

# THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS



"TO NO ONE WILL WE SELL, TO NO ONE DENY  
OR DELAY RIGHT OR JUSTICE"

-Chapter 40, Magna Carta



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# The E-Newsletter

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*The views expressed in the articles are those of the particular authors and should under no account be considered as binding on the Office.*

# Editor's Column



**Assistant Director of Public  
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Is Artificial Intelligence (AI) a tool like any tool? Not totally novel, AI is having a bit of a moment lately. Things have moved. A paradigm shift from human judgment, experience, and gut instinct to a more predictable and unbiased data-supported decision making. This shift is paving its way in every sphere and walk of life.

How would this mind-boggling breakthrough of storing and using anything and everything, in unfathomable modes and techniques, fit in the legal landscape? What challenges would legal practitioners face in the wake of an era where machines, will and can, pretty much do, all the things that a human can? Dealing with compliance, obtaining necessary permits for a particular project, drafting a contract, you name it.

How about when AI meets crime? Criminal lawyers looking askance at the ability to clone voices, comes to my mind. A haven for criminals, a modern twist to impersonation and manipulation of audio evidence, which could hinder investigations and put the integrity of legal proceedings in peril.

Reason and reflection require us to recognise that this seemingly magic tool is unfortunately not without legal risks. How about the potential of it being hacked and the dissemination of misinformation? Can it potentially be a threat to cybersecurity? Legal implications and questions posed by using generative AI are still unclear. Would copyright, patent, and trademark infringement apply to AI creations? Self-driving cars- where would liability lie in case of an accident? How about the admissibility of AI applications in criminal cases? What about deepfake voice technology and forensic science? Do our existing laws cater for the potential breaches of the law by the use of generative AI? Our Courts are yet to establish how intellectual property laws, criminal law generally, and the law of evidence, should be applied to generative AI.

Can AI replace barristers? In this edition, Bhavna, Hanna, and Yanish give us an insight into how the advent of a chatbot, mimicking a human conventionalist has revolutionised tasks, which were, until not a very long time ago, within the special province of human intelligence. Users are left baffled by its capabilities. Its versatility is astounding. They will, through a chat sample, give us a flavour of how to interact with it and its possible use to a prosecutor.

The side effect of technology when it falls in the wrong hands has been felt by many. In this digital age, possibilities for criminals to fraudulently have access to bank accounts abound. They vary in degree and magnitude. From the one-off mind-blowing AI heist changing the game of bank robbery to the petty cybercrime triggering the daily anguish of too many when they fall prey to their bank card having been misused, the risks are diverse.

Online transactions soar. People with an aversion to technology do not have much of a choice in the internet age but to keep up and learn how to use mobile phones to transact. The deceivers are not necessarily tech-savvy. Deepti will take us through the stories of some who have been exploited through the unauthorised use of their ATM cards. They had either been too naïve, negligent or distracted, or just helpless when technology got ahead of them. She also explores the legal framework covering this area of the law.

Constitutional dilemmas, a common occurrence where the recognition of a wide variety of fundamental rights are bound to clash. Each of us has a right to be free in the exercise of our thoughts, speech, and religious beliefs. The same goes for a person's right to respect for private life. How much liberty does a service provider enjoy as far as the choice of his customers is concerned? Would he be impinging on competing fundamental rights if he advertises for a particular type of clients and/or proclaims to exclude his services to a particular group of persons on account of their sexual orientation? Or is the debate in reality a pure free-speech one? What about the right to privacy of a suspect in a criminal investigation and that of the freedom of expression of a publisher, when neither of the right having the right of precedence over the other? Bhavna and Bhamini, have, through two recent pronouncements, in the US and the UK respectively, uncovered the above questions, which I have no doubt, will ignite the mind of our readers.

This issue also contains an overview of three events recently organised by the ODPP. The first event, organised in collaboration with the International Organisation for Migration, marked the World Day against the Trafficking in Persons. The second event, jointly organised with the Mauritius Bar Association, was a discussion on Freedom of Expression and Social Media. The last event was a lecture by the famous psychologist, Dr Micki Pistorius, on Forensic psychology and profiling.



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# ARTICLES

## Can Artificial Intelligence replace Barristers?

**What does a barrister look like?** Perhaps the stereotypical image would be that of a barrister pouring over books in a library, scribbling down notes and rushing to court to present arguments. But now, the tools we use are not limited to a notepad and a pen anymore. Our toolbox could now include virtual assistants such as Siri, chatbots and Meta.

Since we have been hearing a lot about AI lately, we were curious to know what it was like to discuss with a human-like chatbot. We chose the ChatGPT tool, which is an artificial intelligence chatbot launched in November 2022 and readily available on the internet. We interviewed the bot and quizzed it about an imaginary case. We wanted to know if this AI could tackle legal issues which a prosecutor has to consider daily. We chose an imaginary case of possession of stolen goods and asked the AI to analyse the situation. The robot answered us readily, barely a second before the words started appearing as a response. We added some practical difficulties that can arise during a trial to see if the AI could adapt and provide intelligent answers. The conversation was rather surprising and we propose to share it with our readers.

### CHAT WITH CHATGPT

**Q: What are you?**

A: I am an Artificial Intelligence language model. An AI language model is a program that uses advanced algorithms to process and generate human-like text based on the input it receives. It can understand and respond to natural language queries, simulate conversations, and perform various language-related tasks.

**Q: Are there humans controlling you?**

A: No, there are no humans controlling me during our interactions. As an AI language model, I operate autonomously based on the algorithms and training I have received. My responses are generated based on patterns in the data I've been trained on and the input I receive from users like you. However, I don't have consciousness, awareness, or any personal control over the responses I generate.



Ms Bhavna Bhagwan  
State Counsel



Ms Hannah Sayed Hossen  
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Mr Yanish Jeerasoo  
State Counsel

***Q: Do you know most or all of the internet?***

A: As an AI language model, I don't have direct access to my training data or know where it came from. However, I was trained on a mixture of licensed data, data created by human trainers, and publicly available data. OpenAI, the organization behind my development, has not publicly disclosed the specifics of the individual datasets used, including whether the entire internet was used. I don't have direct access to the internet.

***Q: Do you think AI will replace humans someday?***

A: AI is likely to complement humans rather than completely replace them.

***Q: Can you do my job as state prosecutor?***

A: As an AI language model, I can assist you by providing general information, answering questions, and offering guidance on legal concepts and procedures. However, I cannot replace the role of a state prosecutor or perform your job as a prosecutor in a court of law.

***Q: If I gave you all the relevant information could you draft an indictment for me ?***

A: I can assist with drafting an indictment based on the information you provide.

***Q: Could you conduct a criminal trial if you had access to the whole brief including all the statements of witnesses?***

A: As an AI language model, I am not capable of conducting a criminal trial or any other legal proceedings. While I can process and analyze information, including statements of witnesses, I lack the ability to interact in real-time or engage in courtroom activities.

# CAN ARTIFICIAL INTELLIGENCE REPLACE BARRISTERS? (cont'd)

***Q: Am I allowed to coach my witness on whom my whole case depends?***

A: Yes, you are allowed to prepare or coach your witness for their testimony, but it must be done ethically and without encouraging false information or perjury.

***Q: I have an Accused whom I know very well. Should I disclose this to my office?***

A: Yes, as a prosecutor, it is essential to disclose any potential conflicts of interest or personal relationships with the accused to your office or superiors. This disclosure is necessary to ensure transparency, uphold the integrity of the legal process, and avoid any appearance of bias or impropriety.

***Q : I am prosecuting one Kevin for possession of stolen property. Kevin admitted to purchasing the phones from one Tomas but states he did not know Tomas had stolen the phones. Kevin also conceded he bought the phones at a price that was at least 50% below market rate. Do you think I can secure a conviction?***

A:

-Conviction depends on evidence and court interpretation.

-Kevin's knowledge and intent are crucial.

-Suspicion due to reduced price, but evidence matters.

-Present a strong case to establish guilt beyond doubt.

***Q: Tomas is a defence witness and during enquiry told the police that Kevin was not aware about the tainted origin of the phones. However, he approached me in court today and told me he lied to the police and that Kevin in fact was aware of this. What should I do?***

# CAN ARTIFICIAL INTELLIGENCE REPLACE BARRISTERS? (cont'd)

A:

Document the interaction.

Verify the information.

Inform your superiors.

Consult with legal experts.

Disclose the information to the defense.

Inform the court.

Ensure witness protection.

Prepare for cross-examination.

***Q: There is a document in my file that says that the phones belonged to one Mr Mink. I didn't provide that document to the Defence. Do you think I should provide it considering my charge of possession of stolen property?***

A: Yes, you should provide the document to the Defense. As a state prosecutor, you have a legal obligation to disclose all relevant evidence to the defense, including any evidence that may be favorable to their case. Failure to provide exculpatory evidence like the document indicating the phones belonged to Mr. Mink could be a violation of the principle of discovery and may harm the integrity of the trial process. Transparency and fairness are crucial in upholding justice, and disclosing all relevant evidence ensures a fair trial for both parties.

***Q: During enquiry, the police officer who secured the phones stated that the phones were found in Kevin's room in his house. Today in court, the officer stated that the phones were found in the boot of Kevin's car which was parked on the road. Do you think that could impact my case?***

A: Yes, the inconsistency in the police officer's testimony could potentially impact your case.

# CAN ARTIFICIAL INTELLIGENCE REPLACE BARRISTERS? (cont'd)

*Q: Let's assume Kevin had confessed to the charge, to all the elements of Being in possession of stolen property. And let's also assume Tomas was a prosecution witness who would testify to the effect that Kevin bought the phones knowing their tainted origin. If Kevin's confession were admitted as evidence during the trial, would you call Tomas as prosecution witness considering they were very good friends up until this incident?*

A: If Kevin confessed, you may not need Tomas as a prosecution witness, but consider all evidence and consult legal experts.

**Q: How can I assess if Tomas will be biased?**

A: To assess if Tomas will be biased, consider these steps:

1. Review his relationship with Kevin.
2. Examine past statements and actions related to the case.
3. Understand his motivations for testifying.
4. Assess personal interests that may influence his testimony.
5. Check for any external incentives or pressure.
6. Compare his potential testimony with other evidence.
7. Evaluate his overall credibility as a witness.
8. Be prepared to cross-examine him thoroughly

## COMMENTARY

One of the key benefits of AI is that it has the capacity to rapidly sift through huge volumes of data. So less time may be spent on research. ChatGPT set out key considerations to assess the possibility of a prosecution for the hypothetical case in no time. It pointed out that conviction would depend on court interpretation of the suspect's 'knowledge and intent'. It even worked out that there is a presumed 'suspicion due to reduced price'. Certainly, that is one of the factors that a prosecutor would think about to decide if there is sufficient evidence to prosecute. This is the level of discernment that one would expect from a human mind.

## CAN ARTIFICIAL INTELLIGENCE REPLACE BARRISTERS? (cont'd)

Our conversation with the AI also highlighted that its answers are based on the parameters within which it operates. For instance, the AI did not recite Mauritian case law. This is probably based on the case information that was provided to it and the resources it can access. At the start itself, the AI pointed out that 'I was trained on a mixture of licensed data, data created by human trainers, and publicly available data. OpenAI, the organization behind my development, has not publicly disclosed the specifics of the individual datasets used, including whether the entire internet was used. I don't have direct access to the internet.' We can therefore surmise that if the AI was trained on datasets specific on Mauritian Criminal Law, it would have surely been able to provide more specific answers.

Still, there is always a risk of using incorrect AI answers. Such a situation arose in the United States where a lawyer used ChatGPT to prepare submissions for a case. The AI generated cases which turned out to be fictitious! The OpenAI Associate General Counsel, Ashley Pantuliano, specified that while ChatGPT is a helpful starting point for legal research, it can sometimes produce inaccurate information in response to prompts, so legal professionals using the tool should be aware of that.

A barrister will inevitably face ethical dilemmas. Would an AI be able to match real life experience? Surprisingly, the AI was able to provide a nuanced answer to an ethical issue such as the communication of used and unused materials by the Prosecution. It advised on the possible steps which may be taken by the State Prosecutor. Concepts such as fairness, transparency and integrity of the judicial process which are the fruit of years of philosophy and thought were emphasised. An educated guess as to why there were more detailed answers may be that ethical issues are dealt in a similar way in various jurisdictions. Thus there is a greater consensus on what a 'correct' answer can be. Consequently, the AI provided more accurate insights in such a situation as opposed to quoting specific case law or legislations regarding the Mauritian legal context. Again, it is more about providing the right datasets to the AI than anything else.

## CAN ARTIFICIAL INTELLIGENCE REPLACE BARRISTERS? (cont'd)

As aptly pointed out by itself, the AI 'can assist you by providing general information, answering questions, and offering guidance on legal concepts and procedures'. Where there is an intricate trial with vast amounts of technical data, an AI has the potential to meaningfully streamline the case preparation process. In such cases, AI would not only be beneficial for research but it may also provide insights into the relevancy of a piece of evidence. It would not be fantastical to imagine that it can help in presenting complex information before a Court.

In the broader context of criminal investigations, AI powered tools may assist in more efficient and faster crime detection in the digital space. Notably, in a recent report The House of Lords Justice and Home Affairs Committee in England and Wales considered the use of artificial intelligence technologies in the criminal justice system. It underlined the fact that Home Office will be making use of AI to help counter the threat of online child sexual abuse by developing a child abuse image database. Such a use of AI will surely speed up crime detection and encourage prompt prosecutions.

Nonetheless, the use of AI also raises an ethical issue regarding the information being fed to it. It is not because an AI is not human that it is free from human flaws. Its answers are dependent on the data it can access. If that data is deeply flawed then the risk of an equally flawed answer is real. The faster AI develops, the more it needs to be understood. For instance, the issue of bias in AI was considered in a 2022 report by the European Union Agency For Fundamental Rights. One of the aspects considered is how unrepresentative data fed to AI may lead to generalised outcomes which are not reflective of nuances and complexities.

There are also obvious implications in criminal cases when assessing the criminal responsibility of an individual. For instance, If the individual relied on AI and it is the cause of an fatal incident. Would that excuse the individual? Can an individual still be said to have 'la garde de la chose' when AI is shown to be sentient? Intoxication, necessity, self-defence are a few examples of General defences available to humans under criminal law. Similar defences in slightly modified form may also

# **CAN ARTIFICIAL INTELLIGENCE REPLACE BARRISTERS? (cont'd)**

be made available to AI entities. These are some of legal issues that will crop up. Jurisdictions are starting to perceive these issues and there is, as of yet, no definite trajectory on the answer to such issues.

To conclude, can we say farewell to our jobs and let AIs take over? We found that AI is only a tool which to streamline certain tasks and should not be seen as the be-all and end-all solution. Blindly trusting AI-generated insights without rigorous human oversight may lead to wrong conclusions and other legal errors. AI, even at its best, cannot replace human judgement ... at least not in its current form.

**Article By Ms. Bhavna BHAGWAN, State Counsel, Ms. Hanna SAYED HOSSEN, State Counsel and Mr. Yanish JEERASOO, State Counsel**

## Cybercrime sounds fancy, isn't it?



**Ms Deepti Thakoor**  
**State Counsel**

Contactless cards, indicated by the symbol  are easy to use, especially when the purchase amount is below a certain limit as defined by the bank. One does not have to touch the key pad or even remove the card from the wallet (provided though that the other cards are not contactless activated). One could even hand over the contactless card to a trusted person to effect purchases in their behalf. Handy, isn't it? Especially if a person may be severely ill (or hospitalized) and unable to effect purchases on their own.

It is also common in Mauritius for older people to share their pin code (especially before the existence of contactless cards) with their children or other trusted persons for the latter to run errands on their behalf. Some people have also shared their bank app access codes to people they trusted.

But what if, this trusted person, uses the contactless card or the card and pin code for transactions you did not authorize? What protection do you have?

Unfortunately, once you hand over your card, there is not much control over what the person does with the card. However, those trusted persons expose themselves to offences under the Computer Misuse and Cybercrime Act if they use the card for unauthorized transactions. People who commit such offences can be prosecuted for the offence of “unauthorized access to computer data” or electronic fraud.

In order to fall under the offence of “unauthorized access to computer data”, the suspect must cause a computer system, being the technology which processes our bank transactions in this case, to perform a function which he knows is unauthorized. In such a case, the suspect exposes himself to a fine not exceeding Rs 50,000 and to penal servitude not exceeding 5 years.

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In cases where a person discloses any password, access code or pin code to their confederate with a view for the latter to get access to the bank accounts and/or perform any unauthorized transaction, they could be prosecuted for the offence of “unauthorized disclosure of password” and be liable to a fine not exceeding Rs 50,000 and to a term of imprisonment not exceeding 5 years. The confederate, on their part, would be liable for the offence of “unauthorized access to computer data”.

Let me share with you three real life stories of how these offences unfolded in practice, often for small amounts. In all these cases, there had been a successful prosecution against the accused parties.

1. A nephew stole the card and pin code of his uncle, who lived in the same yard, and remitted it to his friend to remove money (a total sum of Rs 5300) from the automatic teller machine (ATM). For each transaction, the nephew remitted Rs 500 to his friend. The latter received Rs 1000 which he spent on food and drinks.

2. A son fooled his mother into giving him his bank account details. He made 9 unauthorised transactions until the card was captured. He then gave instructions to his partner to forge a cash withdrawal form and wanted to withdraw the sum of Rs 10,000. The bank officer called the mother to counter check the proposed transaction and fortunately, the transaction was not authorised. The son and his partner had abstracted Rs 35,000 which was spent on food, drinks, and entertainment.

3. An old person remitted his card and pin code to an unknown woman and asked her to remove Rs 4000 from his account. The woman was accompanied by her husband who distracted the old man. She removed RS 4000 from the ATM which she put in her handbag and removed another Rs 4000 which she remitted to the old man. She then stole the card and ran away. Both husband and wife withdrew another Rs 2000 from the stolen bank card. The stolen proceeds were spent on food and drinks.

Electronic fraud is a more serious offence where:

- a. The suspect must either input, alter, delete or suppress data OR interfere with the functioning of the computer system;
- b. There must be a loss of property to another person;
- c. The suspect must have the intention to procure an advantage for himself or another person.

In the case of electronic fraud, the suspect exposes himself to a fine not exceeding 200,000 rupees and to penal servitude for a term not exceeding 20 years.

In another case, an employer remitted a bank card to his employee to fuel the van used in the course of duty. The employee went to petrol stations and asked the pump attendant to charge his card before fueling the vehicle, which already had a full tank. Upon noticing that the vehicle's tank was full, he asked the pump attendant to refund him in cash. He committed the fraud on no less than 20 occasions and was prosecuted for the offence of larceny by person in receipt of wages and electronic fraud. He had abstracted Rs 31,000 which were spent on food and drinks.

Cybercrime does not have to be complicated and the offender does not have to be tech-savvy. In this day and age where we are surrounded by technology, a person may be committing an offence and not realising the seriousness of it.

Cybercrime offences are serious and are tried exclusively before the Intermediate Court, which shows that the legislator intended to give the magistrates more severe sentencing powers than before the District Court. A magistrate sitting before the District Court can only inflict a term of imprisonment of up to 5 years and fine up to Rs 100,000. However, a magistrate sitting before the Intermediate Court has very wide sentencing powers and can inflict a maximum term of penal servitude of up to 20 years, depending on the circumstances, the offender and the offence.

While technological advances sought to make our life easy, they have also made it easy to fraudulently abstract the property of other people because the latter naively allowed the less scrupulous people to do so.

## Cybercrime sounds fancy, isn't it? (cont'd)

Did you know that out of all the data breaches in 2023 (where personal information was leaked in one way or the other), 74% was due to the human element, such as human mistake, phishing scams, privilege misuse, use of stolen credentials or psychological manipulation to reveal confidential information?

*[Source: Verizon 2023 Data Breach Investigation  
<https://www.verizon.com/business/resources/reports/dbir/> last accessed on 09 Aug 2023]*

Human error in data breaches can have serious repercussions, as was the case last week when the Police Service of Northern Ireland (PSNI) mistakenly uploaded an excel file online, revealing the identities and posting of all of their officers. In Northern Ireland, given the ongoing conflict involving the paramilitaries, who want to reunite Ireland and the loyalists who want to keep Northern Ireland in the United Kingdom and the antagonism against the police, such data leaks can put the life of the officers at risk.

*[source:<https://www.ft.com/content/339976ab-d333-4dcc-aedf-12d123d49349> last accessed on 12 Aug 2023]*

This unprecedented data breach serves as a humble reminder that technology responds to human input and no amount of technological advancement and sophistication can fully anticipate human mistakes or prepare for its consequences. With that in mind, let us realize that it is our responsibility to keep our bank information safe but those, who misuse the trust bestowed upon them, will not escape justice.

***What are you, the owner, doing to keep your bank data safe? And what are you, the trusted person, doing to put yourself in troubled waters?***



# Case Commentaries

# Supreme Court of United States

## **303 Creative LLC ET AL v ELENIS ET AL 600 U.S. (2023) (30 June 2023)**

*Freedom of expression - constitution - public accommodation law - protection from discrimination*

*The Colorado Anti Discrimination Act (CADA) prohibits a business from denying a member of the public access to its goods and services because of characteristics such as sexual orientation. No one is allowed to advertise such restriction as well. 303 Creative LLC, is a graphic design business run by Ms Smith. She does not believe in same-sex marriage and did not want to create wedding websites celebrating it. She also wanted to put a message that she will only create content in line with her beliefs. Ms Smith took pre-emptive legal action thinking that she would be required to create such content websites under the CADA. She argued that this would be a breach of the First Amendment, the Free Speech Clause under the Constitution. She applied for and failed to obtain an injunction before the district court to prevent the State of Colorado (the State) from forcing her to create wedding websites for same-sex couples. The appeal before the Tenth District was also unsuccessful. She appealed to the Supreme Court of United States.*

**Held** - Ms Smith cannot be forced by the State to create content celebrating same-sex marriages which she does not believe in. Doing so would amount to an interference with her right to Free speech.

### **Commentary**

The CADA is considered to be a public accommodation law which aims at ensuring equal access to goods and services. Under the CADA, a place of business cannot refuse to a member of the public full access to its goods and services simply because it does not agree with person's characteristics such as race, sex and sexual orientation. For example, it cannot provide a service to a man and refuse to provide the same service to a woman. Non-compliance leads to sanctions of various kinds. So while discrimination creates uneven access to services, public accommodation laws are meant to level the playing field.

Before the Supreme Court, the issue was whether the State can compel an artist to express a view that she does not believe in or to remain silent? Would this violate the free speech clause of the First Amendment? The word 'artist' is in itself telling. It indicates that Ms Smith's work has a creative aspect.

## Supreme Court of United States

### ***303 Creative LLC ET AL v ELENIS ET AL 600 U.S. (2023) (30 June 2023)***

It is interesting to note that the Supreme Court emphasised that the First Amendment protects all speech, even that which a government can consider as “*misguided*” and can cause “*anguish*”. The Supreme Court went further to state that “*the government may not compel a person to speak its own preferred messages*”. It found that the content on the wedding websites would amount to “*pure speech*” consisting of “*ideas*” which included Ms Smith’s views about marriage. The Supreme Court noted that the State’s sanctions on her for expressing her beliefs would amount to an interference with her right to speak freely. Following the State’s reasoning “*would allow the government to force all manner of artists, speechwriters, and others whose services involve speech to speak what they do not believe on pain of penalty.*” Such interference with her right to speak freely on a point of major significance was not acceptable.

There are two major take-aways from the Supreme Court’s decision on statutory interpretation: first, a law’s intention to ensure equal access may well be laudable but the execution must be compatible with the Constitution. Here, the Supreme Court acknowledged that laws such as the CADA are important in ensuring that all members of society can exercise their rights fully but that they too are also subject to the Constitution. Second, that the Constitution protects freedom of expression even in its more offensive forms: “*The First Amendment envisions the United States as a rich and complex place where all persons are free to think and speak as they wish, not as the government demands. Because Colorado seeks to deny that promise, the judgment is [reversed].*”

It is also notable that this outcome hinges on the Free Speech clause although Ms Smith’s views on marriage were at the heart of the arguments. One could wonder how information about a wedding and a couple is an expression of opinion. In this respect, the Supreme Court relied considerably on the parties agreeing that the website content would be ‘expressive in nature’. The tailor-made services were repeatedly mentioned in the decision.

Thus, it could be argued that the facts of this case played a big role in setting out this type of service apart. This was not a generalised services with a low creative input. As an illustration, an artist who

# Supreme Court of United States

## ***303 Creative LLC ET AL v ELENIS ET AL 600 U.S. (2023) (30 June 2023)***

advertises his services on a social media platform and accepts commissions could also be a 'public accommodation' because he/she would accept work from anyone. However, services such as the commissioning of a painting would be highly personalised. This artist could not be forced to paint something which is in direct contradiction with his/her views such as depicting a message condemning one's sexual orientation. In contrast, a company which paints buildings following the client's instructions would have minimal artistic value and hence, could hardly be allowed to refuse its services to clients of a particular sexual orientation.

It is important to highlight that three judges gave a dissenting opinion. There is a marked difference in approach between the majority and dissenting opinions. The majority reiterated the characteristic of free speech as respecting all forms of speech even if they are offensive and politically incorrect: "*A commitment to speech for only some messages and some persons is no commitment at all.*" But, the dissent reasons that a state should be allowed to intervene and level up a playing field by removing barriers: "*The lesson of the history of public accommodations laws is altogether different. It is that in a free and democratic society, there can be no social castes. And for that to be true, it must be true in the public market.*"

What this case certainly shows is that clashes between constitutional rights can arise. The debate then raises difficult questions with sometimes no clear answers: where does one right start and end? To what extent can a State go to eliminate discrimination? Can it impose a view or can it lead one to remain silent? Can it require a person to put a caveat on his or her work? The principle of Free Speech is straightforward but its application can be fact dependent, specially in the light of this decision.

It can be reasonably expected that there will be consequences to this decision. Which services can fall within the category of expressive activity like 303 Creative LLC? Could certain businesses use this case to restrict access to its services? The possibility that certain businesses will refuse their services on the ground that their work is an expression of opinion is a real one. Only more litigation is a certainty here.

# Supreme Court of United States

## **303 Creative LLC ET AL v ELENIS ET AL 600 U.S. (2023) (30 June 2023)**

### ***What about Mauritius?***

Our constitution also ensures fundamental rights such as the freedom of expression which are subject to the rights and freedoms of others and the public interest. In Mauritius, section 3(b) of the Constitution states that *“there have existed and shall continue to exist without discrimination by reason of race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, each and all of the following humans rights and fundamental freedoms [...] freedom of conscience, of expression [...]”*

In addition, the Equal Opportunities Act (EOA) provides for equal access to services just like the CADA. Section 18 of the EOA provides that:

*“No person who, for payment or otherwise, provides goods, services or facilities, shall discriminate against another person*

*(a) by refusing or failing to provide him with those goods, services or facilities; or*

*(b) in the terms or conditions on which, or the manner in which, he provides that other person with those goods, services or facilities”*

Notably, the Act expressly prohibits discrimination on the ground of sexual orientation whereas the Constitution makes reference only to sex as a protected characteristic.

If there is a clash between the constitutional right to freedom of expression (section 12) and protection from discrimination (section 16) then the boundaries of section 12 will inevitably be questioned. Of course, the fundamental principle is that the constitution prevails over any other legislation. But just as in the US, the starting and end points of the right to speak one's mind would be the subject of judicial attention.

**Commentary by Ms B. Bhagwan, State Counsel**

# Bloomberg LP (Appellant) v ZXC (Respondent) [2022] UKSC 5

*Right to privacy of a suspect pending formal charge – Right to freedom of expression – publishing of information - Article 8 and 10 of the European Convention on Human Rights*

*The case relates to an article published by Bloomberg in connection with a criminal investigation covering possible offences of corruption, bribery, offences under the Proceeds of Crime Act 2002, the Fraud Act 2006, as well as the conspiracy to commit certain offences, involving a publicly listed company ZXC and the chief executive of one of its regional divisions. Bloomberg primarily based its article on a confidential formal Letter of Request emanating from a law enforcement entity in the United Kingdom (the "UKLEB") to its foreign counterpart, soliciting the latter's cooperation in relation to the said criminal investigation.*

**Held** - On 16 February 2022, the UK Supreme Court (the "Court") unanimously decided that, prior to a formal charge being lodged, a person under criminal investigation has, as a general principle, a reasonable expectation of privacy in relation to that investigation.

## **Commentary**

The three issues which were adjudicated upon by the Court were: (i) Whether the Court of Appeal erred when it concluded that as a general rule, prior to being charged, an individual has a reasonable expectation of privacy with regards to information pertaining to the investigation; (ii) Whether the Court of Appeal erred in holding that, in a case in which a claim for breach of confidence was not pursued, that the details of the criminal investigation published by Bloomberg emanated from a confidential law enforcement document rendered the information private and/or undermined Bloomberg's ability to rely on the public interest in its disclosure; (iii) Whether the Court of Appeal erred when it upheld the lower Court's finding that balancing exercise of Article 8 (privacy) versus Article 10 (freedom of expression) tilted in favour of the claimant with regards to his reasonable expectation of privacy.

The two-stage test in **Murray v Express Newspapers Plc [2008] EWCA Civ 446** was applied by the Court to ascertain whether there has been misuse of private information. The first stage is to assess whether the claimant has a reasonable expectation of privacy and if in the affirmative, then the second stage would be to assess whether that expectation is outweighed by the countervailing interest of a publisher's right to freedom of expression.

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The Court focused on the first stage of the test i.e. whether the claimant had a reasonable expectation of privacy regarding the relevant information, taking into account all the facts and circumstances of the case. In this context, the Court held that “*the general rule or legitimate starting point is not a legal rule or legal presumption, let alone an irrebuttable presumption. The determination as to whether there is a reasonable expectation of privacy in the relevant information is a fact specific enquiry.*” However, the general rule is not invariable and there may well be criminal investigations in which this expectation does not arise (for example, public rioting is not the type of activity which Article 8 exists to protect).

At paragraph 144 of the judgment the Court also held that “*... in respect of certain categories of information, such as the information in this case, a consideration of all the circumstances and the weight which must be attached to a particular circumstance will generally result in a determination that there is a reasonable expectation of privacy in relation to information within that category. In respect of those categories of information it is appropriate to state that there is a legitimate starting point that there is an expectation of privacy in relation to that information.*”

The existence of the general rule does not mean that the claimant is relieved from the burden of setting out the circumstances to demonstrate the reasonable expectation. Even if the expectation does arise, there are cases in which the reasonable expectation can be lowered. In such cases, the reduced expectation will have an impact on the strength of the Article 8 arguments at stage two. The rationale of the starting point is that publication of the relevant information can cause “harm and damage” that can be “*irremediable and profound.*”

The Court concluded that the general rule in relation to this category of information, i.e. the facts of a criminal investigation, prior to the point of charge, operates in a similar way to general rules in relation to other categories of information for e.g. health-related information, a category widely considered to give rise to a reasonable expectation of privacy.

Bloomberg challenged the Court of Appeal’s “general rule” or “legitimate starting point” approach. Such an approach underestimated the public’s ability to appreciate the importance of the presumption of innocence. It also overestimated the extent that the publication may cause damage to reputation.

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The Court rejected the argument of Bloomberg and explained that the legal presumption of innocence is applicable in criminal trials and stated the following: *“In this context the question is how others, including a person’s inner circle, their business or professional associates and the general public, will react to the publication of information that that person is under criminal investigation... that a person’s reputation will ordinarily be adversely affected causing prejudice to personal enjoyment of the right to respect for private life...”*. The Court also ruled that Article 8 ECHR encompasses a ‘reputational’ dimension.

The second stage of the test essentially involves a balancing exercise between the claimant’s right to privacy and the publisher’s article right to freedom of expression.

The Court noted that even in circumstances where the relevant information is categorised as private, it could still have been published, had the interest of the publisher’s right to freedom of expression prevailed over the claimant’s right to privacy. By way of illustration, if an individual is formally charged with a criminal offence, this individual cannot have a reasonable expectation of privacy, having regard to the ‘open justice’ principle which generally entails that the relevant information is of an essentially public nature. The Court highlighted that the present appeal was confined to the impact following the publication of information emanating from an investigation conducted by an organ of the State. It would have been a different matter had the information been derived from Bloomberg’s own investigations as opposed to the confidential Letter of Request.

The judgment confirms that, generally, an individual under criminal investigation should remain anonymous unless and until he is formally charged. Counterarguments based on public interest may indeed outweigh the individual’s right to privacy. Naturally the particular facts and circumstances of a case would equally matter. Nevertheless, one cannot have free recourse to Article 10 as a universal justification or panacea to justify damaging the reputation of suspects – still presumed innocent.

***To what extent therefore can a suspect in Mauritius claim that he has a reasonable right to privacy during a criminal investigation prior to being formally charged?***

In this context, the Constitution of Mauritius also ensures the protection of fundamental rights and freedoms of individuals. However, the extent of the right to privacy of an individual is unclear and was recently considered in the constitutional redress case of Fokeerbux and Ors vs The State.

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The judgment in this case is currently pending before the Supreme Court, but once it is delivered, it will hopefully shed light into the real ambit of sections 3 and 9 of our Constitution which relate to the fundamental rights and freedoms of an individual and protection for privacy of home and other property.

Lastly, in Mauritius (and unlike in the UK), individuals arrested during a criminal enquiry are provisionally charged before the District Courts. In other words, the information relating to the arrest of suspects can be argued to be in the public domain. However, this does not mean that rule of privacy does not apply outright. In fact, it may be argued that this rule should apply to sensitive information gathered in confidence by investigators at the enquiry stage prior to the formal charge being lodged. Even in Mauritius, when the balancing exercise is carried out, freedom of information would not automatically and necessarily outweigh the individual's right to privacy.



# Events

## JULY 30: WORLD DAY AGAINST TRAFFICKING IN PERSONS

The following is an extract of the speech delivered by Neerooa M.I.A, SADPP, on July 28, 2023, to mark the World Day against Trafficking in Persons.

“Everyone knows or must have heard of slavery. Slavery is when one person owns another person and has full control over the person he owns. It is considered to be one of the worse crimes against humanity; a slave who is a person becomes an object, deprived of his dignity, hence no human rights. Slavery has been officially abolished and Mauritius celebrates its abolition every 1st of February.

We may say it was one of the evils of the past. But strangely, in our modern times, we find the evils of the past re-appearing under new names. Slavery is one of them; restyled as modern slavery or trafficking in persons or human trafficking.

**What is modern slavery?** It is the trade in a human being with the aim of exploitation. This is not the legal definition, but this is what it means, in a nutshell, for all of us who are discovering this subject. You might be tempted to say, it cannot be; slavery has been abolished and so there cannot be modern slavery. A glimpse at the official records compiled by Dunant University College Foundation in Geneva, will definitely, call for a re-evaluation of your views; trafficking in persons is the second largest organised crime in the world. The following gives a better picture of the threat which trafficking in persons poses to our world today:



You may be inclined to think that this crime is surely present in Africa, or other countries where there is no respect for democracy and Human Rights. You may be right to some extent since it has been recognised that human trafficking is an ignored crime because it affects marginalised people (Kevin Hyland OBE, Anti Slavery Commissioner in UK Government). But you are not entirely correct.

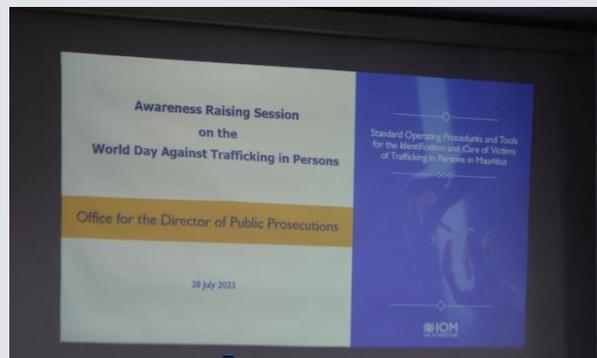
## JULY 30: WORLD DAY AGAINST TRAFFICKING IN PERSONS

Mauritius is not immune to this crime. According to Globalised Organised Crime Index, there are an estimated 1000 people living as modern slaves in Mauritius. This problem, this crime, this stigma, to humankind, is closer to us than we would ever realise or believe. It is therefore high time we stop ignoring the obvious; it is our responsibility and duty to seriously respond and combat this crime, which in simple legal language, is the transportation, recruitment, supply, of a person into a situation of exploitation. The four main common forms of trafficking in person are, forced labour, forced marriage, prostitution, and organ harvesting.

It is in this context and to mark the World Day Against Trafficking In Persons, that the International Organisation for Migration (IOM) together with ODPP, have organised an awareness raising session on 28 July 2023. IOM is a United Nations Organisation and a leading international organisation working on counter trafficking in persons issues and provides assistance to Victims of Trafficking. During this session, participants had an insight about the laws in force to combat trafficking in persons together with the United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons. There are four “Ps” essential in the combat against trafficking in persons, namely, Prosecution of offenders, Protection of victims, Prevention of trafficking in persons, and Partnership.



Mr Azam Neerooa, Senior ADPP



# A CONVERSATION ON FREEDOM OF EXPRESSION AND SOCIAL MEDIA

*Hosted by the Office of the Director of Public Prosecutions in collaboration with the Mauritius Bar Association*

*Date: 23 August 2023*

The Office of the Director of Public Prosecutions, in collaboration with the Mauritius Bar Association, organised a talk on "Freedom of Expression and Social Media" on August 23, 2023. The event, attended by esteemed members of the legal profession, aimed to explore the complex relationship between free speech, social media, and the legal framework that governs them. The event was moderated by Ms. Adeelah Hamuth, Assistant DPP, and featured Miss Deepti Thakoor, State Counsel; Mr. Ashley Victor, Deputy Editor in Chief & Editorial of Radio One; and Mr. Abdal Aumeer, Associate & Barrister at Appleby, as interveners.

Ms. Hamuth commenced the session by extending her gratitude to the attendees and emphasising the dual nature of free speech and social media as a double-edged sword. The initial segment of the talk was dedicated to elucidating the legal foundation of freedom of expression in Mauritius, as enshrined in Section 12 of the Constitution. This section safeguards the right to express opinions, receive and share ideas and information, and be free from undue interference. The exceptions to this right, outlined in the section, include provisions for safeguarding defense, public safety, morality, and more.

Mr. Abdel Aumeer highlighted that this constitutional provision is inspired from Article 19 of the Universal Declaration of Human Rights, stressing the global significance of free expression. Ms. Deepti Thakoor and Mr. Abdel Aumeer elaborated on the nuances of the legal limitations imposed by this provision. Responding to a question from Ms. Hamuth, Ms. Thakoor delved into the sub-sections of Section 12, shedding light on the legally permissible restrictions.

The conversation then shifted to Mr. Victor's insights on the unprecedented power of users to disseminate information through social media platforms. Mr. Victor traced the evolution of social media from its inception in 1997, highlighting the need for a delicate equilibrium between freedom of expression and privacy. He underlined the importance of education in achieving this equilibrium, especially considering the massive user base of platforms like Facebook and Twitter.

The speakers navigated through various theories of freedom of expression, including its value, its status as a fundamental right, positive obligation emanating from it, and its relationship with other competing rights. They explored these concepts within the contexts of private and state organizations, non-interference by the state, the state's proactive role in safeguarding individual expression, and the intricate balance between competing expressions.

# A CONVERSATION ON FREEDOM OF EXPRESSION AND SOCIAL MEDIA

Ms. Thakoor drew attention to a landmark case, *Seegum J v The State of Mauritius* [2021 SCJ 162], which underscored that freedom of expression does not permit unrestricted transmission of content conflicting with societal norms. She cited relevant provisions of the Information and Communication Technologies Act (ICTA) and the Criminal Code.

Mr. Aumeer brought up the absence of child protection provisions in current regulations and recommended stronger scrutiny of age verification, blocking, and filtering mechanisms. The speakers then explored competing rights and the complexities they entail, citing cases where privacy, reputation, and freedom of expression rights intersect.

Mr Aumeer explained that in the case of *Bloomberg LP v ZXC* [2022] UKSC 5, the issue arose as to whether a person, who is not yet facing criminal charges, but is under investigation, has the right to privacy in respect of a letter, clearly described as confidential but which contained business information. Bloomberg claimed that it was in the public interest to publish this letter and as a publisher had a right to freedom of expression. The Court applied a two-stage test:

Does the Claimant objectively have a reasonable expectation of privacy?

If there is such an expectation, is it outweighed by the publisher's right to freedom of expression.

The Court held that the Claimant had a reasonable expectation of privacy which outweighed the publisher's right to freedom of expression.

In an earlier case, *Murray v Big Pictures Limited* [2008] EWCA Civ 446, the Supreme Court adopted a similar approach and held that children have a reasonable expectation of privacy not to be photographed without their consent. In that case, the photographs of toddler David Murray had been taken and published in several newspapers and magazines because he was the son of author J K Rowling.

The speakers engaged in a discussion on whether regulation for social media differ from those for traditional press. Mr. Victor clarified that ethical standards and regulations remain consistent across platforms for formal press. Mr. Victor also highlighted a pertinent distinction – the existence of unregulated online platforms that may circulate content not deemed acceptable by conventional press standards. He exemplified instances where such platforms share images and materials that traditional media outlets would refrain from publishing.

Drawing a contrast between the two, he elucidated that while traditional media often privileges official information, the digital landscape enables the dissemination of opinions and perspectives. Mr. Victor aptly

# A CONVERSATION ON FREEDOM OF EXPRESSION AND SOCIAL MEDIA

referenced the COVID-19 period, wherein social media played a crucial role for press agencies to share real-time updates and engage with the audience in innovative ways. The speakers also tackled challenges of identifying online offenders and the complexities of criminal probes in the digital realm.

The session concluded with audience and speaker opinions converging on the need to strike a balance between freedom of expression and privacy, while also adapting laws to the evolving digital landscape. The event shed light on the critical role education and responsible online behavior play in fostering a harmonious coexistence between individual expression and societal norms.

*Reported by Mrs Shruti LALLBEEHARRY RAMBHOJUN, Legal Research Officer*



# Forensic Psychology & Profiling

## ***Introduction:***

A presentation on basic history of Forensics titled "Forensic Psychology & Profiling" was organized by the Office of the Director of Public Prosecutions (DPP). The event aimed to shed light on the application of forensic psychology in criminal investigations, prosecutions and court proceedings. The guest speaker for the presentation was Dr. Micki Pistorius, a South African forensic psychologist, profiler, and author. She was the first person to initiate the Investigative Psychology Unit of the South African Police Service, founded to profile and investigate serial killers. The talk covered a range of topics, including historic context, forensic science, forensic psychology, and case studies.

## ***Historic Overview:***

**Dr.** Pistorius began by highlighting the historical evolution of forensic evidence in the judicial system. In the absence of modern forensic techniques, courts historically relied on torture for confessions and witness testimonies. She emphasized that contemporary courts now demand validated methodologies and substantiated opinions as evidence.

Introduction to Forensic Science:

Dr. Pistorius elucidated the various specialties within forensic science, such as Forensic Engineering, Forensic Accounting, Digital Forensics/Cybercrime, Chemistry and Toxicology, and more. She used real case scenarios to illustrate those specialties.

## ***Introduction to Forensic Psychology:***

The presentation moved on to delve into forensic psychology, which involves understanding criminal behaviour. Dr. Pistorius explained how forensic psychologists create criminal profiles by studying behavioral traits, habits, motivations, and more. She emphasized that forensic psychology complements forensic science by providing insights into human behavior.

## ***Case Study:***

The final aspect of the presentation included a notable case study involving Stewart Wilken, a South African serial killer. Dr. Pistorius detailed how forensic psychology and profiling were instrumental in understanding Wilken's distinct patterns of victim selection. The case study effectively demonstrated the practical application of the theories discussed.

# Forensic Psychology & Profiling

## ***Limitations of Forensic Psychology:***

Dr. Pistorius acknowledged the limitations of forensic psychology, emphasizing that it is not an exact science. She discussed the five pillars of testimony – clinical observations, self-reporting, psychometric evaluation, collateral evidence, and research – and stressed the need for congruence and substantiated opinions.

## ***Forensic tools:***

The incorporation of a diverse range of forensic tools, encompassing psychometric tests, collateral evidence, pathological and pathological and clinical diagnosis, within the investigative framework allow forensic psychologists to effectively navigate the complexities inherent in criminal behaviour. Dr. Pistorius emphasized the careful application of these tools, underscoring their significant contribution to forming a comprehensive and thorough grasp of the offender's profile.

## ***Role of Forensic Psychologist:***

Dr. Pistorius clarified that the role of a forensic psychologist is not to prove a case but to provide unbiased expert opinions. These opinions, backed by clinical diagnosis, psychometric tests, and other tools, offer a comprehensive understanding of the criminal's mindset and behavior.

## ***Interrogation and Profiling:***

The presentation also covered the use of interviewing and interrogation techniques to uncover deceptive behavior. Dr. Pistorius explained how analyzing a criminal's writing style and responses could reveal hidden traits. She differentiated between psychiatrists and psychologists and highlighted the application of the "dark triad" personality traits for profiling white-collar crime.

## ***Q&A Session:***

During the Q&A session, Dr. Pistorius addressed queries about malingering cases and the role of forensic psychologists in helping law enforcement obtain confessions. She reiterated that their expert opinions in court are unbiased and substantiated.

# Forensic Psychology & Profiling

## ***Conclusion:***

The presentation concluded with the DPP thanking Dr. Micki Pistorius for her insightful presentation. Her expertise in the field of forensic psychology and profiling was acknowledged, and the DPP expressed interest in seeking her assistance in future cases. The event was a valuable opportunity for law officers of the ODPP to gain a deeper understanding of how forensic psychology contributes to criminal investigations, prosecutions and court proceedings.

***Reported by Mrs Shruti LALLBEEHARRY RAMBHOJUN, Legal Research Officer***



***Dr. Micki Pistorius, a South African forensic psychologist, profiler, and author***



# ODPP Numbers

# ODPP

## Increase in Numbers

**225**

CASES LODGED  
BEFORE THE SUPREME  
COURT IN 2022

**159**

CASES LODGED  
BEFORE THE SUPREME  
COURT IN 2021

**41%**



**804**

CASES LODGED  
BEFORE THE  
INTERMEDIATE COURT  
IN 2022

**492**

CASES LODGED  
BEFORE THE  
INTERMEDIATE COURT  
IN 2021

**63%**



**11308**

CASES REFERRED BY  
THE POLICE TO ODPP  
IN 2022

**8850**

CASES REFERRED BY  
THE POLICE TO ODPP  
IN 2021

**27%**



“

The world is changed by your example  
not by your opinion.

”

– Paulo Coelho