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Our response on the ICTA Consultation Paper on the proposed regulation of the use of social media in Mauritius

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In this document, the author conveys his views on the proposed recommendations of the Information and Communication Technologies Authority (ICTA) to regulate and address the abuse and issue of social media in Mauritius (Consultation Paper). The author refers extensively to a Paper[1] which was presented at Meeting of Commonwealth Law Ministers and Attorneys-General of Small Commonwealth Jurisdictions in 2013.

A. Summary

1. Although the laws of many countries pre-date the online social networks era, their provisions are often expressed in general terms flexible enough to cover any form of communication. For example, in the area of defamation law, many Courts have been satisfied with applying traditional principles for establishing liability, their argument being that those who publish online do so "knowing that the information they make available is available to all and sundry without any geographic restriction."[2] On the other hand, some courts have been less than satisfied with the status quo[3] and investigations into reform are commonplace.[4] There may be instances, however, where the current law of countries is not always capable of addressing some of the new ways of communication to cause harm to others. In that regard, a review and reform of existing laws is needed. However, in the case of Mauritius, it would be a very

[1] This Paper was presented by the author acting as Legal Consultant to the Commonwealth Secretariat at the Meeting of Commonwealth Law Ministers and Attorneys-General of Small Commonwealth Jurisdictions, Marlborough House, London, 12-13 September 2013. The Paper was on 'Internet and social networks: freedom of expression in the digital age' and is published in the Commonwealth Law Bulletin Volume 40, 2014 Issue 2 at pages 341-360.

[2] Gleeson CJ, McHugh, Gummow and Hayne JJ in the Australian case of *Dow Jones & Company Inc v Gutnick* (2002 HCA 56), at paragraph 39. Also cited *Lewis v. v King* [2004 EWCA Civ 1329], at paragraph 29.

[3] See, for example, the comments by Kirby J in *Dow Jones & Co Inc v Gutnick supra* at paragraph 166 where he suggests that "national legislative attention and international discussion in a forum as global as the Internet itself" is required. (at paragraph 166).

[4] See, eg, UK Law Commission *Defamation and the Internet*: A Preliminary Investigation Scoping Study No 2, December 2002, the Queensland Parliamentary Library Research No. 2003/11, Defamation and the Internet: A New Challenge, May 2003, the New Zealand Law Commission *The news media meets 'new media': Rights, Responsibilities and Regulation in the Digital Age*, December 2011 and *Media Law and Ethics in Mauritius*. Preliminary Report, April 2012, and the recent ICTA *Consultation Paper on proposed amendments to the ICT Act for regulating the use and addressing the abuse and misuse of Social Media in Mauritius*, April 2021.

bold statement to say that our law, whether as applied to criminal investigations and prosecutions, need significant reforms.

2. Freedom of expression is a fundamental right, fundamental to the existence of democracy and the respect of human dignity. The digital revolution offers unprecedented opportunities for the creation of a vibrant environment for freedom of expression and a democratic culture.[5] Today, there is no shortage of social networking sites. Social networking sites have led to the emergence of citizen-created content that enriches social-political debates and that increases the diversity of opinions, the free flow of information and freedom of expression[6].

3. The Consultation Paper does not state that the ICTA or any other body would intercept any messages before they are posted on social media platforms, nor that they would remove any objectionable posted, through a back door. The concern of the ICTA is the identification of offenders and the timely gathering of evidence to prosecute the offenders.

4. It is not disputed that the Internet has increasingly become a key means by which individuals can exercise their right to freedom expression. The right to freedom of expression is as much a fundamental right on its own accord as it is an "enabler" of other rights, including economic, social and cultural rights, as well as civil and political rights, such as the rights to freedom of association and assembly.

5. To regulate the use of social media, the ICTA proposes to store bulk social media traffic for inspection purposes as and when required.[7] It is submitted that this interferes with the rights to privacy and data protection. The storage of contents data "for inspection as and when required", in the absence of a general retention law in Mauritius would, in the absence of a serious threat to national security that proves to be genuine and present or foreseeable, be in breach of the data protection legislation because such storage would not be for a period that is limited in time to what is strictly necessary.

6. The Consultation Paper further states that, every time users of social media platforms wish to these platforms, this access will be done by a proxy server. It is most unfortunate that the Consultation does not explain in detail who this will happen in practice, including the safeguards. Given the main objective of the ICTA which is to identify illegal contents data and the timely prosecution of offenders, all contents accessed by the users would be identifiable by reference such users. It is submitted that this is a disproportionate measure which is being envisaged because the National Digital Ethics Committee would indiscriminately have access to contents data which users have posted and be aware of who have posted the messages by reference to the certificate to be installed on their computer or mobile device. The Consultation is silent about the certificate of regime which is being contemplated. A certificate

[5] Balkin, J.M., 'Populism and Progressivism as Constitutional Categories', 104 *Yale L.J.* 1935, at 1948-49 (1995).

[6] Bonson, E.et al., 'Local e-government 2.0: Social media and corporate transparency in municipalities', *Government Information Quarterly,* 29 (2012) 123 – 132 at p. 124.

[7] Page 4 of the Consultation Paper.

regime of the sort which is mentioned in the Consultation has certain risks (including data protection risks) which users must be made aware of, including who will be the issuer.

B. Online social networks: an overview

7. There is not one universally accepted term or definition for online social networks. There are numerous synonymous terms such as social networking service[8], online social network[9] or social network site.[10]

8. Traditionally, it was enough to simply have an online presence for the dissemination of information. Such dissemination used to be one-way, that is, with no interaction between the sender and recipient(s) of the information. Today, online social networks such as Facebook, MySpace, Twitter and LinkedIN combine different internet tools and provide interactions, exchanges and collaboration amongst users.

9. Social media is becoming one of the most important tools for people to express their opinions and engage in direct conversation with others. Several studies have demonstrated that people use social networking sites for many purposes: to connect and to communicate with people they meet online[11], to share photos[12], to look at what other people are doing[13], as a form of entertainment[14] and to find information.[15]

10. Historically[16], Classmates.com (1995) and SixDegrees.com (1997) were the first online social networks. In 2004, we saw new online social networks like Bebo, MySpace and Facebook. In

[8] Adamic L.A. and Adar E., 'How to search a social network'. *Social Networks* (2005) 27(3), 187-203 ("Social networking services gather information on users' social contracts, construct a large interconnected social network, and reveal to users how they are connected to others in the network." At p. 188).

[9] F. Schneider, A. Feldmann, B. Krishnamurthy, W. Willinger, Understanding online social network usage from a network perspective. Proceedings of the ACM SIGCOMM Conference on Internet measurement, (2009), pp 35-48 ("Online Social Networks (OSNs) such as Facebook, MySpace, LinkedIN, Hi5 and StudiVZ, have become popular within the last few years. OSNs form online communities among people with common interest, activities, backgrounds, and/or friendships. Most OSNs are Web-based and allow users to upload profiles (text, images and videos) and interact with others in numerous ways." At p. 35).

[10] Boyd, Danah M.; Ellison, Nicole B. (2007). Social Network Sites: definition, History and Scholarship. *Journal of Computer-Mediated Communications 13(1).* Available at http://jcmc.indiana.edu/vol13/issue1/boyd.ellison.html (Last accessed on 5 May 2013), ("We define social network sites as web-based services that allow individuals to (1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system." At p. 211).

[11] Ellison, N., Steinfield, C. & Lampe, C. (2007), 'The benefits of Facebook "friends": Exploring the relationship between college students' use of online social networks and social capital'. *Journal of Computer Mediated Communication, 12(3)*.

[12] Joinson, A.N. (2008), 'Looking at', 'Looking up' or 'Keeping up with' People? Motives and Uses of Facebook, CHI 2008 Proceedings, April 5-10. Florence, Italy.

[13] Rau, P.L., Gao, Q., & Ding, Y. Relationship between the level of intimacy and luring in online social network services. *Computers in Human Behaviour*, 24, 2750-2770.

[14] Pennington, N. (2009), What it means to be a (Facebook) friend: Navigating friendship on social network sites. *Advances in Communication Theory & Research.* Volume 2, 2009; Tosun, L.P. (2012). Motives for Facebook use and expressing "true self" on the Internet. *Computers in Human Behaviour,* 28, 1510-1517.

[15] Won Kim, Ok-Ran Jeong and Song-Won Lee, On social Web sites. *Information Systems*. 35 (2010) 215-236 at p. 217.

[16] Boyd, D.; Ellison, N. (2007). Social Network Sites: definition, History and Scholarship. *Journal of Computer-Mediated Communications 13(1)*. Available at http://jimc.indiana.edu/vol13/issue1/boyd.ellison.html (Last accessed on 5 May 2013).

2005, social media sites like Flicker and YouTube followed.[17] Facebook and MySpace allow users to create their personal profiles, send each other messages, and share content including photographs, videos, blogs and links. Facebook users connect with others by sending and accepting "Friend" requests. Instagram which is also very popular is a free social media platform for sharing photographs and videos. Instead of words, the Instagram platform is built entirely around the sharing of images and videos. WhatsApp, one of the most popular text and voice messaging applications allows the users to send messages, makes voice calls and host video chats on both mobile and desktop devices. With WhatsApp, a user can initiate a conversation with an individual or a group and video chat with up a maximum number of people. Because of the use of WhatsApp, it can be said that it is messaging platform and not a social media platform.

11. Whilst Facebook and MySpace allow their users to make all their information available to the users, LinkedIN users can only contact each other if a pre-existing relationship exists between them. The features in LinkedIn are primarily geared towards professional networking. It allows users to invite and add business "connections" to their contact list. Thus, first degree, second degree and even third-degree connections can be used to gain an introduction to someone a user wishes to know or add. This feature allows users to find jobs, people and other opportunities. Employers can also list their jobs on this site and screen potential candidates. Contacts in this site are added through known connections and aimed at building trust among users. Job seekers can also search company profiles and statistics through this site. Information such the list of employees and location of the company is the type of information available on this site. Another feature available on this site is called LinkedIn Answers which allows users to ask questions to the community. LinkedIn Groups is another feature that can be used to form new business or industry groups in any subject or area, like alumni associations, professional groups, sports groups and the like.

12. Blogs are an increasingly important web publishing medium. A blog (short for 'weblog' or 'web log') is a website whose pages comprise reverse chronologies of posts, with the most recent posts on the home page and older posts on archive pages, usually by months. Blogging services such as Google's Blogger[18], Typepad[19] and WordPress[20] provide the forms and templates that enable a person to publish a blog site. The majority of blogs are maintained by individuals who express their personal interests and points of view.

13. Twitter is technically a blogging site, but unlike traditional blogs, Twitter encourages micro blogging. Twitter users can post messages with a maximum length of only 280 characters. These short posts are commonly known as 'tweets' and, like the traditional blog, the author will have subscribers, known as 'followers', who will comment on the 'tweets'. Subjects can also be attached to 'tweets' allowing for searching, "hashtags". Another feature of Twitter is

[17] *See id.* Urstadt, B., Social networking is not a business. Available at www.technologyreview.com/featuredstory/410313/social-networking-is-not-a-business (Last accessed on 8 May 2013).
[18] www.blogger.com
[19] www.typepad.com
[20] www.wordpress.com

"trending topics" which allows users to see words and phrases that have been popular within a particular region over a particular period of time.

C. ICTA's proposal

14. It is the intention of the ICTA to regulate the use of social media and in order to do so, it is the view of the ICTA that the deployment of technical toolset is mandatory which requires the decryption of encrypted traffic on social media platforms and the contents data will then be archived for inspection purposes as and when required. [21] In addition, in order to access a social media platform, users will need to have a certificate on their computer or mobile device. Hence, every time the users access a social media platform, this will be done by a proxy server. All contents accessed by[22] the users will be identifiable by reference to the users.

15. It is the contention of the ICTA that complaints made by local authorities[23] to the administrators of the social media administrators remain unattended or are not addressed in a timely manner.

16. The ICTA refers to measures that are being taken in foreign jurisdictions such as Germany, the United Kingdom, France, the European Union, Australia and India.

17. It is the view of the ICTA that laws which are intended to block or remove harmful and illegal contents can only be implemented because social media platforms have a physical presence in these countries and such laws would be of no effect in Mauritius because these social media platforms do not have a physical presence in Mauritius.[24]

18. The ICTA lists different categories of offences which have been reported on the Mauritian Cybercrime Online reporting System from January 2020 to January 2021.[25]

19. The ICTA takes the view that because social media platforms have no representatives or local offices in Mauritius, the "only logical and practical solution would be the implementation of a statutory framework that only provides a legal solution to the problem of harmful and illegal content but also provides the necessary technical enforcement measures required to handle this in a fair, expeditious, autonomous and independent manner."[26]

20. To achieve the objectives set out in the Consultation Paper, the ICTA proposes the creation of:

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[21] Page 4 of the Consultation Paper.
[22] The Consultation Paper does not state if any contents posted by the users will be identifiable by reference to the users' certificates.
[23] Paragraph 3.3 of the Consultation Paper. The document does not state which local authorities. Presumably, reference is being to the law enforcement agencies.
[24] Paragraph 5.1 of the Consultation Paper.
[25] Paragraph 6.1 of the Consultation Paper.
[26] Paragraph 6.3 of the Consultation Paper.

(a) A National Digital Ethics Committee as the decision-making body on the contents; and

(b) A Technical Enforcement Unit to enforce the technical measures as directed by the National Digital Ethics Committee.

D. Freedom of expression

21. Freedom of expression is undoubtedly one of the basic human rights. The value of freedom of expression has been highlighted by Courts in many jurisdictions[27]. In the UK case of *R v. Secretary of State for the Home Department, Ex p Simms*[28], Lord Steyn laid out arguably the key benefits that freedom of expression brings to a state:

(a) firstly, it promotes the self-fulfilment of individuals in society. According to the justification from individual self-fulfilment, individuals will not be able to develop morally and intellectually unless they are free to air their views and ideas in free debate with each other. This justification does not value speech in itself, but rather, instrumentally, as a means to individual growth.

(b) secondly, in the famous words of Mr. Justice Holmes (echoing John Stuart Mill), 'the best test of truth is the power of the thought to get itself accepted in the competition of the market.': *Abraham v United States* 250 US 616 at 620 (1919), *per* Holmes J. (dissenting). The basic proposition is that truth is most likely to emerge from free and uninhibited discussion and debate.

(c) thirdly, freedom of speech is the lifeblood of democracy. The free flow of information is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them.[29] The justification for participating in a democracy, which is associated primarily with the American writer Meiklejohn[30], is that citizens cannot participate fully in a democracy unless they have a reasonable understanding of political issues. Therefore, open debate on such matters is essential.

22. There is a fourth justification for freedom of expression. Whether the argument used is Rawl's hypothetical social contract or Dworkin's basic postulate of the State's duty to treat its citizens

[27] For example, in the Republic of South Africa, the importance of freedom of expression in a democratic society has been emphasised in numerous cases, including in *Khumalo and Others v Holomisa* (CCT53/01) [2002] ZACC 12; 2002 (5) SA 401; 2002 (8) BCLR 771 (14 June 2002), ("*Freedom of expression is integral to a democratic society for many reasons. It is constitutive of the dignity and autonomy of human beings. Moreover, without it, the ability of citizens to make responsible political decisions and to participate effectively in public life would be stifled.")* Paragraph 21. Available at http://www.saflii.org/za/cases/ZACC/2002/12.html (Last accessed on 3 May 2013); *South African National Defence Union v Minister of Defence* (CCT27/98) [1999] ZACC 7; 1999 (4) SA 469; 1999 (6) BCLR 615 (26 May 1999), ("*Freedom of expression lies at the heart of a democracy.[9] It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally.1[0] The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters*." Paragraph 7. Available at http://www.saflii.org/za/cases/ZACC/1999/7.html (Last accessed on 3 May 2013).

[28] [2000] 2 AC 115.

[29] *Ibid* at 126.

[30] 'The First Amendment is an absolute', (1986) Sup Ct Re 245.

with equal concern and respect, this justification for freedom of expression is centred around the liberal conviction that matters of moral choice must be left to the individual. Thus, the argument defends virtually all kinds of speech and other forms of expression.

23. Such is the importance of freedom of expression that it has been recognised in Courts even in the absence of a written Constitution. For example, under UK common law, there has long been freedom to express an opinion or disclose information, provided that the expression is not forbidden by law[31]. The common law right to freedom of expression has been developed by UK judges in the context of, for example, the right to protest,[32] or, the defences of fair comment[33] and qualified privilege[34] to libel. Even before the UK adopted the Human Rights Act 1998 (HRA), it had been held that the common law provides the same protection to free speech as the European Convention on Human Rights[35]. In *R v Secretary of State for the Home Department, ex p Simms*,[36] Lord Steyn stated that "the starting point is the right of freedom of expression"[37] (holding that Prison Rules and Standing Orders could not be applied to prevent prisoners giving interviews to journalists unless the latter agreed not to publish), and later re-affirmed that "there is a constitutional right to freedom of expression in England"[38].

24. The first case which came before the House of Lords concerning freedom of expression after the UK's HRA incorporated the European Convention on Human Rights into UK domestic law was *R v. Shayler*.[39] In this case, the House of Lords had to decide whether a public or national interest defence was available in a prosecution for unlawful disclosure under sections 1 and 4 of the Official Secrets Act. Lord Bingham of Cornhill reaffirmed that the fundamental right had been recognised at common law for many years but that "*it was not until incorporation of the European Convention into our domestic law by the Human Rights Act 1998 that this fundamental right was underpinned by statute."*[40] In *R (Laporte) v Chief Constable of Gloucestershire Constabulary*[41], Lord Bingham reaffirmed Sedley LJ's observation in *Redmond-Bate v Director of Public Prosecutions* (1999)[42] that the Human Rights Act 1998 represents a "constitutional shift."

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[31] Dicey, *An Introduction to the Study of the Law of the Constitution.* (10th ed, 1959) 239-240.

[32] *Brutus v. Cozens* [1973] AC 854. In this case, Lord Reid held that holding that the word "insulting" in the Public Order Act 1936, as amended should not be construed to penalise the use of offensive language during an anti-apartheid demonstration at Wimbledon. Lord Reid held the view that "*it would be wrong to stretch the existing criminal law to cover matters of this kind. This is an area of the law where very great questions of principle are involved relating to the freedom of the subject and, therefore, it is a matter for Parliament after due deliberation of all the questions involved …*" (at page 859).

[33] *Silkin v. Beaverbrook Newspapers Ltd* [1958] 1 WLR 743.

[34] *Reynolds v. Times Newspapers Ltd* [1999] 3 WLR 1010.

[35] Lord Steyn in *R v Secretary of State for the Home Department, ex p Simms* [1999] UKHL 33, agreeing with *Attorney-General v Guardian Newspapers Ltd.* (No.2) [1990] 1 AC 109 283-284 (Lord Goff of Chieveley) and *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534 550H-551A (Lord Keith of Kinkel).

[36] n. 16.

[37] n. 24 at page 125.

[38] *Reynolds v. Times Newspapers Ltd* [2001] 2 AC 127 at page 207.

[39] [2003] 1 AC 247.

[40] [2003] 1 AC 247 at page 267.

[41] [2007] 2 AC 105 at page 127.

[42] [1999] Crim LR 998.

25. At the regional level, in *Centro Europa 7 SRL and Di Stefano v. Italy*[43], the European Court of Human Rights ("ECtHR") echoed previous jurisprudence when it stated in the context of pluralism in the audio-visual media that *"there can be no democracy without pluralism. Democracy thrives on freedom of expression."* In *Von Hannover v. Germany (no. 2)*[44], the ECtHR reiterated the importance of the concept of freedom of expression as one of the essential foundations of a democratic society:

> *"Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society"."*

26. The importance of the right to freedom of expression is also recognised in major democracies. Before the adoption of the Canadian Charter of Rights and Freedoms, the Supreme Court of Canada, in the case of *Reference Re Alberta Statutes*[45], held that the abrogation of freedom of public discussion and debate was considered by the Court to constitute an interference with the operation of democratic government. In the Indian case of *Secretary, Ministry of Information and Broadcasting, Government of India & Ors v. Cricket Association of Bengal & Ors*[46], the Supreme Court of India stated, for the purposes of Article 19 of the Constitution of India, the following:

> *"The freedom of speech and expression includes right to acquire information and to disseminate it. Freedom of speech and expression is necessary, for self expression which is an important means of free conscience and self fulfillment. It enables people to contribute to debates of social and moral issues. It is the best way to find a truest model of anything, since it is only through it, that the widest possible range of ideas can circulate. It is the only vehicle of political discourse so essential to democracy."*[47]

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[43] [2012] ECHR 974 at para. 129.
[44] [2012] ECHR 228 at para. 101.
[45] [1938] SCR 100.
[46] 1995 AIR 1236 at para. 44.
[47] In *Brutus* v. *Cozens* [1973] AC 854, the House of Lords, the appellant was charged with using insulting behaviour where a breach of the peace was likely to occasioned, contrary to s.5 of the Public Order Act, 1936, as amended. The object of the demonstration was to protest against the apartheid policy of the Government of South Africa. On appeal against the decision of the Divisional Court setting aside the decision of the Magistrate which had found that the appellant's behaviour was not insulting, the House of Lords made the following pertinent remarks: *"It would have been going much too far to prohibit all speech or conduct likely to occasion a breach of the peace because determined opponents may not shrink from organising or at least threatening a breach of the peace in order to silence a speaker whose views they detest. Therefore vigorous and it may be distasteful or unmannerly speech or behaviour is permitted so long as it does not go beyond any one of three limits. It must not be threatening. It must not be abusive. It must not be insulting."* (Emphasis).

27. In the Mauritian case of *Gilbert Ahnee & ors v The Director of Public Prosecutions*[48], the Judicial Committee of the Privy Council in an appeal against the conviction of scandalising the Supreme Court of Mauritius, recognised that:

> *"[F]reedom of expression is the lifeblood of democracy … there is no doubt that there is a tension between freedom of expression and the offence of scandalising the court."*

28. Freedom of expression is also recognised at the international level. Article 19 of the Universal Declaration of Human Rights provides that:

> *"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to see, receive and impart information and ideas through any media and regardless of frontiers."*

29. Additional international human rights instruments recognise the importance of the right to freedom of expression. Article 9 of the African Charter on Human and Peoples' Rights ("ACHPR")[49] provides that every individual shall have the right to receive information and to express and disseminate his opinions within the law. The International Covenant on Civil and Political Rights ("ICCPR") recognises the right to freedom of expression at Article 19, providing that everyone shall have the right to hold opinions without interference and the right to freedom of expression. Article 19(2) provides that this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

E. Restrictions to Freedom of Expression

30. Freedom of expression is not an absolute right. For example, article 10(2) of the European Convention on Human Rights incorporated in the HRA 1998 provides that the exercise of this freedom "carries with it duties and responsibilities" and may be subject to "such formalities, conditions, restrictions or penalties as are prescribed by law". Not only must these "formalities, conditions, restrictions or penalties" be provided for by law but they must also be necessary in the limited circumstances set out in that article.

31. Similar limitations are found in the constitutional instruments of many Commonwealth countries. Sections 3 and 12 of the Mauritian Constitution do not guarantee a wholly unrestricted freedom of expression. The freedom to receive and impart ideas and information without interference is subject to what is prescribed by law and done under the authority of the law in the interests of, amongst others, defence, public safety, public order and public

[48] Privy Council Appeal No. 28 of 1988.
[49] The African Charter on Human Rights and Peoples' Rights came into force on October 21, 1986.

morality, provided that that provision or "the thing done under its authority" is reasonably justifiable in a democratic society.

32. As described in the Consultation Paper, the proposed regulatory regime which the ICTA wishes to implement constitutes massive surveillance of contents data which are posted on social media platforms. To regulate the use of social media, the ICTA proposes to store bulk social media traffic for inspection purposes as and when required.[50] It is submitted that this interferes with the rights to privacy and data protection. In *Klass v Germany,*[51] the European Court of Human Rights made it clear that "[c]ontracting States [do not] enjoy an unlimited discretion to subject persons within their jurisdiction to secret surveillance."[52] In *Sazbo and Vissy v Hungary*, [53] the European Court of Human Rights made the following pertinent remark: [I]t would defy the purpose of government efforts to keep terrorism at bay, thus restoring citizens' trust in public security, if the terrorist threat were paradoxically substituted for by a perceived threat of unfettered executive power intruding into citizens' private spheres by virtue of uncontrolled and yet far-reaching surveillance techniques and prerogatives." In the Mauritian context, it is not the position of the ICTA that drastic measures as explained in the Consultation Paper must be taken because the country has an 'imminent' terrorist threat.

33. Another objectionable measure which the ICTA is proposing is the storage of contents data "for inspection as and when required". In the absence of a general retention law in Mauritius, nothing prevents the storing of contents data, including personal data, for very long period of time. Such storage of contents data would, in the absence of a serious threat to national security that proves to be genuine and present or foreseeable, would be in breach of the data protection legislation because such storage would not be for a period that is limited in time to what is strictly necessary.

34. It is further noted that the regime for bulk storage of contents data which the ICTA is advocating does not provide sufficient safeguards, namely: (a) the scope and application of the regime[54], (b) the categories of persons affected, (c) duration, (d) the procedure to be followed to communicate contents data to a third-party, (e) the circumstances in which the contents data must be erased or destroyed.

F. Online social networks and privacy

35. Privacy is of utmost importance in protecting liberal and democratic values in society. A right to privacy encapsulates the core of many other basic freedoms enjoyed in a civilised society. Without it, we would also be without freedom of conscience, freedom of religion or any

[50] Page 4 of the Consultation Paper.
[51] App. No. 5029/71, 6 September 1978.
[52] App. No. 5029/71, 6 September 1978. Paragraph 49.
[53] App. No. 37138/14, 12 January 2016.
[54] Notwithstanding the communique which the ICTA issued following the issuance of the Consultation Paper, it remains unclear which types of social media platforms would come under the proposed regime.

protection of family life. In the Mauritian case *CB Lala v. Le Mauricien & Ors*[55], a defamation suit, the Supreme Court stated that "*Freedom of expression is a limited right protected by the Constitution and it has also as one of its counterparts the right to privacy, to one's honour and reputation which is also protected by the Constitution.*"

36. Privacy laws can either be created by the judiciary, broadening existing legal principles or Parliament. For example, in the UK, the concept of privacy as encapsulated by the tort of breach of confidence has been well established in the cases of *Kaye v Robertson*[56] and *Douglas v Hello!*[57] The judiciary has not introduced any new forms of privacy rights *per se* but has instead addressed the issues within the sphere of the existing tort of breach of confidence. In other countries, Parliament has passed specific laws relating to privacy. A few examples are Canada's Privacy Act[58] and the Personal Information Protection and Electronic Documents Act[59], Australia's Privacy Act[60] and New Zealand's Privacy Act[61].

37. The Consultation Paper provides that, in order to access a social media platform, users will need to have a certificate on their computer or mobile device. Hence, every time the users access a social media platform, this will be done by a proxy server. All contents accessed by the users will be identifiable by reference to the users. It is submitted that this is a disproportionate measure which is being envisaged concerning the collection and viewing of contents data which the users would not wish everybody to see. The retention regime which is mentioned in the Consultation Paper is excessively wide and would not satisfy the requirements of the data protection legislation which requires that personal data must not be processed, including stored, longer than is necessary.

G. Online social networks and criminal prosecutions

38. The "anonymity" facilitated by the Internet does not shield users from legal consequences. Reference may be made to the interesting observations of the learned Judge in the Singaporean case of *PP v. Koh Song Huat Benjamin*[62]. In this case, two bloggers were charged with having made racist "invective and pejorative remarks" against the Malay-Muslim communities, contrary to section 3(1)(e) of the *Sedition Act*.[63]

> *"The virtual reality of cyberspace is generally unrefered. But one cannot hide behind the anonymity of cyberspace, as each accused has done, to pen diatribes against another race or religion. The right to propagate an opinion*

[55] 2005 SCJ 42.
[56] [1991] FSR 62; *The Times* 21 March 1990.
[57] [2001] QB 967, CA.
[58] Available at http://laws-lois.justice.gc.ca/eng/acts/P-21/FullText.html (Last accessed on 5 May 2013).
[59] Available at http://laws-lois.justice.gc.ca/eng/acts/P-8.6 (Last accessed on 11 May 2013).
[60] Available at http://www.comlaw.gov.au/Details/C2013C00125 (Last accessed on 5 May 2013).
[61] Available at http://www.legislation.govt.nz/act/public/1993/0028/latest/DLM296639.html (Last accessed on 5 May 2013).
[62] [2005] SGDC 272.
[63] The bloggers pleaded guilty; one was sentenced to one month imprisonment, while the other, whose comments were considered less offensive, was sentenced to one day imprisonment and a fine of $5,000.

> *on the Internet is not, and cannot be, an unfettered right. The right of one person's freedom of expression must always be balanced by the right of another's freedom from offence, and tampered by wider public interest considerations. It is only appropriate social behaviour, independent of any legal duty, of every Singapore citizen and resident to respect the other races in view of our multi-racial society. Each individual living here irrespective of his racial origin owes it to himself and to the country to see that nothing is said or done which might incite the people and plunge the country into racial strife and violence. These are basic ground rules. A fortiori, the Sedition Act statutorily delineates this redline on the ground in the subject at hand. Otherwise, the resultant harm is not only to one racial group but to the very fabric of our society."* [64]

39. The above extract highlights two important points. First, the learned Judge stressed the principle of responsibility when expressing views in the digital world. This implicitly acknowledges that blogs and openly accessible Web discussion forums are part of the public realm and, hence, subject to general law. From this, one can extrapolate that speech in the digital world is to be treated no differently from the expression of speech in the real world.

40. In different countries, there are statutory provisions which deal with the sending of messages which are grossly offensive, of an indecent, obscene or menacing character. For example, in the UK, under section 127(1)(a) of the Communications Act 2003, a person is guilty of an offence if he or she sends '*a message or other matter that is grossly offensive or of an indecent, obscene or menacing character*' by means of a public electronic communications network. A similar legislative provision exists in Mauritius[65].

41. The application of these laws to social media platforms has not been without difficulties. The decision on where to draw the line has profound consequences for freedom of expression. On the one hand, it can be argued that a free society and free socio-political discourse requires that speech, no matter how shocking or distasteful, must be permitted. If free speech is limited only to speech that supports the views of the majority, then it is no freedom at all. On the other hand, there are those who argue that the interests of public order and the rights of others, particularly minorities, require certain speech acts to be restricted. In the leading case of *DPP v Collins* [66], the defendant made a number of racist phone calls. In deciding whether an offence had been committed under section 127(1)(a) of the Communications Act 2003, the House of Lords considered the standards of an open and just multi-racial society,[67] taking into account the context of the words and all relevant circumstances. This is a question of fact. The House of Lords held that, for the purposes of section 127(1)(a), it must be proved that the sender "*intended his words to be offensive to those to whom they related or be aware that*

[64] n.63. at para. 8
[65] s. 46(1)(h) of the Information and Communication Technologies Act.
[66] [2006] 1 WLR 2223.
[67] Note 72, at page 2228.

they may be taken to be so … it can make no difference to criminal liability whether a message is ever actually received or whether the persons who do receive it are offended by it. What matters is whether reasonable persons in our society would find it grossly offensive." [68]

42. In the case of Collins[69], Lord Bingham opined that "[t]here can be no yardstick of gross offensiveness otherwise than by the application of reasonably enlightened, but not perfectionist, contemporary standards to the particular message sent in its particular context. The test is whether a message is couched in terms liable to cause gross offence to those to whom it relates." [70] However, suggesting that because one section of society will find something "grossly offensive" the whole of society will, is perhaps questionable. Indeed it could be argued that this may be the difference between "offensive" and "grossly offensive".

43. The recent cases involving Mr Ahmed[71] and Mr Woods[72] illustrate the types of cases that the U.K. Crown Prosecution Service (CPS) and the judiciary are not prepared to condone when there is an abuse of the freedom of speech on online social networks. However, on the other side of the line is the case of Daniel Thomas, a semi-professional footballer who posted a homophobic message on Twitter about Olympic divers Tom Daley and Peter Waterfield. The CPS decided not to prosecute and explained that the message was a one-off offensive Twitter message, intended for family and friends, which made its way into the public domain. In addition, the CPS was satisfied that the message was not intended to reach Mr Daley or Mr Waterfield nor was it part of a campaign, or intended to incite hatred. Mr Thomas removed it reasonably swiftly and expressed remorse. The complainants subsequently informed the CPS that they felt that prosecution was warranted. Against this background, the CPS held the view that the message "*was not so grossly offensive that criminal charges need to be brought.*"[73]

44. In *DPP v Chambers*[74], a conviction for sending by a public electronic communications network a message of a menacing character contrary to section 127(1)(a) of the Communications Act 2003 was quashed. The Court considered that a "threat" sent via Twitter had been intended as a joke and would have been understood as a joke by those reading it. On appeal against conviction, the Court held that a message which did not create fear or apprehension in those to whom it was communicated, or who might reasonably be expected to see it, fell outside section 127(1)(a), for the simple reason that the message lacked menace.

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[68] *Ibid.* At page 2231.
[69] *Ibid.*
[70] *Ibid. At page 2228.*
[71] BBC News, *Azhar Ahmed sentenced over Facebook soldier deaths slur,* 9 October 2012. (Last accessed on 12 April 2013). (The defendant who posted a Facebook message, which said "all soldiers should die and go to hell" following the deaths of six British soldiers was given 240 hours of community service order.).
[72] BBC News, Lancashire, *April Jones: Mathew Woods jailed for Facebook posts*, 8 October 2012. Last accessed on 12 April 2013 (The defendant who made a number of derogatory comments on Facebook about April and missing Madelein McCann was sentenced to 12 weeks' imprisonment (reduced to 8 weeks on appeal)).
[73] CPS News Brief, *DPP statement on Tom Daley case and social media prosecutions,* 20 September 2012. Available at http://blog.cps.gov.uk/2012/09/dpp-statement-on-tom-daley-case-and-social-media-prosecutions.html (Last accessed on 11 May 2013).
[74] [2012] EWHC 2157.

45. In *Monis v. The Queen*, [75] the defendant was alleged to have written letters to the families of soldiers killed in Afghanistan. While expressing to the bereaved families, the defendant was very critical of the part the Australian soldiers had played in the war, referring to them in a "denigrating and derogatory fashion."[76] The defendant sought to have his indictment quashed on the grounds that section 471.12 of the Australian Criminal Code was invalid as it infringed the right to freedom of political communication implied by the Australian Constitution. The Australian Constitution prohibits parliament from enacting a law that restricts freedom of communication on government and political matters unless such law is reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of the constitutionally prescribed system of government in Australia. The District Court found both of these requirements satisfied and dismissed the motion to quash the indictment. On appeal to the Court of Criminal Appeal, the Court found section 471.12 of the Criminal Code to be valid. The appellant appealed to the High Court. The Court was split 3-3. Allowing the appeal, French CJ, Hayne J and Heydon JJ found that section 471.12 of the Criminal Code burdened the implied right to freedom of communication about government and political matters.[77] Hayne J stated that "*[H]istory, not only recent history, teaches that abuse and invective are an inevitable part of political discourse*." [78] Crennan, Keifel and Bell JJ, on the other hand, held that section 471.12 of the Criminal Code was not in breach of the Constitution as any burden placed upon political communication by that section was merely incidental. The judges held the view "*that communications of the kind which are prohibited by s 471.12 are limited to those which are of a seriously offensive nature. This does not suggest an effect upon the freedom which could be regarded as extensive. It does not prevent communications of a political nature which do not convey such offensive matter*." [79]

46. The concerns expressed by French CJ, Hayne J and Hendon J with regard to section 471.12 of the Australian Criminal Code highlight the issues concerning the criminalisation of an "offensive" conduct. As French CJ noted the word "offensive" is a subjective concept, encompassing a wide range of behaviour: "*conduct which would cause transient displeasure or irritation and also conduct which would engender much more intense responses*."[80] The existence of criminal offences based on this subjective concept "*places in the hands of the Court, mediated by the emotional reactions of imaginary reasonable persons, a judgment as to whether the content is within or outside the prohibition*."[81] Even Crennan, Kiefel and Bell JJ acknowledged that "*the word "offensive", may be problematic in statements of what constitutes a criminal offence on any view*."[82]

[75] 27 February 2013. [2013] HCA 14.
[76] *Ibid*. At paragraph 6.
[77] *Ibid.* at paragraph 84.
[78] *Ibid.* at paragraph 85.
[79] *Ibid.* at paragraph 35.
[80] *Ibid.* at paragraph 57.
[81] *Ibid.* at paragraph 63.
[82] *Ibid.* at paragraph 301.

47. Given the difficulties of courts in determining when a statement is "offensive" or "grossly offensive", it is questionable whether it is within the proper remit of the criminal law to police offensive conduct. The freedom to express only 'inoffensive' opinions may be considered as no freedom at all.

48. In deciding whether or not to prosecute an offender who has sent an offensive message, the prosecuting authority will determine whether the message was "so grossly offensive" as to warrant bringing criminal charges. The context and circumstances of the message are taken into account. However, given the vast amount of information on websites which, on first reading, may be considered as "grossly offensive" by some but merely "distasteful" by others, it cannot be possibly right and feasible that all such information must be examined. This exercise requires a considerable amount of human resources and time.

49. The question to ask is how the prosecuting authority will decide which messages on online social networks warrant investigation and prosecution of the offender. In the U.K., the Director of Public Prosecutions issued '*Social Media - Guidelines on prosecuting cases involving communications sent via social media'* on 19 December 2012. These have now become final Guidelines and have come into effect recently on 20 June 2013[83]. The Guidelines are suitably cautious about the dangers of prosecuting speech on social networks. The CPS follows a two-stage test when deciding whether to prosecute. The first stage is the evidential test – is there sufficient evidence to provide a realistic prospect of conviction? The second stage is the public interest test – is it in the public interest to prosecute? The Guidelines say a great deal on this topic. Key factors which may swing the balance are whether the communications: (i) constitute credible threats of violence to the person or damage to property; (ii) specifically target an individual or individuals and which may not constitute harassment or stalking within the meaning of the Protection from Harassment Act or which may not constitute other offences, such as blackmail; (iii) may amount to a breach of a court order — which should be referred to the Attorney General; (iv) communications which do not fall into any of the categories (i) to (iii) and fall to be considered separately because they may be considered grossly offensive, indecent, obscene or false. The Guidelines provide that the messages in category (iv) will be subject to a high threshold and, in many cases, prosecution will not be in the public interest.

50. The Guidelines also provide that prosecution should be contemplated where the communication concerned is more than offensive, shocking or disturbing, or satirical, iconoclastic or rude comment, or the expression of unpopular or unfashionable opinion about serious or trivial matters, or banter or humour, even if distasteful to some or painful to those subjected to it. With regard to children and young people, they provide that the age and maturity of suspects should be given significant weight, particularly if they are under the age of 18. Prosecution is rarely likely to be in the public interest in this case.

[83] Available https://www.cps.gov.uk/legal-guidance/social-media-guidelines-prosecuting-cases-involving-communications-sent-social-media (Last accessed on 23 May 2021)

51. Prosecutorial guidance similar to the Guidelines may mitigate dated legislation whose application to online social networks could otherwise be incompatible with the right to freedom of expression.[84]

H. Conclusion and recommendations

52. The concern of the ICTA is not only in relation to what is being posted on social media platforms but is concerned with the prosecution of offences which have been committed using social media platforms.

53. As stated above, it is very likely that the proposed measures that have been mentioned in the Consultation Paper, if implemented, would be questionable from a constitutional law and data protection law perspective. It is very difficult to see how the mass and undifferentiated collection of contents data would pass any proportionality test or could survive constitutional scrutiny on this ground alone.

54. At the individuals' level, a regulatory regime akin to the US Notification and Takedown procedure may be implemented to require a person who has posted an objectionable message online to remove the message and if the person disputes the position of the regulator, the person may take up the matter further before a reviewing body.

55. At the level of social platforms administrators, the Mauritius Police Force together with the ICTA may engage in a constructive dialogue with the administrators to see how the concerns of the law enforcement agencies may be adequately addressed. A review of international literature pertaining to the subject matter of the Consultation Paper shows that social platforms administrators are increasingly collaborating with law enforcement agencies.

56. Finally, criminal offences that are created and which encroach on one's freedom of expression must be in line with international human rights norms, e.g., the mere sending or transmission of a false message cannot reasonably constitute a criminal offence.[85] The sending or transmission of a false news would and should constitute a criminal offence if the false news is sent intentionally to cause public harm.

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[84] McGoldrick D., 'The Limits of Freedom of Expression on Facebook and Social Networking Sites: A UK Perspective.' *Human Rights Law Review (2013) 13(1): 125-151*; Scaife, 'The Regulation of Social Media' (2012) 14 *E-Commerce Law & Policy* 6 and Rowbottom, 'To rant, Vent and Converse: Protecting Low Level Digital Speech' (2012) 71 *Cambridge Law Journal* 355.
[85] S. 46(g)