Note on Mauritius' Information and Communication Technologies Act 2001

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This Note assesses Mauritius' Information and Communications Technologies Act 2001 (ICT Act) against international human rights standards, in particular on freedom of expression and privacy.[1] The Act does contain some laudable elements, such as confidentiality provisions that prevent telecommunications service providers from breaching consumer privacy by improperly using their messages (section 32(4)).

However, the ICT Act contains numerous provisions that do not accord with international standards on freedom of expression and privacy. This Note is divided into three parts, each dealing with a core set of problems with the ICT Act. First, improvements could be made to the independence, diversity and minimum qualifications of the members of the four regulatory or advisory bodies created by the ICT Act. Second, the ICT Act's licensing scheme imposes licensing requirements on too many services, has vague criteria for the issuance or removal of licences and authorises intrusive search powers without sufficient oversight. Third, the ICT Act creates numerous offences that could criminalise a broad range of quotidian online activity such as clearing one's e-mail inbox. Many of these offences also lack intent requirements or at least sufficiently specific intent requirements, and all offences under the Act are subject to the same penalty – up to ten years' imprisonment and a fine of one million rupees (approximately USD25,000) – which is excessive for many such offences.

Independence and Diversity of Oversight Bodies

Overview

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An important part of the ICT Act is dedicated to creating four bodies that have different roles with respect to ICT. Two bodies have regulatory functions. One is the Information and Communications Technologies Authority (ICTA), the lead body for regulating ICT and telecommunications services. The ICTA has broad powers to regulate ICT and telecommunications service providers, including by awarding licences, receiving and deciding upon complaints about the sector, formulating ICT policy and establishing performance standards (see section 18). The other, the ICT Appeal Tribunal (Tribunal), is a quasi-judicial body that hears appeals from decisions of the ICTA (section 39(1)). Two other bodies serve in an advisory or promotional rather than regulatory role. These are the ICT Advisory Council, which advises the Minister in charge of ICT on how to improve ICT services, equipment and technology (section 35), and the Internet Management Committee, an advisory and discussion body for Internet-related policies (section 13(1)).

Independence of Regulators: the ICTA and the Tribunal

It is a key international law standard regarding media freedom that any bodies that exercise regulatory powers over the media should be independent of political actors. The main reason for this is fairly obvious; if a regulator is controlled by a political actor, it will make decisions which favour that actor rather than in the public interest. It is still appropriate for government to set general policy directions but specific regulatory decisions which affect individual media outlets, such as licensing and deciding upon complaints, need to be taken by an independent body.

This is set out in various authoritative documents. For example, the 2019 Declaration of Principles on Freedom of Expression and Access to Information in Africa (2019 African Declaration), adopted by the African Commission on Human and People's Rights, the official human rights body created by the African Charter on Human and Peoples' Rights,[2] states, in Principle 17:

> (1) A public regulatory authority that exercises powers in the areas of broadcast, telecommunications or internet infrastructure shall be independent and adequately protected against interference of a political, commercial or other nature.
>
> (2) The appointment process for members of a public regulatory body overseeing broadcast, telecommunications or internet infrastructure shall be independent and adequately protected against interference. The process shall be open, transparent and involve the participation of relevant stakeholders.[3]

[2] Adopted 27 June 1981, entered into force 21 October 1986.

[3] Adopted by the African Commission on Human and People's Rights at its 65th Ordinary Session in Banjul, the Gambia, 21 October 2019-10 November 2019, https://www.achpr.org/public/Document/file/English/Declaration%20of%20Principles%20on%20Freedom%20of%20Expression_ENG_2019.pdf.

Similarly, the 2003 Joint Declaration by the three special international mandates on freedom of expression states:

> All public authorities which exercise formal regulatory powers over the media should be protected against interference, particularly of a political or economic nature, including by an appointments process for members which is transparent, allows for public input and is not controlled by any particular political party.[4]

The two regulatory bodies under the ICT Act – the ICTA and the Tribunal – are not adequately protected against political interference, or in other words are not sufficiently independent – to meet international standards in this area. As a preliminary point, the ICT Act lacks any general provision indicating that the regulatory bodies it creates are independent. Such provisions are good practice because they set the tone for the rules, as well as the culture of regulatory bodies. Also, in the event of litigation that involves the ICT Act, such provisions provide guidance to the court on the importance of interpreting the law so as to safeguard the independence of those bodies.

In terms of specific provisions, government control over the ICTA is the most stark in section 19, which authorises the minister to give binding "directions of a general character" to the ICTA's board that are not inconsistent with the objects of the ICTA if the minister believes it is in the "public interest" to do so. This grants the minister very broad discretion to give orders to the board. While it is not inappropriate, as noted above, for the government to set policy, this power goes far beyond that.

A key way of guaranteeing the independence of regulatory bodies is through the membership of the board and the manner in which members are appointed, by insulating this from political, commercial or other types of influence. The appointments process for the ICTA Board falls well short of international standards in this regard because the process is largely controlled by the government. According to section 5(3) of the ICT Act, the Chair of the board is appointed by the Prime Minister after "consultation" with the leader of the opposition, four of the other nine members are representatives of different ministries, while the remaining four are appointed directly by the minister. This effectively gives the government full control over the board with the only minor qualification on this being the requirement to consult with the leader of the opposition in relation to the chair.

This control does not end with the board. Highly exceptionally, the board may only appoint the executive director with the approval of the minister (section 14(1)(b)). This drives political control right into the core work of the ICTA without any justification whatsoever.

[4] The special mandates – the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression – now four with the addition of the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, have adopted a Joint Declaration every year since 1999. See their Joint Declaration of 18 December 2003, https://www.osce.org/files/f/documents/4/0/28235.pdf.

Better practice would be to involve a much wider range of actors in the process. Members of civil society, academia and other non-governmental actors should, for example, be given the power to nominate members while a multiparty body such as parliament or a committee thereof should also play a role, for example by appointing members or confirming nominations.

Closely linked to protecting the independence of the appointments process is the need to protect members against arbitrary or retaliatory dismissal. Unfortunately, this is missing from the ICT Act. A first measure here is to provide for preset presumptive terms of office or tenure for members. The ICT Act is silent on this issue, merely stating that members shall "hold office on such terms and conditions as the Prime Minister may determine" (section 5(4)(b)). To prevent undue political influence over members, the Act should enshrine fixed-year terms and indicate whether reappointments are possible. Members also receive "such remuneration and allowances … as may be determined by the Minister" (section 6(6)). Better practice is to link this to an existing position, such as a senior official or judge, so as to prevent any risk of political manipulation.

The ICT Act also fails to provide adequate protection for board members against arbitrary removals. They may not "remain" members if they are "incapacitated by physical or mental illness" (section 7(1)(c)) or act contrary to any provision of the ICT Act (section 7(1)(d)). No procedure whatsoever is set out for how this will be done. It seems likely that the appointing body, i.e. the Prime Minister or a minister, would exercise this power. These broad and largely subjective grounds for removal essentially grant political actors wide discretion to remove members who do not follow their bidding. A member could, for example, be removed if he or she became ill even for a short period of time or due to minor breaches of the Act, such listing the incorrect business address or failing to list an address on a licence (thereby acting contrary to section 10(a)). Better practice is to protect this process against arbitrariness both substantively and procedurally. For example, the Act could specify that an illness must be serious and prolonged and that the process would need to start with a super-majority (say two-thirds) vote of the other members.

The rules on funding the ICTA are not very clear. According to section 20(3), it shall derive its income from a combination of such charges or fees that it prescribes, the Consolidated Fund and such other sources as the minister may approve, while the Minister approves the budget (section 20(4)). It is not clear what portion of the funding in practice is derived from charges and fees, on the one hand, and from the Consolidated Fund, on the other. Better practice in this regard is for a multi-party body such as parliament to approve the budget. It is also not clear exactly what is covered by "charges" and "fees" as set out in section 20(3). Allowing the ICTA to benefit from fines it levies on licensees would create a perverse incentive for the ICTA to levy higher fines.

There are similar problems in the rules relating to the Tribunal, the main function of which is to decide on appeals from decisions of the ICTA. The Chairperson and Deputy

Chairperson of the Tribunal are appointed by the Public Service Commission and be "barristers of not less than 10 years standing". Otherwise, however, the Act is silent as to their tenure and conditions of service. While the Public Service Commission is not as partisan as a politician, such as the minister, this appointments process could still benefit from involving other actors. The rest of the members are appointed by the minister (section 36(1)), have their terms of service set by the minister (section 36(2)) and have fixed terms of three years and are eligible for reappointment (section 36(3)). This clearly gives the minister extensive power over appointing these members. This is particularly the case given that although there are requirements of experience for the Chairperson and Deputy Chairperson (namely that they are barristers of at least ten years' standing, section 36(1)(a)), there are no minimum qualification requirements for the other members of the Tribunal, which means that the minister can essentially appoint almost anyone he or she wishes.

The rules on remaining a member of the Tribunal are also vague, leaving members open to arbitrary or retaliatory removal. Sections 38(a)-(b) authorise the removal of a member who has been "found guilty of any misconduct or default in the discharge of his duties…which renders him unfit to be a member" or for being "convicted of an offence of such nature as renders it desirable that he should be removed from office". No guidance is provided on what conduct would make someone "unfit" to be a member or what would render it "desirable" to remove a member from office. Members can also be removed for "suffering from such mental or physical infirmity as renders him unfit to discharge his duties as a member" (section 38(c)), which should be amended along the lines recommended for the similar provision which applies to member of the board of the ICTA. The procedure for removal is also not set out in the ICT Act but it might be assumed that the appointing body – i.e. the Public Service Commission or minister – would be responsible for this. As such, these provisions grant extensive discretion to political actors to remove members.

Diversity of Advisory Bodies: The Council and Committee

The Internet Management Committee (Committee), created by section 12 of the ICT Act, essentially serves to provide advice to the ICTA with a focus on the Internet, but its mandate also extends to administering domain names "in the context of the development of the information and communication industry". We presume that, despite this rather unclear qualification, the Committee administers the Mauritian country domain names (since it would be rather difficult to divide this function among more than one organisation). For its part, the ICT Advisory Council (Council), created by section 34 of the ICT Act, mainly serves to provide advice to the minister on a range of ICT issues, including the interests of consumers, research and improving ICT services in general.

There is less need for the Committee and Council to be independent since they primarily play an advisory and promotional role rather than issuing binding decisions that directly impact freedom of expression. However, since these bodies provide advice in important

areas that indirectly impact freedom of expression to the minister and ICTA, they should be held to standards of diversity (i.e. be drawn from a range of governmental and non-governmental sectors) and minimum standards of expertise and experience. Furthermore, since the Committee primarily advises the ICTA and also allocates domain names, which is generally considered to be a regulatory function, one would assume that it would be largely controlled by the ICTA.

In fact, however, the 11 members of the Committee are appointed by the minister after consultation with the board of the ICTA (section 12(1)), "from among representatives from the public sector, private sector, non-government organisation and academia, by virtue of their qualifications, expertise and experience" in various areas (section 12(4)). It would be preferable to reverse the appointing roles of the board and minister here and to include a reference to the idea that, collectively, membership of the Committee should be diverse and representative, overall, of Mauritian society.

The Council has ten members including a chair, four representatives of the Prime Minister and other ministries, two representatives from business associations and three representatives of "consumers, purchasers and other users" (section 34(2)). The four members who do not represent specific groups, including the chair and those representing consumers, are all appointed by the minister, without any requirement of consultation (section 34(3)), while there are no conditions of expertise or experience for any members, unlike for the Committee (and ICTA) or collective requirements of diversity, all three of which should be added. It would also be preferable to create a role for civil society in the appointments process for representatives of consumers.

Recommendations

- Consideration should be given to adding a general statement to the ICT Act about the independence of the ICTA and Tribunal.
- The minister's power to give directions to the ICTA's board under section 19 should be limited to policy directions.
- For the ICTA, consideration should be given to removing all of the officials from the board or at least limiting them to far fewer than is currently the case.
- Civil society and other interested stakeholders should be given a role in appointing members of the both the ICTA board and the Tribunal, such as nominating individuals, and consideration should be given to allocating the power of appointment to parliament or a parliamentary committee rather than the minister.
- The tenure and conditions of service of all members of both the ICTA board and Tribunal should be set out in the legislation, perhaps by linking them to those for other established positions, and clear conditions and procedures for the removal of members, designed to protect their independence, should be set out in the ICT Act.
- The budget of the ICTA should be set by parliament or a committee thereof, and fines levied by the ICTA

should be remitted to a fund that is separate from the funds from which the ICTA draws its income.

- The roles of the minister and board of the ICTA should be reversed in terms of appointment members of the Committee.
- A role should be created for civil society in terms of appointments to the Committee and Council, and the rules should require members, collectively, to be broadly representative of Mauritian society.
- Minimum qualification requirements should be established for members of the Tribunal (other than the Chairperson and Deputy-Chairperson) and Council.

Licensing Scheme

Overbroad Requirement to Obtain a Licence

The ICT Act requires too many services to obtain a licence. Licensing is mandated for "any service involving the use of information and communication technologies including telecommunication services" (section 24(1)), while operating such a service without a licence is an offence (section 46(l)). This would impose licensing requirements on *any* online service, such as an online booking system for a hairdresser. Such requirements are illegitimate according to international law. In their 2005 Joint Declaration, the special international mandates on freedom of expression state:

> No one should be required to register with or obtain permission from any public body to operate an Internet service provider, website, blog or other online information dissemination system, including Internet broadcasting. This does not apply to registration with a domain name authority for purely technical reasons or rules of general application which apply without distinction to any kind of commercial operation.[5]

Instead, the law should only utilise licensing to advance important public policy issues, such as the management of public resources such as a frequency spectrum, the need to manage competition or the need to promote diversity within an industry. Internet services should generally not be subject to licensing requirements unless such issues come into play; this might justify the regulation of top-level Internet service providers, for example, but the ICT Act's provisions on this are significantly more expansive than that.

Furthermore, the wording of the ICT Act would appear to subject private broadcasters to licensing requirements, intruding on the competence of the Independent Broadcasting Authority (IBA), the main broadcasting regulator for Mauritius. A "telecommunications service", which must be licensed in accordance with section 24(1), is defined as "a service for carrying a message by means of guided or unguided electromagnetic energy or both"

[5] Joint Declaration of the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression of 21 December 2005, http://www.oas.org/en/iachr/expression/showarticle.asp?artID=650&lID=1.

and specifically includes "radio communication", while "public broadcasting" is excluded from the definition (section 2). It is thus clear that this wording covers private radio and television broadcasters, at least where they distribute over the airwaves. This would appear to conflict with the licensing authority of the IBA, which is "the sole authority empowered to issue licences for broadcasting" (section 4(j) of the Independent Broadcasting Authority Act).[6] It is better practice for one body to regulate broadcasters, even where they require a frequency licence to distribute over the airwaves (radio frequencies), with the broadcast regulator obtaining the frequency licence from the telecommunications regulator, where these bodies are not combined into one in a converged regulatory system.

Vague Licensing Requirements

The conditions for the issuance or variance of licences are vague. For example, the ICTA must take into account "the public interest and the likelihood of unfair practice" (section 24(5)(a)). Without more precise definitions of the terms "public interest" and "unfair practice", this is so vague as to permit denials on virtually any basis that the ICTA desires. It could, for example, decide that it is no longer in the "public interest" to allow an Internet service provider which provides services for an independent media website to continue to operate. Licences can also be denied based on "any element" of national security (section 24(5)(b)). However, only a real and imminent threat to national security could be a legitimate basis for denying a licence, which represents a very important restriction on freedom of expression. Reducing the denial barrier here to "any element of national security" is far too low given the freedom of expression implications of this.

The conditions for suspending licences are also too punitive. Specifically, licensees can have their licences suspended for a breach of *any* term of either the licence or the law (section 24(11)). A licence suspension has very significant implications for freedom of expression and yet breaches of either the law or licence terms can be very minor in nature. International standards thus call for a graduated system of sanctions, starting with warnings and then fines for one-off or minor breaches, and only allowing suspensions for repeated and grave breaches which other measures have failed to address.

Section 25(6) of the ICT Act empowers the ICTA to cancel the licence of any public operator the share capital composition of which has undergone a substantial change, with the public operator bearing the burden of proof of explaining why its licence should not be cancelled. While substantial changes in capital may justify the withdrawing of a licence, due process should require the ICTA to be the one to bear the burden of justifying why a substantial change in the public operator's share capital would warrant this, albeit it is reasonable to require operators to report such changes.

[6] Act 29/2000, http://cert-mu.govmu.org/English/Documents/ICT%20Acts/IBA%202000.pdf.

Excessive Search Powers

The licensing regime also threatens human rights by enabling gratuitous search powers that arbitrarily interfere with privacy, an internationally protected human right. Article 17 of the *International Covenant on Civil and Political Rights* (ICCPR),[7] which Mauritius ratified on 12 December 1973, provides: "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence…" In General Comment 16, the UN Human Rights Committee clarified that the word "home" in Article 17 of the ICCPR is "understood to indicate the place where a person resides or carries out his usual occupation." [8] Thus, work premises are also covered by privacy protections under international human rights law.

Section 25(2) allows the ICTA to empower officers to "at all reasonable times inspect any installation, apparatus or premises relating to a licence" without seeking a warrant. The breadth of this extraordinary power is unclear, given the law's failure to define "reasonable times", "inspect" and what it means for an installation, apparatus or premise to "relate" to a licence. The next provision, section 25(3), authorises a similar power but with due process protections such as requiring a magistrate's warrant, rendering section 25(2) in its current formulation unnecessary, although it might possibly be legitimate to authorise warrantless searches in certain very limited circumstances. Section 27(5) empowers public operators – i.e. service providers which are in many cases private companies, with the word "public" referring to a public service and not the nature of the business – to, without warrant or notice, enter "any private property" to "remove any tree, branch, hedge or any other object that is likely to be a danger" to the ICT installation. The law should at least require reasonable notice to the owner of the property, which might exceptionally be waived in situations of imminent harm.

Recommendations

- The requirement to obtain a licence should be limited to those services or networks where the allocation of scarce public resources or other important public policy objectives justify this, which would exclude most Internet services.
- The licensing of private broadcasting, including in terms of radio frequencies, should be done through one centralised licensing process, overseen by the Independent Broadcasting Authority.
- Sections 24(5)(a)-(b) should be rewritten to include more specific standards for the issuance, variance and denial of licences.
- A graduated system of sanctions, including warnings and fines for initial or minor breaches of the law and

[7] UN General Assembly Resolution 2200A (XXI), 16 December 1966, in force 23 March 1976.
[8] UN Human Rights Committee, *CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, 8 April 1988, para. 5, https://www.refworld.org/docid/453883f922.html.

licence suspension or revocation only for serious and repeated breaches, should replace section 24(11).

- Section 25(6) should be rewritten to require the ICTA to justify why a change in share capital composition should warrant the revocation of a licence.
- Section 25(2) should be removed or at least limited to highly exceptional circumstances which would justify an inspection of private premises without a judicial warrant.
- Consideration should be given to amending section 27(5) to include a requirement of reasonable notice, absent imminent harm, before the power it lists can be exercised.

Overbroad and Vague Offences

The law also significantly restricts freedom of expression through a range of content restrictions. Many of these restrictions do not meet the three-part test for restrictions on freedom of expression set out in Article 19(3) of the ICCPR. This requires restrictions to a) be prescribed by law; b) to aim to protect the rights or reputations of others, national security, public order, public health or public morals; and c) be necessary to protect one or more of those interests.

Section 18(1)(m) grants the ICTA the very general power to "regulate or curtail the harmful and illegal content on the Internet and other information and communication services". As such, it has the power to apply any content restriction in Mauritian law where content is distributed over those services.

One example of an overbroad content restriction is section 32(5), which authorises public operators (service providers) to intercept, withhold or otherwise deal with messages they consider to be "indecent or abusive" (section 32(5)(a)(i)), to contravene the Act (section 32(5)(a)(ii)) or to endanger the State's defence, public safety or public order (section 32(5)(a)(iii)). While it is legitimate to provide for protection for public safety, public order and national defence, it is not clear that it is appropriate to grant such broad authority to private actors to take action to address this sort of content (see below). Furthermore, while it is generally acceptable to allow for measures to address obscene content, subject to authoritative decision-makers such as courts elaborating on what that means over time, the definition of what might quality as "indecent" or "abusive" is simply too broad and flexible to serve as the basis for a restriction on freedom of expression, at least absent clear and appropriate definitions in the ICT Act of what these mean. Absent such a definition, this provision grants unduly broad discretion to intercept or withhold messages.

The overbreadth of the section 32(5) power is compounded by its lack of due process and transparency provisions. It may be contrasted with an analogous provision for messages

that are material to criminal proceedings, in section 32(6), which provides for an application to be put to a judge to authorise measures by public operators. Section 32(5), in stark contrast, empowers public operators to take action on their own, including by blocking a communication, without any authorisation or consideration by an independent body. According to section 32(5)(b), where a message is "withheld", but apparently not where it is subjected to other measures, the public operator must refer it to the ICTA for "such written directions as the latter may think fit". Since the Tribunal can only hear appeals from a "decision" of the ICTA (section 39(1)), it is not clear whether "written directions" under section 32(5), if at all they are even issued (since this is left to the discretion of the ICTA) are appealable. Furthermore, the ICT Act does not impose any notice requirement on the section 32(5) power, including informing the message's author of the measures taken or the reasons for them, so that even if an appeal were available, those affected may well not even be aware of the need to appeal. As such, this system is woefully inadequate in terms of providing those affected with appropriate redress following measures against their content.

The ICT Act also creates a number of specific content restrictions which are not legitimate under international law. Section 46(g) makes it an offence knowingly to send "false messages" and section 46(na) does the same for "knowingly providing information which is false or fabricated". Inaccuracy alone is not sufficient to restrict freedom of expression. As the four special international mandates on freedom of expression state in their 2017 Joint Declaration: "General prohibitions on the dissemination of information based on vague and ambiguous ideas, including 'false news' or 'non-objective information'" are incompatible with international guarantees of freedom of expression.[9]

Section 46(ga) prohibits the use of telecommunication equipment to send messages which are "obscene, indecent, abusive, threatening, false or misleading" and which could "cause annoyance, humiliation, inconvenience, distress or anxiety" to any person. This wording is so vague that it criminalises a broad sweep of regular expressive behaviour. We again see the use of flexible terms like "indecent" and "abusive", and the problematical prohibition on "false" content but even "misleading" statements are now prohibited. The results are equally broad. Article 19(3) of the ICCPR allows for restrictions to protect the rights and reputations of others but expanding this to protect individuals against "annoyance", inconvenience" and "anxiety" goes very significantly further. Section 46(h) is even more problematical, making in an offence merely to *receive* messages which are indecent or menacing, which could make it an offence to be a victim of online sexual harassment. It also covers messages which "cause annoyance, humiliation, inconvenience, distress or anxiety", without any additional requirement (section 46(ga) at least requires these messages to be

[9] UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR Special Rapporteur on Freedom of Expression and Access to Information, Joint Declaration on Freedom of Expression and "Fake News", Disinformation and Propaganda, 3 March 2017, para. 2(a), https://www.law-democracy.org/live/wp-content/uploads/2012/08/17.03.03.Joint-Declaration.PR_.pdf.

"misleading" or "abusive"). Section 46(ha) makes it an offence to uses information and communication services (including telecommunication services) to impersonate another in a manner likely to cause "annoyance, humiliation, inconvenience, distress or anxiety", which would cover teenagers pretending to be each other to send prank texts. None of these offences have a specific intent requirement, beyond the basic (simple) criminal intent requirement of committing the act, thereby compounding the risk that these offences will be used to restrict legitimate speech.

Section 40(5)(d)(i) makes it an offence to insult a member of the Tribunal during proceedings. International law is very clear on the point that while everyone should benefit from the protection of defamation law, officials, including members of the Tribunal, should never benefit from special protection in this regard due to their position. If anything, they should tolerate a greater degree of criticism due to their position. To the extent that members of the Tribunal may need to limit speech to protect their ongoing proceedings, this is already covered by section 40(5)(d)(ii) (i.e. section 40(5)(d)(i) cannot be justified on that basis).

Some of these offences are also duplicative of provisions in other laws, such as the Criminal Code.[10] We have not been able to verify all cases of duplication but, for example, section 46(ga) prohibits, among other things, using telecommunications equipment to send "threatening" messages, while sections 224-226 of the Criminal Code already prohibit threats of violence in multiple forms.

The law also creates many offences that would criminalise everyday online behaviour. For example, section 46(d) makes it an offence when someone "steals, secretes or destroys a message"; destroying messages occurs every time someone deletes a message from their email inbox. Section 46(e) makes it an offence when someone omits or delays to transmit a message, which is not only a regular online occurrence but appears to create a very general positive obligation on everyone to forward messages.

Section 46(n)(ii) makes it an offence to disclose a message or information about a message to any other person without the consent of the sender(s) and recipient(s), which would cover forwarding an email without obtaining the consent of the original sender, something virtually everyone who operates online has done repeatedly. It would also cover showing someone a mass text advertisement without obtaining the consent not only of the sender but also the potentially thousands of other recipients.

The overbreadth of the numerous offences discussed above is compounded by the severe maximum punishment that is available for all of them. Section 47 prescribes a maximum of ten years' imprisonment or one million rupees (approximately USD25,000) for any offence.

[10] Cap 195, 29 December 1838, https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/85779/96240/F1364216116/MUS85779.pdf.

It would be better practice to have more tailored punishments, with repeated or more serious offences, such as those involving the intent to defraud (sections 46(b)-(c)), warranting larger fines or jail time, and initial or less serious offences, such as obtaining telecommunication services without proper payment (section 46(j)(ii)), involving smaller fines or warnings.

Recommendations

- Section 32(5) should either be removed entirely or limited to highly exceptional cases where it is not possible to obtain a warrant from a judge before taking action against content, for example in case of the ongoing dissemination of extremely harmful content such as child pornography.
- Sections 40(5)(d)(i), 46(d), 46(e), 46(g), 46(ga), 46(h), 46(ha), 46(n)(ii) and 46(n) should either be removed entirely from the ICT Act or substantially amended to bring them into line with international standards.
- The singular punishment in section 47 should be rewritten to include a graduated system of sanctions that includes warnings or smaller fines for less serious or initial offences and larger fines or imprisonment for grave or repeated offences.