)
>
> c) There must not be any less restrictive but equally effective alternative (necessity stage)
>
> d) The measure must not have a disproportionate impact on the right holder (balancing stage)."

The court therefore concluded, on the question of the test to be adopted, thus (para 126):

> *"Therefore the aforesaid stages of proportionality can be looked into and discussed. Of course while undertaking this exercise it has also to be seen that the legitimate goal must be of sufficient importance to warrant overriding a constitutionally protected right or freedom and also that such a right impairs freedom as little as possible. This court, in its earlier judgments, applied [the] German*

> *approach while applying proportionality test to the case at hand. We would like to proceed on that very basis which, however is tempered with more nuanced approach as suggested by Bilchitz. This, in fact, is the amalgam of German and Canadian approach. We feel that the stages, as mentioned in Modern Dental College & Research Center and recapitulated above, would be the safe method in undertaking this exercise, with focus on the parameters as suggested by Bilchitz, as this projects an ideal approach that need be adopted."*

[331] The legislation under consideration by the Indian Supreme Court was the **Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act 2016,** referred to hereinafter as ***"the Aadhaar Act"***. That Act gave a legal framework to a project designed to provide a universal proof of identity and allow residents of India to prove their identity anywhere in that country. It would (para 12 of the majority judgment):

> *"…give the Government a clear view of India's population, enabling it to target and deliver services effectively, achieve greater returns on social investments and monitor money and resource flows across the country. It was felt that crucial to the achievement of this goal is the active participation of the central, state and local Governments as well as public and private sector entities. Only with their support will the project be able to realise a larger vision of inclusion and development in India."*

The aim was to implement a unique identification system by which all residents of India would be provided a unique identification number. Each individual would have only one identity with no chance of duplication. The primary reason was to ensure correct identification of targeted beneficiaries for delivery of various subsidies, benefits, services, grants, wages and other social benefit schemes funded by the Indian state.

[332] The Aadhaar Act provided for the taking of demographic and biometric information and regulated how it was to be shared and used. One key component involved verification in conjunction with private sector interests and purposes. The

demographic information included name, date of birth, gender and residential address. The biometric information took the form of a photograph, fingerprint and iris scan.

[333] Notwithstanding the laudable objectives of the project, and the limited nature of the data collected, the majority found that the Aadhaar Act offended certain constitutional rights, including the right to privacy. The right to privacy, it was decided, is at the core of human dignity (paragraph 94 et seq of the majority judgment). The right of choice and self-determination are accepted parts of human dignity. The court recognised that in modern society human dignity has three elements: intrinsic value, autonomy and community value. So that personal autonomy is constrained by the "values, rights and morals" of people who are just as free and equal. These facets of dignity have to be balanced and it is the duty of the court to carry out that balancing act (para 116 majority judgment).

[334] The majority in the Indian Supreme Court decided that, given the limited data collected, the restrictions on its use, as well as the safety mechanisms in place, there was no danger of a surveillance state being created, as was alleged by the Claimants before them. This was because in the Aadhaar Act, the sharing of core biometric data is prohibited. In order for any information to be shared the consent of the individual is required. Furthermore, the logs for authentication transactions were maintained for only a short period, and information about the nature and location of a transaction was not taken during authentication. The biometric information required under the Act was minimal.

[335] The majority of the court ultimately upheld the Aadhaar Act because its mandatory component was limited to the provision of socio-economic rights and benefits (in the nature of welfare schemes) to the deprived and marginalised section of the society. The court, be it noted, accepted that if authentication failed the person concerned would not be deprived of a benefit. The individual would be permitted to establish his or her identity by any other means. It is noteworthy that the court made it clear that "benefit" could not include education for children. Their admission to school could not be thereby restricted. The court saved the statutory provision for sharing

information by reading into it a requirement that the individual concerned was to be given an opportunity to be heard before such information was shared. The Authority was regarded as a trustee of the data and information (para 344 of the majority judgment). The court held to be unconstitutional the attempt to link cellular mobile connections to the Aadhaar identity because the linkage failed the proportionality test. The Court in its majority judgment, stated at paragraph 442:

> *"There can be other appropriate laws and less intrusive alternatives. For the misuse of such sim cards by a handful of persons, the entire population cannot be subjected to intrusion into their private lives. It also impinges on the voluntary nature of the Aadhaar scheme. We find it to be disproportionate and unreasonable state compulsion. It is to be borne in mind that every individual resident subscribing to a sim card does not enjoy the subsidy benefit or services mentioned in section 7 of the Act."*

[336] Notwithstanding the far reaching decision of the majority (a detailed summary of which is at paragraphs 446 to 448 of the majority judgment), I am inclined towards the view of Dr. Dhananjaya Y Chandrachud J in his dissenting judgment. That learned Judge recognised that technology has caused our institutions of governance to face new challenges. *"Technology questions the assumptions which underlie our processes of reasoning. It reshapes the dialogue between citizens and the state. Above all, it tests the limits of the doctrines which democracies have evolved as a shield which preserves the sanctity of the individual".* At paragraph 3 of his judgment he starkly sets forth the import of the decision: "*Technology, confronts the nature of freedom itself". "The case", he asserts* at paragraph 5, *"speaks to the need to harmonise the commitment to social welfare while safeguarding the fundamental values of a liberal constitutional democracy*".

[337] This judge, in his dissent, applied the same proportionality test as did the majority but arrived at a different result. His decision is sufficiently important, and so reflective of my own views, that I will outline the details (see paragraph 339 of his judgment):

> (a) It was unconstitutional to introduce the Aadhaar Act as a Money Bill. This holding necessitated judicial review of

the speaker's decision. The speaker's decisions were only protected in respect of procedural matters but the issue was substantive.

(b) There is a legitimate state aim in maintaining a system of identification to ensure that welfare benefits provided by the state reach the intended beneficiaries without diversion

(c) Once a biometric system of identification is compromised it is compromised forever. Therefore, concerns about the protection of privacy must be addressed while developing the system. At the time of collection individuals must be informed about the collection procedure, the intended purpose of the collection, the reason why the particular data set is requested and who will have access to their data. Additionally, the retention period must be justified and individuals must be given the right to access, correct and delete their data at any point in time, a procedure similar to an opt out option. There was in the Act no mechanism for informed consent nor for opting out

(d) The Act suffered from "overbreadth" as it gives wide discretionary power to publish, display or post core biometric information. The Act also can result in invasive collection of biological attributes, insofar as a discretion to collect "such other biological attributes" as it may deem fit is conferred.

(e) The Act therefore violates essential norms of informational privacy and data protection.

(f) The facts revealed that the Aadhaar project resulted in instances of exclusion of eligible beneficiaries. Dignity and the rights of individuals cannot be made to depend on algorithms or probabilities. Constitutional guarantees cannot be subject to the vicissitudes of technology.

(g) The breaches of fundamental rights failed to satisfy the test of necessity and proportionality because the architecture of Aadhaar poses a risk of potential surveillance activities by use of its database. Secondly the biometric database is accessible to third party vendors as the source code for the deduplication technology belongs to a foreign corporation. The protection of data of 1.2 billion citizens of India is a question of national security and ought not to be

> subjected to mere terms of a normal contract. Also the administrative entity (UIDAI) has no institutional accountability for protecting or failing to protect the database. The Act is silent on its liability in the event there is a breach or of remedies open to the citizen. There is no independent robust regulatory or monitoring framework.

[338] This learned Judge, in his dissent, also decided that the proportionality test failed because the Act allowed private entities to use Aadhaar numbers. This he said would lead to commercial exploitation of the personal data and profiling without consent. Profiling can be used to predict market behaviour and preferences and even influence the choice for political office. These are contrary to privacy protection norms. Susceptibility to communal exploitation renders the relevant provisions arbitrary. The failure to define "services and benefits" also was unreasonable and disproportionate. I will quote the learned Judge:

> *"If the requirement of Aadhaar is made mandatory for every benefit or service which the government provides, it is impossible to live in contemporary India without Aadhaar. The inclusion of services and benefits in section 7 is a pre-cursor to the kind of function creep which is inconsistent with the right to informational self- determination. Section 7 is therefore arbitrary and violative of Article 14 in relation to the inclusion of services and benefits as defined" (para 339 (14) (k) of his judgment).*

[339] The state, said he, had failed to demonstrate that less intrusive measures other than biometric authentication would not serve the purpose. Aadhaar if seeded into every database would become a bridge across discreet data silos and will allow the construction of a profile of the individual, contrary to the right to privacy. The state failed to demonstrate that the targeted delivery of subsidies entails a necessary sacrifice of the right to individual autonomy, data protection and dignity. As the Judge said, *"One right cannot be taken away at the behest of another*" (Para 339 (14) (n).

[340] There were other elements to the decision of this dissenting Judge. Firstly, on the effort by the Indian Parliament to give the scheme retrospective validity, the Judge stated that in order to do so Parliament would first have to cure the cause of invalidity.

Secondly he found disproportionate and excessive the effort to link Aadhaar to all account based relationships. The provision, he said, operated on the presumption that all account holders were money launderers. There was no distinction made based on the nature of the business relationship, the value of the transaction, or the actual possibility of terrorist or money laundering. He came to a similar conclusion with regard to the attempt to link the Aadhaar number with mobile phone use. The legitimate aim of subscriber verification had to be balanced against the duty to preserve the integrity of biometric data and phone subscriber privacy. The effort to link Aadhaar numbers with mobile subscribers was unconstitutional.

[341] In words, which I respectfully wish to adopt as my own, the learned Judge summarised the overall constitutional failings of the Aadhaar scheme thus:

> *"Identity is necessarily a plural concept. The Constitution also recognises a multitude of identities through the plethora of rights that it safeguards. The technology deployed in the Aadhaar scheme reduces different constitutional identities into a single identity of a 12-digit number and infringes the right of an individual to identify herself or himself through a chosen means. Aadhaar is about identification and is an instrument which facilitates a proof of identity. It must not be allowed to obliterate constitutional identity." (paragraph 339 (21) of his judgment).*

[342] The Constitution of India, unlike ours, has no express statement of the right to privacy. Their Judges implied the right. Also, unlike ours, their Constitution allows for "fair just and reasonable" exceptions to the rights guaranteed. These differences notwithstanding, the decision of the majority as well as the reasoning of the minority, are of great assistance and relevance.

[343] As stated earlier the test of constitutionality is twofold (paragraph 267 above). One must first determine if the right is impacted. If it is, the next question is whether the measure is demonstrably justified in a free and democratic society. The **Oakes** test has been applied in this jurisdiction. It is clear and easily understood. I see no need to add the refinements alluded to by the Supreme Court of India. A measure will be demonstrably justified in a free and democratic society if:

(a) The objective of the offending statute is of sufficient import to warrant the override of the right

(b) The means by which the objective is to be achieved is proportional, meaning:

(i) The measures must be carefully designed to achieve the objective. They cannot be arbitrary, unfair or irrational

(ii) The measures should impair as little as possible the right in question

(iii) The effect of the measure must be proportional to the sufficiently important objective. The more severe the effect of a measure the more important must be the objective.

[344] Applying the test in **Oakes,** therefore, I am of the view that sections of NIRA are in breach of the Constitution. The modified approach of the Supreme Court of India would yield the same result. I will treat with the impugned sections in the order in which they appear in the NIRA statute.

[345] Section 4, quoted in its entirety at paragraph 272 above, offends the right to equality before the law guaranteed by section 13 (3) g of the Constitution. The Attorney General's submission, that the constitutional imperative is satisfied provided the law applies equally to all to whom it applies, is with respect untenable. The submission, as demonstrated in the judgment of Chief Justice Sykes, is not supported by the decisions cited. If correct it would mean that a discriminatory statute, so long as it applies equally to those discriminated against by that statute, could not be challenged. To adopt an extreme example to prove the point: a statute saying all persons residing above Torrington Bridge are to pay twice the amount for the same journey on public transportation as other Jamaicans, would, on the Attorney General's analysis, not offend the guarantee of equality before the law. This because the statute only applied to persons living above Torrington Bridge. It is manifest that such a law creates unequal

treatment. To be upheld it would need to get over the second limb of the **Oakes** test. The same is true of section 4 of NIRA.

[346] In this case there has been no evidence to justify imposing, on Jamaicans and on persons resident here, obligations not required of those who do not live here. Given the stated objective, to accurately identify persons who access public services, it is arbitrary and unreasonable to allow non-residents access to the same service without the need of an NIC. Similarly, it is discriminatory to prevent citizens and residents using other means of identification in order to access public goods and services. The measure is not proportional to the consequence of the unequal treatment which inheres in section 4.

[347] Section 6(1) states;

> *"(1) The functions of the Authority shall be to-*
>
> *a) administer the National Identification System as provided under the Act;*
>
> *b) establish, maintain and operate the database;*
>
> *c) establish and maintain an improved and modernized system of civil registration and keep public records through appropriate means;*
>
> *d) develop appropriate systems and protocols for the security, secrecy and necessary safeguards for the protection and confidentiality of identity information and demographic information in the Database;*
>
> *e) develop policies, procedures and protocols for the collection, processing, use and sharing of information contained in the Database consistent with data protection, best practices;*
>
> *f) provide information or advice, or make proposals, to the Minister on matters relating to the Authority;*

> *g) develop public education programmes, monitor and promote compliance with this Act and regulations;*
>
> *h) perform such other functions as may be assigned to the Authority by the Minister by or under this Act or any other enactment.*

This section does not infringe the rights guaranteed by the Constitution. It outlines the scope of the Authority's functions. These are not unconstitutional because the establishment of a system of identification is unobjectionable.

[348] Section 15 provides:

> *"The Authority shall establish, maintain and operate in accordance with this Act, a consolidated national databank to be known as the National Civil and Identification Database for the collection and collation of identity information and demographic information regarding registrable individuals."*

"*Registrable individuals*" means any citizen or person who is ordinarily resident in Jamaica (see section 2 of NIRA). Section 15, standing alone, does not impact the right to security of the person or privacy. Collation, collection and storage of identity and demographic information, in and of itself, offends no individual constitutional right. In other words, information about who you are and where you were born, can be requested and recorded for collation collection and storage. The mere request and storage, when information is voluntarily given, offends no constitutional right. Neither is it unconstitutional to store information only in relation to citizens or persons ordinarily resident. This is because, even if there is unequal treatment, the need for and utility of the storage of information is demonstrably justifiable in a free and democratic society. The choice of information to store is one properly within the remit of policymakers.

[349] Section 20 (1) to (7) reads:

> *"(1) Every registrable individual shall apply to the Authority for enrolment in the database.*

(2) The Authority shall take such steps as may be necessary to enrol all registrable individuals in the Database.

(3) The Authority may collaborate with public and private sector entities as may be necessary to establish enrolment centres and to ensure ease of access by the enrolment centres.

(4) The form and manner of the application, the information to be collected and the procedure to be adopted for the conduct of enrolment shall be as specified in the regulations.

(5) The Authority shall, at the time of enrolment, inform the registrable individual of the following details in such a manner as may be specified in the regulations namely-

(a) The reason why the information is being collected;

(b) The purpose for which the information will be used;

(c) the fact that, and the manner in which, the information will be verified;

(d) the right of the individual to access the information in the future;

(e) the right to request the correction of inaccurate information registered in the Database;

(f) to whom and under what circumstances information included in the database may be disclosed; and

(g) the right to appeal decisions taken by the Authority.

(6) The Authority shall take such steps as may be necessary to satisfy itself as to the accuracy of the identity information provided by a registrable individual.

(7) No identity information about a registrable individual shall be entered into the Database unless the information has been verified by the Authority."

The section offends the right to security of the person and privacy in, sections 13 (3) (a) and (j) of, the Constitution. These rights reflect, and are integral to, the dignity of a

person. The Act proposes to compel persons to divulge information personal to them. It is the right to choose, whether or not to share personal information, which individual liberty in a free and democratic state jealously guards. The mandatory nature of the requirement as well as the breadth of its scope, and the absence of a right to opt out, are not justified or justifiable in a free and democratic society. If it is intended to prevent corruption or fraud, then it is premised on the assumption that all Jamaicans are involved with corruption and fraud. The danger of abuse by the state or its agencies, and the removal of personal choice, outweigh any conceivable benefit to be had by the community or state.

[350] Subsections (6) and (7) of section 20 authorize verification. In that regard see also section 38(2) which states:

> *"The Authority may verify identity information of a registrable individual, in such form and manner, subject to such conditions and on payment of such fees, as may be specified in the regulations."*

The information and data to be obtained is detailed in the Third Schedule to the Act. Part A of the Third Schedule outlines the biographic information. Part B outlines biometric information. B1 describes core biometric information that must be included; the photograph or other facial image of the individual, the fingerprint of the individual, the eye colour of the individual and the manual signature of the individual. B2 outlines core biometric information that may be included in the database: the retina or iris scan, the vein pattern, if either of them cannot be had then, the footprint, the toe print and the palm print of the individual. B3 outlines other biometric information as any distinguishing feature including physical features of the individual and the blood type of the individual. Manifestly, provisions that mandate verification of such information will necessitate an impact to security of the person and privacy. One may ask how, for example, is a blood type to be verified except by the collection and testing of blood. The collection of biometric data categorized in B1, B2 and B3 all involve an infringement on the privacy and security of the person rights. The collection by force of such data is likely to infringe the right to equitable and humane treatment guaranteed by section 13 (3) (h) of the Constitution.

[351] The question therefore is can such infringements be justified in a free and democratic society. I think not. The integrity of the individual is inherent in the person of every free man. That integrity would be defeated by such provisions. Those provisions, by their mandatory nature, defeat the very essence of a free society. A person's blood is his, or her, own. So too is his, or her, fingerprint. So too is that person's image and likeness. Indeed, so too is his or her name. They are not to be taken without that person's consent. In societies organized on a different ethos, where for example the common good or the welfare of the state takes primacy over the individual right, the conclusion might be otherwise. Such societies are the antithesis to the free and democratic society. In this regard I refer to, and rely upon, the following quotation from the dissenting judgment of Justice Dr K.S. Puttashamy:

> *"Privacy is founded on the autonomy of the individual. The ability to make choices is at the core of the human personality. Its inviolable nature is manifested in the ability to make intimate decisions about oneself with a legitimate expectation of privacy. Privacy guarantees constitutional protection to all aspects of personhood. Privacy was held to be an "essential condition" for the exercise of most freedoms. As such, given that privacy and liberty are intertwined, privacy is necessary for the exercise of liberty..." (paragraph 24)*

[352] In the case, discussed at paragraphs 327 to 341 above, the majority in the Indian Supreme Court decided that the mandatory taking of identifying features was justifiable only if it related to the poor and underprivileged; and if its purpose was to allow them access to social welfare. The court was moved by evidence that the failure to identify individuals entitled to social welfare "*was [a] major hindrance*" to implementing social welfare programmes (para 261(ii) of the majority judgment). The majority was careful to note that:

> *"It may be mentioned that the scheme for enrolling under the Aadhaar Act and obtaining the Aadhaar number is optional and voluntary "(paragraph 277 of majority Judgment).*

[353] Enrolment being voluntary, the Petitioner's challenge to the legislation was as to the process of authorisation and other issues (Paragraph 278 majority judgment). In that

case the majority described the required identifying features and information as "minimal". These were: mandatory demographic information comprising name, date of birth, address and gender; optional demographic information; non-core biometric information comprising a photograph; core biometric information being a fingerprint and iris scan (para 293 majority judgment). The court stated that nowadays fingerprint and iris scans are the most accurate yet non-invasive methods of identifying persons. Finally, the court in its balancing exercise had regard to the evidence of corruption and large scale leakages in the system of distributing state welfare benefits (para 307).

[354] Given these factors it is not surprising that the majority of the Judges decided as they did; (para 309)

> *"In the instant case, a holistic view of the matter having regard to the detailed discussion hereinbefore would amply demonstrate that enrolment in Aadhaar of the underprivileged and marginalised section of the society, in order to avail the fruits of welfare schemes of the government, actually amounts to empowering these persons."*
>
> And later in the same paragraph;
>
> *"Here we find that the inroads into the privacy rights where these individuals are made to part with their biometric information, is minimal. It is coupled with the fact that there is no data collection on the movements of such individuals when they avail benefits under section 7 of the Act thereby ruling out the possibility of creating their profiles, in fact, this technology becomes a vital tool of good governance in a social welfare state. We therefore are of the opinion that the Aadhaar Act meets the test of balancing as well."*

[355] It is manifest that section 20 of NIRA does not meet the balancing test. If it is the purpose to secure state benefits for persons dependent on welfare programmes then it certainly is an overreach to require every citizen and resident of Jamaica to submit to it. Furthermore, the information, both demographic and biometric is extensive and intrusive. The requirement for verification involves potentially even more intrusive measures. There is no evidence of massive fraud or corruption necessitating such

measures, nor is there evidence that existing alternate methods of identifying individuals are unworkable. In requiring every citizen and resident to obtain the NIN and NIC the state will commit a breach of the right to privacy and security of the person. That breach, and its potential consequences, will be disproportionate to any perceived benefit. There is no suggestion that any free and democratic society would require all its citizens to provide such information. The very real prospect of control by data, and of big brother tracking your every move is the antithesis of freedom in a democratic state. Sections 20, 38(2) as well as the Third Schedule to the Act cannot stand.

[356] Section 23 provides for the assignment of a unique number, the NIN. Standing alone the provision infringes no guaranteed right.

[357] Section 27 of NIRA outlines the nature of the National Identification Card (NIC). Although pleaded no submissions were advanced in writing by the Claimant's counsel. Standing alone this section does not impact any constitutional right. The position is similar with respect to sections 30 and 36(4) of NIRA. The former section provides that the NIC is the property of the Authority. This is reasonable given that it is issued without charge, see section 25 (2) of NIRA. The latter section provides for the return of the NIC to the Authority in certain circumstances. The sections offend no constitutional right.

[358] Section 39 provides:

> *"39. (1) A requesting entity may apply in writing to the Authority requesting that the Authority verify identification and the Authority may grant the request but shall not disclose core biometric information of the individual.*
>
> *(2) A requesting entity shall ensure that any identity information of an individual that was obtained through its access to the database is only used for verification purposes.*
>
> *(3) A requesting entity shall provide the individual submitting his identity information and demographic information to that requesting entity for verification, with the following details, namely-*

> *(a) that the requesting entity may seek to verify the information submitted by the individual by using the verification services provided by the Authority; and*
>
> *(b) the uses to which the information received through its access to the Database, may be put by the requesting entity.*
>
> *(4) A requesting entity that contravenes subsection (2) commits an offence and is liable to the penalty specified in relation to the offence in the Fourth Schedule."*

[359] This section allows the Authority to verify identification utilizing information it has collected. This may result in a limited sharing of information. Furthermore, to the extent that the Authority does not need the consent of the individual whose identity is to be verified prior to verification, the provision is in conflict with the privacy rights and rights to security of the person. It is noteworthy that when considering third party authentication, the Indian Supreme Court was concerned to ensure that neither the location of the person nor the purpose of authentication would come to the knowledge of the Authority. (para 197 majority judgment). The court in fact struck down a provision which allowed for retention for 5 years of authentication records. Six months was a sufficient retention period (para 205 of judgment).

[360] There are no similar limitations in NIRA. These matters, of data retention period and treatment of authentication records, are left to regulations to be made. The Honourable Attorney General suggests we should await regulations. I think we would be abdicating our responsibility if we were to do so. The NIRA fails to prohibit sharing of such information at the time of verification or authentication, or to require the individual's consent. It has no time limit on the retention of such information. For reasons stated above the perceived benefits are disproportionate to the infringements.

[361] Section 41 states:

> *"41(1) A public body shall require that a registered individual submit the National Identification Number assigned to him or the National Identification Card issued to him to facilitate the delivery to him of*

goods or services provided by the public body; and the registered individual shall comply with the request.

(2) A private sector entity may require that a registered individual submit the National Identification Number assigned to him or the National Identity Card issued to him to facilitate the delivery to him of goods or services provided by the private sector entity.

(3) This section does not apply during a period of public disaster or public emergency as defined in section 20 of the Constitution of Jamaica or in any other situation that poses a threat to health or life."

This section directly impacts the life, liberty and security of the person contrary to section 13 (3) (a) of the Constitution. It means that registrable individuals, who do not have a NIN or a NIC, will be prevented from accessing public services or even trading in the private sector. It also infringes the right to equality before the law (section 13 (3) (g) of the Constitution). Furthermore, insofar as it becomes a prerequisite to the right of a passport, it directly impacts freedom of movement. I agree with the Defendant's submissions that nothing in the Act suggests it impacts the right to be registered as an elector. If applied so as to impede the right to vote it would contravene the Constitution. The right to vote is not a "good or service" provided by a public body.

[362] The attitude of the Supreme Court of India, to an attempt to make the Aadhaar number a prerequisite for commercial transactions, is instructive. The court struck down that part of the legislation which allowed body corporates and private individuals to seek authentication (paragraph 218 majority judgment). It was unconstitutional to the extent it made it possible for private sector interests to demand authentication using the Aadhaar number (para 447(4) (h) of majority judgment). The court also limited the meaning of the word "*benefits*" to: welfare schemes provided by the state, targeted at a deprived class and, paid for from the consolidated fund (para 321 of majority judgment). With respect to the provision of education for children, the court decided public education is *"neither a service nor a subsidy"* (Para 332 (c) of majority judgment). It is manifest that NIRA offends these approaches. Coercing all citizens to obtain a NIN and a NIC, by depriving

them of public services if they do not, is disproportionate to any benefit to be gained. Section 41 is unconstitutional and cannot stand as it infringes the rights to privacy and the liberty of the subject and is not justified in a free and democratic society.

[363] There is no doubt that if one chooses to access public services it is normally necessary to satisfy that entity of one's identity. That is not what makes section 41 offensive. Section 41 is unconstitutional because it purports to make a national identification card or number the only method of verification of identity. This, for the reasons adumbrated above, is not justified in a free and democratic society.

[364] Section 43 states;

> *"43(1) The Authority shall not disclose identity information stored in the database about any individual except where the identity information is disclosed-*
>
> *(a) pursuant to a request of the individual whose identification is being disclosed;*
>
> *(b) To facilitate the identification of the bodies of unknown deceased persons;*
>
> *(c) To facilitate the finding or identification of missing persons;*
>
> *(d) Subject to subsection (2) pursuant to an order of the Court; or*
>
> *(e) Where the Act authorizes the disclosure*
>
> *(2) The court may, on an ex parte application by the Authority to a Judge in Chambers, grant an order for disclosure of the identity information of an individual on the grounds that the disclosure is necessary-*
>
> *(a) For the prevention or detection of a crime;*
>
> *(b) In the interest of national security;*
>
> *(c) Where there is a public emergency; or*

(d) To facilitate an investigation under the Proceeds of Crime Act.

(3) The Authority may disclose demographic information to enable the generation of statistical information as may be required by the statistical Institute of Jamaica established under the Planning Institute of Jamaica Act."

[365] This section clearly runs afoul of the privacy provisions contained in section 13 (3) (j) of the Constitution. It allows disclosure of any and all identity information in broad terms. So, for example, it says to "facilitate the finding of missing persons." There is no restriction; all that is required is for someone to be alleged to be missing. Subsection (2) (a), in relation to crime, says disclosure is subject to an order made ex parte. However, all that is required is evidence, that the information will assist in detecting crime, to be placed before a judge sitting ex parte. This section impacts the right.

[366] The question then is can it be justified in a free and democratic society. It certainly is to be expected that information in the possession of the state will be available to assist to locate missing persons and/or to solve crime. A mechanism to access the data is therefore appropriate. Such a mechanism must however have the most stringent controls so as to prevent abuse and impact the right abridged as little as possible. NIRA has no or no adequate protections. It does not require the person or persons to be affected, by any sharing of data or information, to have an opportunity to be heard prior to any decision to share. Neither is there regulation of the time the requesting agency will be allowed to retain the information after it is shared. In the Aadhaar case the majority declared that any individual whose information was requested had to be afforded a fair hearing before any decision to release it (para 447 (1) (d) (iii). This seems to me to be a minimal requirement if there is to be any hope of proportionality. In its present form section 43 cannot be justified in a free and democratic society.

[367] Section 45, (quoted in paragraph 320 above) provides for access to core biometric information. It suffers from the same malaise as section 43. Although not referenced in the Fixed Date Claim, submissions were made orally on section 45 by

both parties. I disagree with the submission by the Attorney General that the requirements in section 45(3) are cumulative. The disjunctive "or" at the end of section 45 (3)(b) is an indication that they are alternatives. Section 45, for reasons stated in paragraphs 364 and 365 above, is unconstitutional.

[368] Section 60 effects amendments to various legislative enactments. These are detailed in the sixth schedule of NIRA. A perusal of the several statutes impacted gives impetus to the individual rights concerns already expressed: The amendments are to, inter alia, the: Aliens Act, Children (Adoption of) Act, Cybercrimes Act, Education Act and Regulations, DNA Evidence Act, Justice Protection Act, Marriage Act, The Passport Act and Proceeds of Crimes Act (just to name a few). For reasons outlined above the NIRA suffers from extreme overreach. Its compulsory nature is disproportionate and cannot be justified in a free and democratic society. The consequential amendments to other law as contemplated by section 60 cannot therefore stand.

[369] In **Hinds v R** (cited at paragraph 265 above) Lord Diplock at page 372 (i), explained the approach the Court should take after having found that sections of a statute offend the Constitution. After finding that specific provisions of the Gun Court Act 1974 were void, he stated:

> *"The final question for their Lordships is whether they are severable from the remaining provisions of the Act so that the latter still remain enforceable as part of the law of Jamaica…The test of severability has been laid down authoritatively by this Board in Attorney-General for Alberta v. Attorney-General for Canada [1947] A.C. 503, 518:*
>
> *'The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is ultra vires at all.'"*

[370] Claimant's Counsel declined to make submissions on severability. He indicated that the issue should be left to the discretion of the court. The Defendant similarly made

no submissions on the issue. I am of the view that NIRA cannot survive the severance of the unconstitutional provisions. The evidence placed before us does not establish that the measures involved are proportional to the restriction of rights contemplated. The NIRA creates a mandatory regime, applicable to all Jamaicans and persons resident here, which is intended to be used and accessed by public and private sectors. The contemplated scheme, reliant as it is on its universal applicability and on its mandatory components, cannot survive severance of the offensive provisions. NIRA is therefore bad in law and must be declared unconstitutional.

[371] I have not in this judgment considered it necessary to discuss the several authorities cited by the Crown. This is because the learned Chief Justice has fully dealt with and distinguished those cases, and in so comprehensive a manner, that I could find nothing useful to add. I am in general agreement with the judgment of my lord the Chief Justice of Jamaica. We part company on the issue whether, in matters of constitutional breach, a failure to plead is fatal. It is, and has always been, my view that where a constitutional breach is brought to the attention of the court it ought not to be ignored. The Defendant, if caught by surprise, may request time to respond. However, the door to constitutional relief is not to be shut on technical rules of procedure or pleading or because of the absence of rules, see **Jaundoo v Attorney General of Guyana** (1971) 16 WIR 141. On the matter of severance, for example, it matters not that the Claimant did not apply to strike down the statute. He may have his personal, or political, reason for not wishing to have that consequence. However, just as political parties cannot combine to create unconstitutional law by ordinary legislation, neither can a litigant save a statute which has been successfully impugned before this court. The question, whether the unconstitutional provisions can be safely severed, is a matter of law and falls to be determined by the court whether or not the parties wish it to be. Unconstitutional conduct is not far removed from illegality in the attitude courts take to it. It is after all a matter of public interest whether legislation is or is not constitutional. It is for this reason that the failure to plead section 45, with respect to the constitutionality of which we heard submissions, ought not to preclude us making a finding in the circumstances of this case.

[372] The Claimant has requested an order for costs. Costs are not normally awarded, in matters of this nature, against an unsuccessful Claimant (Civil Procedure Rules Part 56.15 (5)). There is however no such reservation, or bar, to an award of costs in favour of a successful Claimant. In this case the citizen has, I suppose at great expense, successfully challenged the state. He is entitled to recover costs. Such costs to be taxed if not agreed.

CONCLUSION

[373] The Constitution of Jamaica is premised on the notion that free men in a democracy provide the best arrangement to secure a peaceful stable and productive society. The separation of powers is intended to prevent a concentration of power which can militate against democracy. The guarantee of individual rights is intended to prevent erosion of the freedoms enjoyed by free men in a democracy. The free and democratic society, thereby created, functions best where there is trust between the average citizen and the state. Corruption, high crime rates, unemployment and underfunded social services may undermine that trust. This situation can pose a serious challenge to policy makers. The court is not unsympathetic to this reality. However, the exigency of the moment does not render proportional, or otherwise justify, a breach of rights guaranteed by the Constitution of a free and democratic society. The Constitution provides in section 13 (9) for temporary suspension of rights in times of emergency. It also provides in section 49 for its own amendment. Save as aforesaid the rule of law necessitates the upholding of the Constitution. We do not doubt the good intentions of the policy makers but chaos and the need for order has, all too often in history, been the justification for policies which curtail freedom and ultimately undermine democracy.

[374] Judges, as the learned Attorney General reminded us, are not responsible for policy or for the content of legislation. We however interpret and apply legislation intended to implement the policy. It is our sworn duty to ensure that enactments are consistent with, and do not derogate from, the Constitution which is our highest law. It is not within the remit of judges to say whether the premise of the Constitution is right or wrong. It is our duty to uphold the policy of the Constitution as revealed in its words,

structure and historical roots. We do this without regard to our popularity which, as judges, we neither crave nor require. In the words of Justice Hiler B Zobel an associate Justice of the Massachusetts Superior Court of the United States:

> *"Elected officials may consider popular urging and sway to public opinion polls. But judges must follow their oaths and do their duty heedless of editorials, letters, telegrams, picketers, threats, petitions, panellists and talk shows. In this country, we do not administer justice by plebiscite.*
>
> *A judge in short is a public servant who must follow his conscience whether or not he counters the manifest wishes of those he serves; whether or not his decision seems a surrender to prevalent demands." (Quoted in "The Literature of the Law "by Brian Harris page 20)*

[375] In this judgment I have endeavoured to do no less. The NIRA is unconstitutional null and void insofar as it is intended to make compulsory the taking of biometric and other data so as to provide a national identification number and card for every citizen and resident of Jamaica. The involuntary nature of the policy infringes guaranteed constitutional rights. Furthermore, the statute seeks to prevent access to services both public and private, or to make possible the denial of such services, to citizens who fail to obtain the said national identification. There is further no, or no adequate, mechanism to prevent the utilisation of the data obtained for other purposes such as the creation of profiles. The danger of a "big brother state" or as the Supreme Court of India called it, a "surveillance state" is real. The wide ranging provisions for information sharing and verification, as well as identity confirmation by public and private sector, adds to that reality.

[376] Policymakers and social scientists should, if they have not already done so, consider the manner in which policies of control reminiscent of the plantation impact the trust level between citizen and state. They may find that programmes, which liberate not restrict and which uplift not suppress, do more to repair existing deficits of trust. Those are, however, matters for the policy maker not the judge. I therefore end this

judgment, as I began, with words which that icon of reggae music addressed to us all: *“Emancipate yourself from mental slavery, none but ourselves, can free our minds”.*

[377] There will, for reasons stated above, be Judgment for the Claimant. It is hereby declared and ordered as follows:

1. The National Identification and Registration Act is unconstitutional, null, void and of no legal effect.

Batts J

PALMER HAMILTON J (Ag)

[378] I have read the judgments of my learned brothers, Bryan Sykes, CJ and David Batts, J. and I concur with the finding that the National Identification and Registration Act (hereinafter referred to as NIRA) is unconstitutional, null and void and therefore cannot stand even if certain sections which remain were excised from the substantive Act. The salient issue which I am compelled to address is a very narrow one, that of severance, and I will also deal with, to a lesser extent, the issue of the constitutionality of section 45 of the NIRA. I readily embrace the fact that to embark on an extensive discourse on the other aspects of the law and the sections which are unconstitutional

would be an exercise in futility as these areas were more than adequately addressed by my learned brothers.

[379] A careful examination of some cases from the Caribbean context, the Commonwealth and the United States of America (USA) may offer some guidance in understanding the doctrine of severance and its development over time.

The International Perspective

[380] In an article intituled "Partial Unconstitutionality" written by Kevin C. Walsh, found at (2010) 85 New York University Law Review 738, the doctrine of severance is explored from the American jurisprudence and the author gives an overview of the historic doctrine of severance. Interestingly, the American modern perspective differs somewhat from the Commonwealth jurisdiction but its foundation was in the common law and as such I adopt some of the views expressed by Walsh.

[381] At the root of severance or severability is the salient question which the Judiciary must ask, that is, any court engaged in judicial review must ask itself whether the act of the legislature is void. It therefore means that unconstitutionality if so found, is a holding of voidness.

[382] As Walsh so elegantly puts it at page 740 "Severability doctrine governs whether a court may first separate out or "sever" the unconstitutional provisions or applications of a law, and then subtract or "excise" them, so the constitutional remainder can be enforced going forward."

[383] In my view, it seems very clear to me that in order for us to determine whether severance should be made, a careful examination of the legislative intent for the particular Act or Bill must be embarked upon. Hence in **Ayotte v Planned Parenthood of N. New England** 546 US 320, 328 the court held that:

> *"severability doctrine sets legislative intent as a constraint on when courts can limit the solution to the problem. If the legislature would not have enacted the unconstitutional law without its*

> *unconstitutional provisions or applications, the doctrine calls for courts to invalidate the legislation in its entirety. The phrasing of the doctrinal test and the inherently counterfactual nature of the problem reveal that the required inquiry into legislative intent is unlike interpretative inquiries that aim to uncover what the legislature actually provided for in its legislation. Severability doctrine asks what the legislature would have done, not what the legislature actually did."*

[384] Unlike some jurisdictions, such as Singapore in the case of **Prabagaran a/l Srivijayan v Public Prosecutor and other matters** [2017] 4 LRC 26, and some pieces of legislation, the NIRA does not possess a severability or in severability clause. The absence of such a clause for the NIRA is the unspoken prompt that the parties ought to have made submissions on this crucial point and as such I join with my brothers in highlighting the sidestepping of this issue by both lead Counsel. Nonetheless, it still falls for our determination whether or not it is addressed.

[385] The departure from USA law is evident in the distinction that their courts make between State Statutes and Federal Statutes which is not applicable in this jurisdiction. However, the USA law seems to be hinged on an excision-based approach to judicial review. The methodology employed to determine severability, in my view, is relevant. Within the excision-based approach, severability is the exclusive doctrinal tool for dealing with the problem of partial unconstitutionality. (see **Walsh, Partial Unconstitutionality**, page 745).

[386] I therefore find merit in the legislative-intent test that is to be applied in making this determination of severance. The courts held in the case **Warren v Mayor and Aldermen of Charlestown** (1854) 68 Mass (2 Gray) 84, 99:

> *"If constitutional and unconstitutional portions of a statute are so mutually connected with and dependent on each other…as to warrant a belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently the entire statute must fall."*

[387] This was further endorsed by the decision of the Supreme Court of the United States in **Alaska Airlines Inc. v Brock**, (1987) 480 US 678 in which the court considered the standard for determining the severability of an unconstitutional provision to be well established and indicated that it comprises two (2) parts. Firstly, the court considers whether the truncated statute, with the unconstitutional portion excised will operate in the manner that the legislature intended. Secondly, even if the first part is satisfied, the court must determine if the legislature would have enacted the truncated statute with only the remaining provisions. This position is also similar in Australia.

[388] In my view, it is evident that although severance is of antiquity it is a time consuming process and requires in depth analysis which a judicial review court is always ready to embark on to ensure that the legislation in question, if it stands, is pursuant to it being justifiable in a free and democratic society.

[389] As Kirby, J in **New South Wales v Commonwealth** (2006) 81 ALJR 34 succinctly puts it, *"the court cannot separate the woof from the warp and manufacture new web."* If the court were to do that then we would be usurping the role of the legislature which would violate the doctrine of separation of powers. In other words, severance if applied, does not result in the judiciary creating a whole new statute or piece of legislation. The court therefore undertakes to perform an *"amputation and excision, where necessary, but not to perform judicial plastic surgery upon the challenged law. By inference this is a reference to judicial excisions that would substantially alter the appearance of the law, presenting a law that looks quite different from that which was made by the Parliament."* (per Kirby, J in **New South Wales v Commonwealth** (supra) page 95).

The Commonwealth Perspective

[390] In revisiting the case of **Prabagaran a/l Srivijayan v Public Prosecutor and other matters** (supra) Chao Hick Tin, JA stated that:

> *"If the court concludes that the challenged law was intended to operate fully and completely according to its terms or not all, the*

> *court will not, under the guise of interpretation and severance uphold what would effectively be a new and different law."*

[391] Chao Hick Tin, JA at page 42 was of the view that there was nothing wrong with severing an unconstitutional provision that would only work as a composite whole with the remaining constitutional parts of the legislative framework. He went further to state:

> *"It seems to us that there is nothing wrong in severing an unconstitutional provision that only works as a composite whole with the remaining constitutional parts of the legislative framework. Rather, it is where the latter cannot function without the former at least in a manner that Parliament could not have contemplated that a constitutionally valid provision may be struck off."*

The Regional Context

[392] The jurisprudence on the doctrine of severance kickstarts with the case of **Moses Hinds et al v R and the Director of Public Prosecutions v Trevor Jackson et al** (1975) 13 JLR 262. This oft cited locus classicus from the region on severance was also relied on by my learned brothers on this very point and as such I will not go into much detail or `spend much time on this case. The **Hinds** case makes it clear that the judicial review court must examine the constitutional validity of the provisions of the legislation in question. Lord Diplock at page 266 states:

> *"…if other provisions of the Act are invalid a question of severability arises. The court accordingly cannot avoid the task of examining the constitutional validity of the other provisions of the Act in order to see whether those which must be struck down as invalid form part of a single legislative scheme of which the specific provisions applicable to the particular case are also an integral and inseparable part."*

[393] Lord Diplock goes further to state that the test of severability was laid down in the landmark case from Canada, **Attorney General for Alberta v Attorney General for Canada** [1947] A.C. 503 at page 518:

> *"The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is ultra vires at all."*

[394] This has been the common thread throughout the cases within the Region and the principle has not changed over time nor has the approach to be taken. The doctrine of severability was further endorsed in **Independent Jamaica Council for Human Rights (1998) Ltd., and others v Marshall-Burnett and another**, [2005] 2 AC 356. Lord Bingham of Cornhill relied to a great extent on the decision in **Hinds** and also cited the case of **Maher v Attorney General** [1973] IR 140 in which Fitzgerald, CJ adopted a similar test. Fitzgerald CJ at page 147 of the **Maher** case stated:

> *"But if what remains is so inextricably bound up with the part held invalid that the remainder cannot survive independently, or if the remainder would not represent the legislative intent, the remaining part will not be severed and given constitutional validity."*

[395] In 2011, our local courts dispensed with another judicial review matter in which the doctrine of severance arose in the case of **Adrian Nation et al v The Director of Public Prosecutions and the Attorney of Jamaica and other** (unreported) Supreme Court, Jamaica, Claim No. 2010 HCV 5201 judgment delivered 15th July 2011. Both Horace Marsh, J (now retired and Patrick Brooks, J (as he then was) made reference to the doctrine of severance dealt with in the **Hinds** and **Alberta** cases, though not in great detail and concluded that the certain sections of the Acts in question were *"so inextricably bound up in the repugnance, that no part of any of them may be salvaged*." (see paragraph 151 of **Adrian Nation** Case).

To Sever or Not to Sever, that is the Question

[396] To determine whether the sections which were found to be unconstitutional could be excised out of the NIRA, I will now examine the Legislative intent of Parliament, which is evidenced in the preamble and section 3 of the NIRA. The preamble states:

> *"An Act to establish a body to be called the National Identification Registration Authority for the promotion, establishment and regulation of a National Identification System that facilitates the enrolment of all citizens of Jamaica and individuals who are ordinarily resident in Jamaica and the verification of identity information and the authentication of a National Identity Number and a National Identification Card; to provide for the establishment, maintenance and operation of a databank to be called the National Civil and Identification Database; for the assignment by a National Identification Number to each individual whose particulars are included in the Database; for the issue of National Identification Cards and certain certificates to individuals whose particulars are included in the Database; to facilitate the collection, compilation, analysis, abstraction and publication of Statistical information relating to the commercial, industrial, social economic and general activities and condition of the citizens of Jamaica and individuals who are ordinarily resident in Jamaica; and for connected matters."*

[397] Implicit in the preamble of the NIRA is the fact that the legislature intended to create a mandatory regime in order to achieve its objectives encapsulated in section 3 of the NIRA. This mandatory regime is applicable to all Jamaican citizens and persons ordinarily resident in Jamaica. The data required and captured as a result of this mandatory regime would then be accessible by both the public and private sectors. In my view, this unbridled accessibility by public and private sectors is untenable and unconstitutional and would need requisite safeguards in place to ensure that the constitutional rights of the citizens are not violated. In my judgment, even if we were to excise or sever sections 6, 20, 39, 41, 43, 45, and 60, and the Third and Sixth Schedules from the body of the NIRA, any form of severance, if it can be effected at all, based on the legislative intent of the NIRA, *"would emasculate and abort"* the Act as a whole and *"defeat and negate the teleological purpose of the provisions."* (per Chao Hick Tin, JA in **Prabagan** case, page 44).

[398] Examining the NIRA as a whole, it is clear that its legislative intent and purpose is to establish machinery that mandatorily requires every citizen to be registered on that particular national identification scheme.

[399] In my view, as was stated in **Alberga** (supra) and the line of cases already cited by me, the other sections remaining are so inextricably bound up to those which have been struck down as unconstitutional and invalid, that what remains cannot independently survive.

Conclusion

[400] I am of the firm view that the remaining provision of the NIRA will not be able to survive severance and I have no alternative but to concur with my learned brothers, Sykes, CJ and Batts, J on that point.

[401] On the issue of declaring section 45 of NIRA unconstitutional, though not pleaded, I concur with Batts, J.

[402] In my judgment, the mere composition of a judicial review court is to determine, in the main, the unconstitutionality of statutes and whether any citizen's constitutional and human rights have been violated. Therefore, having declared that section 45 is a violation of section 13 (3) (j) of the Charter, I adopt the findings of Lord Diplock in the case of **Olive Casey Jaundoo vs Attorney General of Guyana**, (1971) 16 WIR 141 where at page 146 he states:

> *"They are not confined to the procedure appropriate to an ordinary civil action…The clear intention of the Constitution that a person who alleges that his fundamental rights are threatened should have unhindered access to the High Court is not to be defeated by any failure of Parliament or the rule-making authority to make specific provision as to how that access is to be gained."*

[403] In my view, once the Defendant has been put on notice as to the substance of the claim for constitutional redress, the finding of unconstitutionality of a provision, though not pleaded, must be anticipated. Of note, is the distinction made between a civil action filed and the justiciability of a constitutional right being violated. Constitutional redress ought not to be denied merely on a defect in form and not substance. I agree wholeheartedly with my learned brother, Batts, J on this point. The **Jaundoo** case

proved quite useful especially in the light of a similar provision in our jurisdiction being section 19 (1) of the Charter which states:

> *"If any person alleges that any of the provisions of this chapter has been, is being or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress."*

[404] The Claimant in the case at Bar, having asserted that section 13 (3) (j) is likely to be violated has put the Defendant on Notice and it is now open to this court to make a finding on the constitutionality or lack thereof of section 45 of the NIRA.

[405] Additionally, it is my view that the inherent powers of the court allow for a finding of this nature. According to Alexander Hamilton in the article The Federalist, No. 78 at page 378;

> *"The power of the judiciary is to enter judgments in cases. In reaching judgments, courts possess the authority to pronounce legislative acts void, because contrary to the constitution …this authority derives from the Constitution's status as fundamental law and from judges' obligation to regulate their decisions by the fundamental laws, rather than by those which are not fundamental."*

[406] For the foregoing reasons and in agreement with my learned brothers, I find judgment for the Claimant and the NIRA is therefore struck down as unconstitutional, null, void and of no legal effect.

Palmer-Hamilton J

ORDER OF THE COURT

By unanimous decision it is declared that the National Identification and Registration Act is declared to be unconstitutional null, void and of no legal effect.

Parties to make written submissions on costs not later than midday May 3, 2019.

Sykes CJ

Batts J

Palmer Hamilton J