

# THE UNCONSTITUTIONALITY OF NIDS

	<p>On November 21, 2017, over the objections of the Opposition and a few independent voices in the wider society, the Parliament enacted the National Identification and Registration Act, 2017; and on December 8, 2017, his Excellency the Governor General gave his assent, passing it into law.</p> <p>Throughout the debate and since its enactment, the People’s National Party (PNP) has pointed to several flaws and unconstitutionality of several sections of the Act. We warned several times that we would take court action to secure the rights of the Jamaican people and today we are fulfilling that promise.</p>	
<p><b>The NIDS Act Infringes on:</b></p>	<ul style="list-style-type: none"> <li>a) 13(3)(a) – the right to security of the person;</li> <li>b) 13(3)(g) – the right to equality before the law;</li> <li>c) 13(3)(h) – the right to equitable and humane treatment by a public authority in the exercise of its functions;</li> <li>d) 13(3)(i) – the right to freedom from discrimination;</li> <li>e) 13(3)(j) – the right to privacy;</li> <li>f) 13(3)(n) – the right to a passport;</li> <li>g) 13(3)(o) – the right to protection from inhumane or degrading treatment</li> <li>h) 13(3)(q) – the right to protection of property rights; and</li> <li>i) 13(3) (r) – the right to due process.</li> </ul>	
	<p><b>Why do we insist that the NIDS Act contravenes our constitutional rights?</b></p>	
<p><b>Precondition for delivery of goods and services</b></p> <p><b>Unequal treatment</b></p>	<p><b>Section 4</b> – which provides that the Act be applied to all Jamaican citizens, regardless of residence, and to persons who are ordinarily resident in Jamaica, requires in section 20 that for all “registrable individuals” to “enrol in the Database;” and added to that, in section 41 for production of the resultant National Identification (ID) Number or National Identification Card as a precondition for delivery of goods and services from any public body.</p> <p>A non-citizen and non-resident of Jamaica seeking to purchase property in Jamaica will not be subject to the requirements of the Act, but a Jamaican resident will be. The Jamaican resident would be treated less favourably.</p>	<p><b>The Example</b></p>
<p><b>Violation of the right to privacy</b></p>	<p><b>Section 6</b> – the duty of the Authority under this section “to develop policies, procedures and protocols” for, inter alia, “sharing” of “information in the Database” is a violation of citizens right to privacy (protected by section 13(3)(j) of the Constitution).</p> <p>This is because “<b>sharing</b>” is synonymous with “<b>disclosure</b>”, and “policies, procedures and protocols” are to be</p>	<p>“<b>Sharing</b>” is the same as “<b>Disclosure</b>”</p>

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<p><b>Disclosure of personal data</b></p> <p><b>Denial of Fair Hearing</b></p>	<p>determined by the Authority without any requirement for prior or subsequent judicial authorization.</p> <p>This is an instance in which, as provided for in section 43(1) (e), “the Act authorizes disclosure.” The effect is that personal data may be disclosed in circumstances and to persons that the Authority alone may determine, without any of us having an opportunity to prevent the disclosure from taking place.</p> <p>As the right to privacy is a civil right and the Authority’s decision to share the personal data could be adverse to our interests, this lack of judicial oversight also violates the right of citizens to a <b>fair hearing</b> in accordance with section 16(2) of the Constitution.</p>	
<p><b>Collection &amp; Sharing of Personal Data</b></p> <p><b>Biometric data</b></p>	<p><b>Section 15</b> – the requirement under the Act to collect and store our personal data (or “information”, the term euphemistically used by the Act) is a violation of our privacy rights protected by sections 13(3) (j), 13(3) (m) and 13(3) (n).</p> <p>Our constitutional rights to privacy, to a passport, and to vote, will be contingent on our compliance with the requirement to enrol in “the Database”.</p> <p>Further, this requirement violates our rights under sections 13(3)(a) and 13(3)(q), vis-à-vis our security of person and the protection of our property rights.</p> <p>Biometric data are the subject of informational property rights which are guaranteed protection as “other property” under section 13(3)(j) of the Constitution.</p>	<p><b>Threatens our right to privacy, to hold a passport and to vote</b></p>
<p><b>The Act’s coercive provisions on enrolment in “the Database” are not predicated on a criminal charge or conviction.</b></p>	<p><b>Section 20(1)</b> – the requirement for “registrable individuals” to enrol in “the Database” is a violation of the right to privacy under section 13(3)(j), and the right to security of the person under section 13(3)(a), of the Constitution.</p> <p>Both those rights include the right to bodily integrity, which entitles a person to be the final arbiter of what is done or not done to his or her body.</p> <p>The right to bodily integrity also involves the right to freedom from physical coercion or other interference.</p> <p>This last-mentioned right, while not absolute, may only be justifiably infringed where a person is charged with (and especially once the person is convicted of) a criminal offence. The Act’s coercive provisions on enrolment in “the</p>	

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	Database” are not predicated on a criminal charge or conviction.	
<b>Giving third-party access to information</b>	<p><b>Section 39</b> – the power of the Authority, under subsection (2), to allow a “requesting entity” to “access” the Database violates citizens right to privacy under section 13(3)(j) of the Constitution.</p> <p><b>Section 39(2)</b> itself, acknowledges that in the course of granting “access,” the “requesting entity” may obtain information that it could use for purposes other than “verification purposes”.</p> <p>This “access” amounts to constructive disclosure of our personal data, which is yet another instance of the potential for personal data to be disclosed without prior judicial oversight.</p> <p>This “access” also poses a risk to the integrity of our personal data in a way that can compromise the protection of our private and family lives, as set out in section 13(3)(j)(ii) of the Constitution.</p>	<p><b>Potential misuse of information</b></p> <p><b>Risk pose to private and family life</b></p>
<b>Denial of goods and services</b>	<p><b>Section 41</b> – the requirement of this section to produce a National Identification Number or a National Identification Card as a precondition for the provision of goods and services by a public body, and the way the section is likely to be implemented, constitute a violation of the rights contained under sections 13(3)(m), 13(3)(n) and 13(3)(p) of the Constitution.</p>	
<b>There is a real and present danger that our constitutional rights to privacy will further be affected.</b>	<p><b>Section 43</b> – the Act’s provisions at 43(1)(e) (i.e. that the Act may authorise disclosure) and at section 43(3) (i.e. that the Authority may disseminate personal data variously and without the data subjects’ consent), constitute an infringement of our right, to privacy as protected by section 13(3)(j) of the Constitution.</p> <p>The provisions of section 43 of the Act (of which subsection (1)(e) should be read in conjunction with section 6(1)(e)) appear open-ended, particularly as the Regulations that are to underpin the Act have not yet been made or even produced in draft form.</p>	
<b>Applying for a passport</b>	<p><b>Section 60</b> – this section, insofar as it relates to the Sixth Schedule to the Act (and, in particular, the Passport Act), is contrary to the Constitution’s due process clause (i.e. section 16(2)).</p> <p>It makes enjoyment of the constitutional right to be granted a passport contingent on our submitting to the unconstitutional violation of our right to bodily integrity, which submission is required by section 20 of the Act.</p>	

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	<p>As failure to enrol in “the Database” will inevitably and automatically preclude the issuing of a passport to the unenrolled person, the Act’s provisions will in this way negatively impact our right (under section 13(3)(n) of the Constitution) to be granted a passport.</p>	
	<p>The Act’s various provisions, as further set out contravene or are likely to contravene our constitutional rights guaranteed under Chapter III of the Constitution.</p>	
	<p>It is our belief that these contraventions are not “demonstrably justified in a free and democratic society” (the standard to which, by section 13(2) of the Constitution, any right/freedom-infringing law must attain to be saved from unconstitutionality).</p>	
	<p>The Act’s purpose, as set out in its section 16, is purely for identification purposes. We contend that any perceived deficiency in existing identification mechanisms is not attributable to the current protection of the several fundamental rights that the Act violates.</p> <p>Accordingly, there is no basis on which to contend that such violations are required to remove some sort of “prejudice [to] the rights and freedoms of others” (the eventuality which Chapter III of the Constitution limits the guarantee of rights and freedoms to prevent from materializing).</p>	