701A

THE 2018-2019 PRICE MEDIA LAW MOOT COURT COMPETITION

RAS & UCONNECT

(APPLICANTS)

V

STATE OF MAGENTONIA

(RESPONDENT)

MEMORIAL FOR APPLICANTS

Word count: 4982

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LIST OF ABBREVIATIONS

ACHR	American Convention of Human Rights
CJEU	Court of Justice of the European Union
CT	Cyanisian Times
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
GDPR	General Data Protection Regulation
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
IDPC	Information and Data Protection Commission of Magentonia
MPF	Magentonia Popular Front
OECD	Organisation for Economic Co-operation and Development
PIDPA	Public Information and Data Protection Act 2016
TBM	Take Back Magentonia
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UMP	United Magentonia Party
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNHRC	United Nations Human Rights Council

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STATEMENT OF RELEVANT FACTS

Cyanisia and Magentonia

1. Cyanisia and Magentonia are two neighbouring democratic countries. However, Cyanisia's political landscape is particularly volatile and toxic. The systematic persecution and violence of political dissidents led to a mass exodus of members from the Celadon tribe to Magentonia, who eventually were stripped off their citizenships by law.
2. Magentonia's economy is heavily reliant on the industry of natural gas which regularly employs Cyanisian refugees. In February 2018, global prices of natural gas fell, invoking fears of an economic recession and social backlash against the Cyanisian refugees widely perceived as a threat to Magentonians' job security. Such deep-seated anti-immigration resentment formed the backdrop of the Magentonian parliamentary elections in June 2018.

Unger Ras

3. Unger Ras was a former professor at the State University of Cyanisia and founder of the main opposition party in Cyanisia. In February 2001, *The Cyanisian Times* published an article reporting that an arrest warrant had been issued against Ras for alleged misappropriation of university funds. His university issued a public statement clarifying that he had been accused and investigated of misconduct in 1995, but eventually cleared.
4. Ras fled to Magentonia and obtained citizenship in 2011. He joined the United Magentonia Party (UMP), the political party of the incumbent government. He is a strong champion for the rights of refugees, especially Cyanisian refugees living in Magentonia.

UConnect

5. Uconnect is the most popular social media platform among Cyanisians and Magentonians with over 100 million active users worldwide. UConnect offers two main functions. First, it enables users to post, comment and share personal stories and news. Second, the platform provides a search functionality.
6. Content is displayed based on users' preference and behavior. There is a feature allowing users to boost their post to appear in the 'trending' and 'promoted' feed. The Complaints Portal enables users to lodge complaints against posts in violation of its Community Standards. Human reviewers would process such complaints within 72 hours.

Magentonian Mail Article

7. An article was published on 1st April 2018 by *The Magentonian Mail,* a private owned news website, claiming that Ras fled Cyanisia due to a corruption scandal in his former university, as collaborated by the 2001 CT Story. Ras immediately issued a statement to clarify that the story was false and reproduced his former university's statement. *The Magentonian Mail* also carried his statement.
8. Upon Ras' request, the article was removed by *Magentonian Mail* in 15th April 2018. But by then, the article had already been 'trending' on UConnect, highly viewed and shared among Magentonian users with a penchant for Magentonian politics. Public posts linked to the article also appeared high on the search results when terms related to 'Ras' and 'Magentonia' are entered.
9. On 25th April 2018, *TakeBackMag200,* an anonymous user, posted a web link of the 2001 story with the caption 'you can't erase history'. It was later promoted and trended. On 29th April 2018, Ras wrote a letter requesting for the removal of the post and for the

2001 CT Story to be blocked or removed. UConnect agreed to remove the post, but refused to remove the search results unless ordered by the IDPC of Magentonia.

10. On 5th May 2018, Ras filed a petition to the IDPC to compel UConnect to remove all search results that depicts the 2001 CT Story pursuant to Section 22 of the PIDPA and Article 7 of the Magentonian Constitution. On 10th May 2018, the IDPC rejected Ras' request on the basis of 'public interest' considering that he was a public figure and a candidate for the upcoming election. Ras appealed to the Magentonian High Court against such decision.

Anti-Refugee Posts

11. In early May 2018, TBM began actively posting content on UConnect against Ras and Cyanisians. An article published on 26 May 2018 described Cyanisians in derogatory terms and trended on UConnect for 4 days before its removal on 30th May 2018.
12. On 30th May 2016, TBM posted another article which cited a study by the University of Magentonia claiming that Cynasian refugees would outnumber native Magentonians by 2025. The post trended for 3 days until 1st June 2018. No user reported against it.
13. On 2nd June 2018, the Magentonian prosecution charged UConnect under Section 3 and 5 of the PIDPA relating to these two posts. An interim injunction was issued ordering UConnect to suspend all its operations in Magentonia pending trial.
14. On 4th June 2018, the UMP won the parliamentary election, albeit with a reduced majority. Ras failed to win a seat. The *Magentonian Watch*, an independent organization, attributed their failure to the effective campaign ran by TBM on UConnect.

Magentonian Judiciary Decision

15. On 1st July 2018, the Magentonian High Court dismissed Ras' appeal.

16. On 10th July 2018, the High Court found UConnect guilty under Section 3 of the PIDPA for failing to swiftly remove the 26th May post, and under section 5 of PIDPA for recklessly disseminating false propaganda. A fine of USD 100,000 was imposed.

STATEMENT OF JURISDICTION

Unger Ras, UConnect and the state of Magentonia, which is a party to the International Covenant on Civil and Political Rights(ICCPR), have submitted their differences to the Universal Court of Human Rights ('this Court'), and hereby submit to this Court their dispute concerning Articles 17 and 19 of the ICCPR.

On the basis of the foregoing, this Court is requested to adjudge the dispute in accordance with the rules and principles of international law, including any applicable declarations and treaties.

QUESTIONS PRESENTED

I. Whether Magentonia's decision not to grant Ras any rectification, erasure or blocking of search results depicting *The Cyanisian Times* story of 2001 violated article 17 of the ICCPR?

II. Whether Magentonia's suspension of UConnect's operations violates article 19 of the ICCPR?

III. Whether Magentonia's prosecution and conviction of UConnect under the PIDPA violates article 19 of the ICCPR?

SUMMARY OF ARGUMENTS

I. Magentonia's decision not to grant Ras any rectification, erasure or blocking of search results depicting The 2001 CT Story violated the two-stage test under Article 17 of ICCPR. At the first stage, Ras is entitled for protection under Article 17. First, Ras' right to privacy under Article 17 incorporates the right to be forgotten as s.22 of the PIDPA provides for the right to allow rectification, erasure or blocking of data which is irrelevant, incomplete or inaccurate. Second, Magentonia has a positive obligation to protect Ras' right to be forgotten. At the second stage, the interference with Ras' right to privacy was unlawful and arbitrary. First, the decision was not provided by law as the term 'public interest' under s.22 of PIDPA was too vague. Second, 'public interest' is not a legitimate aim recognised under the ICCPR. Third, the interference was unlawful and arbitrary: (i) the disclosure of information on search results is an infringement to privacy, (ii) Ras' right to privacy overrides UConnect's economic interest, (iii) The 2001 CT Story was not of public interest, (iv) the 2001 CT Story caused reputational harm to Ras, (v) the request to delist search results is the least intrusive remedy; and (vi) the 2001 CT Story was no longer news worthy.

II. Magentonia's decision to suspend UConnect's operations in Magentonia until the conclusion of the trial violated Article 19 of the ICCPR. First, the suspension was not provided by law as Sections 3 and 5 of the PIDPA do not extend criminal liability to passive intermediaries such as UConnect, and also do not provide for imposition of prior restraints. Second, the suspension did not pursue a legitimate aim as there was no actual or imminent risk to public order. Third, the suspension was unnecessary in a democratic society because (i) less intrusive measures could be taken instead, (ii) UConnect had employed sufficient measures to restrict potential unlawful content by

their users; and (iii) the suspension was aimed at suppressing political dissent and discourse in light of the upcoming elections.

III. Magentonia's prosecution and conviction of UConnect under the PIDPA violated Article 19 of the ICCPR. First, such action was not provided by law since it was unforeseeable that a passive intermediary such as UConnect could be made criminally liable for content posted by their users. Second, such action pursued no legitimate aim since the impact of TBM's posts on the Magentonian society was minimal and did not cross the *'de minimis'* threshold. Third, such action was unnecessary in a democratic society since (i) the content of the posts was not unlawful; and even if so, (ii) UConnect had sufficiently exercised its duties as a passive intermediary in responding to TBM's posts.

ARGUMENTS

I. MAGENTONIA'S DECISION NOT TO GRANT RAS ANY RECTIFICATION, ERASURE OR BLOCKING OF SEARCH RESULTS DEPICTING THE 2001 CT STORY VIOLATED ARTICLE 17 OF THE ICCPR

1. The right to privacy is enshrined under Article 17 of the ICCPR[1] and numerous human rights conventions.[2] The legality of Magentonia's decision not to grant Ras' request involves a two-stage test:[3] (A) whether such decision interfered with Ras' right to privacy under Article 17; and if yes, (B) whether such interference was unlawful and arbitrary.

A. Magentonia's decision interfered with Ras' right to privacy

2. Ras was entitled to the delisting of UConnect's search results depicting the 2001 CT Story because (i) the right to privacy incorporates the right to be forgotten; and (ii) Magentonia had a positive obligation to protect such rights.

(i) The right to privacy incorporates the right to be forgotten

3. Privacy is a broad term[4] not susceptible to exhaustive definition.[5] Such right is commonly

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[1] International Covenant on Civil and Political Rights (ICCPR) (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

[2] UDHR (adopted 10 December 1948) UNGA Res 217A (III), art 12; European Convention on Human Rights (ECHR) (adopted 4 November 1950, entered into force 3 September 1953), art 8; American Convention on Human Rights (ACHR) (adopted 22 November 1969, entered into force 18 July 1978), art 11.

[3] UN Human Rights Committee (HRC), *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 [4]; Ursula Kilkelly, *The right to respect for private and family life: A guide to the implementation of Article 8 of the European Convention of Human Rights* (Human Rights Handbook No. 1 2001), p. 8-9.

[4] *S. And Marper v The United Kingdom* App nos. 30562/04 and 30566/04 (ECtHR, 4 December 2008) [66]; *Vukota-Bojić v. Switzerland* App no. 61838/10 (ECtHR,18 October 2016) [52]; *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* App no 932/13 (ECtHR, 21 July 2015) [129]; *Peck v United Kingdom* Application no. 44647/98 (ECtHR, 28 January 2003) [57].

[5] DeVRIES, 'Protecting Privacy in the Digital Age' *Berkeley Technology Law Journal* (2003), Vol.18, No.1, p.284; Dennis F. Hernandez, 'Litigating the Right to Privacy: A Survey of Current Issues' 446 PLL/PAT (1996),

referred to the right to live privately away from unwanted attention,[6] or the "*right to be left alone*".[7] Private life encompasses the physical and psychological integrity of a person,[8] and also activities of a professional or business nature.[9]

4. Personal data protection is vital to a person's enjoyment of private life, specifically the right to informational self-determination.[10] Mere storage and disclosure of one's personal data is sufficient to trigger the protection of privacy regardless of the sensitivity of the information.[11]

5. The 'right to be forgotten' originates from the French concept of "*le droit a l'oubli*" ('right of oblivion')[12] that allows convicted criminals to remove history of their incarceration upon

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p.425 & 429; *Bensaid v United Kingdom* App no. 44599/98 (ECtHR, 6 February 2001) [47]; *Antović and Mirković v Montenegro* App no. 70838/13 (ECtHR, 28 November 2017) [41].

[6] *Satakunnan v. Finland* (n 4) [130]; *Smirnova v. Russia* App nos. 46133/99 and 48183/99 (ECtHR, 24 October 2003) [95].

[7] *Justice K.S. Puttaswamy (Retd.) and Anr. v Union of India and Ors*, Writ Petition (Civil) No.494 of 2012 [2,25,177]. Warren and Brandeis, 'The Right to Privacy', *Harvard Law Review* (1890), Vol.4, No. 5, p.193; Voss & Renard, 'Proposal For An International Taxonomy On The Various Forms of The "Right To Be Forgotten": A Study On The Convergence Of Norms', *Colorado Technology Law Journal* (2016), Vol.14, No.2, p. 284.

[8] *Satakunnan v Finland* (n 4) [130]; *X and Y v. the Netherlands* App no. 8978/80 (ECtHR, 26 March 1985) [22].

[9] *Satakunnan v Finland* (n 4) [130]; *Niemietz v. Germany* App no. 13710/88 (ECtHR, 16 December 1992) [29].

[10] *Satakunnan v Finland* (n 4) [137]; UNHRC, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (17 April 2013) UN Doc A/HRC/23/40 [22].

[11] *Leander v. Sweden* App no. 9248/81 (ECtHR, 26 March 1987) [48]; *Satakunnan v Finland* (n 4) [133]; *Amann v Switzerland* App no. 27798/95 (ECtHR, 16 February 2000) [68]; *Kopp v Switzerland* App no. 23224/94 (ECtHR, 25 March 1998) [53].

[12] Alessandro Mantelero, 'The EU Proposal for a General Data Protection Regulation and the Roots of the 'Right to be Forgotten'' *Computer Law & Security Review* (2013), Vol.29, No.3, p.229; Jeffrey Rosen, 'Symposium Issue The Right to Be Forgotten' *64 Standford.Law Review Online 88* (2012), p.88 <https://review.law.stanford.edu/wp-content/uploads/sites/3/2012/02/64-SLRO-88.pdf > accessed 3 November 2018; John Schwartz, 'Two German Killers Demanding Anonymity Sue Wikipedia's Parent*' The New York Times* (USA, 12 November 2009) <https://www.nytimes.com/2009/11/13/us/13wiki.html?rref=collection%2Fbyline%2Fjohn-schwartz&action=click&contentCollection=undefined®ion=stream&module=stream_unit&version=search&contentPlacement=3&pgtype=collection> accessed 3 November 2018;

release and rehabilitation.[13]

6. In this digital age, the right to be forgotten derives from the principle of limited data retention[14] and extends to the delinking of search results on Internet databases.[15] The *locus classicus* is the Court of Justice of the European Union's (CJEU) 2014 decision of *Google Spain v Costeja*[16] in its interpretation of Directive 95/46[17] – the repealed predecessor of the EU General Data Protection Regulation (GDPR).[18] The CJEU recognized that individuals have the right to request search engines to rectify or remove personal data "*which are inaccurate, inadequate, irrelevant or excessive in relation to the purpose of processing*".[19]

7. This landmark ruling prompted over a million other de-listing requests on Google and

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[13] Rehabilitation of Offenders Act 1974; *R (L) v Com'r of Police for the Metropolis (Secretary of State for the Home Dept intervening)* [2010] 1 AC 410 [27]; *R (T) v Chief Constable of Greater Manchester Police* [2014] UKSC 35 [158]; *Gaughran v Chief Constable for the Police Service of Northern Ireland* [2015] UKSC 29 [37]; *CG v Facebook Ireland Ltd* [2016] NICA 54 [44]; *R (P) v Secretary of State for the Home Department* [2017] EWCA Civ 321 [63].

[14] *Rodriguez Maria Belén v/Google Inc. s/daños y perjuicios*, 28 October 2014, Supreme Court of Justice of the Argentine Republic [19-20]; Case C-131/12 *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AEPD), Mario Costeja González*, ECLI:EU:C:2014:317 [72]; The Right to Erasure or Right To Be Forgotten Under The GDPR Explained And Visualized, < https://www.i-scoop.eu/gdpr/right-erasure-right-forgotten-gdpr/> accessed on 3 November 2018; Joseph Steinberg, 'Why Americans Nedd And Deserve The Right To Be Forgotten' (Inc., 7 February 2018) < https://www.inc.com/joseph-steinberg/why-americans-need-deserve-right-to-be-forgotten.html> accessed on 3 November 2018; Shaniqua Singleton, 'Balancing A Right To Be Forgotten With A Right To Freedom Of Expression In The Waking Of Google Spain v AEPD' *Georgia Journal Of International & Comparative Law*, Vol.44, No.1, p. 171.

[15] Voss & Renard, 2016 (n 7), p. 288; Cécile de Terwangne, 'Internet Privacy and the Right to Be Forgotten/Right to Oblivion' *REVISTA DE INTERNET, DERECHO Y POLÍTICA* (2012), Vol.13, No.109, p. 110; *Google Spain*(n 14) [82]; *M.L. and W.W. v Germany* App nos 60798/10 and 65599/10 (ECtHR, 28 September 2018) [109].

[16] *Google Spain* (n 14) [3].

[17] Council Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, art 12 & art 14; *Google Spain* (n 43) [3].

[18] Council Regulation (EC) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1, art 17 & art 21.

[19] General Comment No. 16 (n 3) [10]; GDPR (n 18) [39]; *Google Spain* (n 14) [92].

Bing.[20] In the latest 2018 Google Transparency Report, Google reported removing 43.4% of the 2.8 million URLs requested to be de-listed.[21]

8. The right to be forgotten has received widespread legal recognition worldwide:

   (a) EU countries like France,[22] Germany,[23] Austria,[24] Belgium[25] and The United Kingdom[26] have enacted legislations on par with the GDPR;

   (b) Non-EU countries such as Argentina,[27] Chile,[28] Brazil[29] and Canada[30] are on the brink of passing legislations on such right; and

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[20] Daphne Keller, 'The Right Tools: Europe's Intermediary Liability Laws and the EU 2016 General Data Protection Regulation' *Berkley Technology Law Journal* (2018), Vol. 3, No.287, p. 315.

[21] Google, 'Search Removals Under European Privacy Law' Transparency Report < https://transparencyreport.google.com/eu-privacy/overview?delisted_urls=start:1401321600000;end:1519862399999&lu=delisted_urls > accessed 3 November 2018; David Meyer, 'People Have Asked Google to Remove 2.4 Million Links About Them. Here's What They Want to Forget' (*Fortune*, 28 February 2018) < http://fortune.com/2018/02/28/google-right-to-be-forgotten-europe-reasons-eu/ > accessed on 3 November 2018; Edward Lee, " Recognizing Rights in Real Time: The Role of Google in the EU Right To Be Forgotten", *UC Davis Law Review* (2016), Vol.49, No. 3, p.1043.

[22] Code of good practice on the right to be forgotten on social networks and search engines, Secrétariat d'Etat_à la Prospective et au Développement de l'économie numerique, 'Charte du droit à l'oubli dans les sites collaboratifs et les moteurs de recherche', 30 Septembre 2010.

[23] Federal Data Protection Act 2017.

[24] Data Protection Act 2018 (Austria).

[25] Data Protection Authority Act 2018 (Belgium).

[26] Data Protection Act 2018 (UK).

[27] Diego Fernandez, 'Argentina's New Bill on Personal Data Protection' (*IAPP*, 2 October 2018) < https://iapp.org/news/a/argentinas-new-bill-on-personal-data-protection/ > accessed on 3 November 2018.

[28] Bill 'Modifies article 13 of Law No. 19,628, on the protection of privacy, to establish the right to forget, personal data stored in search engines and websites' Bulletin No. 9388-03.

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[30] Stuart Thomson, 'Will Canadians Soon Have the Right To Be Forgotten' Online? Here's What You Need To Know' (*National Post*, 10 October 2018) < https://nationalpost.com/news/politics/will-canadians-soon-have-the-right-to-be-forgotten-online-heres-what-you-need-to-know > accessed on 3 November 2018.

(c) The courts in Argentina,[31] Mexico,[32] Peru,[33] Italy[34] and India[35] have recognized such right as a fundamental right even in the absence of data protection legislation.

9. The right to privacy is crystallised in Article 7 of the Magentonian Constitution.[36] Section 22 of the PIDPA,[37] which mirrors the GDPR regime, accords any person "*the right to obtain from a data controller the rectification, erasure or blocking of data which is irrelevant, incomplete or inaccurate*".[38] Hence, the right to be forgotten is deeply ingrained within Magentonian legal framework.

(ii) Magentonia has a positive obligation to protect Ras's right to be forgotten

10. Article 17 construed in tandem with Article 2(1) of the ICCPR imposes upon Magentonia both negative and positive obligations to protect the right to privacy of its citizens.[39]

11. Positive obligations necessitate the adjudicatory and enforcement framework to secure

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[31] *D. C. V. c/ Yahoo de Argentina SRL y otro s/ Daños y Perjuicios*, 10 August 2010, National Civil Appeals Chamber; *Bluvol, Esteban Carlos c / Google Inc. y otros s/ daños y perjuicios*, 5 December 2012, National Civil Appeals Chamber; *Peña María Florencia c/ Google s/ ART. 250 C.P.C. Incidente Civil*, file No. 35.613/2013, National First Instance Civil Court No. 72; *Carrozo, Evangelina c/ Yahoo de Argentina SRL y otro s/ daños y perjuicios*, 10 December 2013, National Civil Appeals Chamber; *Rodríguez, María Belén c/ Google Inc. s/ daños y perjuicios* (n 14); *Da Cunha, Virginia c/ Yahoo de Argentina S.R.L. Y otro s/ daños y perjuicios*, 30 December 2014, Nation's Supreme Court of Justice; *Lorenzo, Bárbara cl Google Inc. si daños y perjuicios*, 30 December 2014, Nation's Supreme Court of Justice.

[32] *Carlos Sanchez v Google Mexico*, File No. PPD. 0094/14, 26 January 2015, Federal Institute for the Access of Information and Data Protection.

[33] Case No. 045-2015- JUS/DGPDP, File No. 012-2015-PTT, 30 December 2015.

[34] Italian Supreme Court 9 April 1998, no. 3679.

[35] *Justice K.S. Puttaswamy v Union of India* (n 36) [183]; *Sri Vasunathan v The Registrar General* W.P.No. 62038/2016; *Dharmraj Bhanushankar Dave v State of Gujarat and Ors*. SCA No.1854 of 2015.

[36] Fact Pattern, [4.6].

[37] Fact Pattern, [4.6].

[38] Fact Pattern, [4.6].

[39] ICCPR (n 1), art 2; UN Human Rights Committee (HRC), *General Comment no. 31, The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13 [8]; General Comment No. 16 (n 3) [1]; Special Rapporteur 2013 (n 10) [24] – [25].

respect for privacy[40] even in the sphere of the relations of individuals between themselves,[41] to protect such rights from unlawful private actions.[42] Failure of Magentonia's state authorities to exercise due diligence to prevent or redress such actions would amount to a violation of Article 17.[43]

12. Although Magentonia submitted a declaration in relation to Articles 17 and 19 when it ratified the ICCPR, such declaration would not operate as a reservation that modifies its obligations,[44] and in any event should not be construed in a manner that would defeat its object and purpose.[45]

13. A State's positive obligation is even more profound where 'fundamental values' or 'essential aspects' of private life are at stake,[46] and the obligation has been narrowly and precisely defined under domestic law.[47]

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[40] *Tautkus v Lithuania,* App no. 29474/09 (ECtHR, 27 November 2012) [53]; *Cesnulevicus v Lithuania* App. No 13462/06 (ECtHR, 10 January 2012) [74]; *Armoniene v Lithuania* App. no 37553/05 (ECtHR, 15 October 2015) [158].

[41] *Von Hannover v Germany (No.1)* App no. 59320/00 (ECtHR, 24 June 2004) [57]; *Stubbings and Others v the United Kingdom* App nos. 22083/93 and 22095/93 (ECtHR, 22 October 1996) [61-62]; *Mosley v The United Kingdom* [2015] EWHC 59 (QB) [105]; *X and Y v The Netherlands* (n 8) [23]; *Von Hannover v Germany (No.2)* App nos. 40660/08 and 60641/08 (ECtHR, 7 February 2012) [98].

[42] *Hämäläinen v. Finland* App no. 37359/09 (ECtHR, 16 July 2014) [63]; *Airey v Ireland* App no. 6289/73 (ECtHR, 9 October 1979) [33].

[43] General Comment No. 31 (n 39) [8].

[44] UN Human Rights Committee (HRC), *CCPR General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant*, 4 November 1994, CCPR/C/21/Rev.1/Add.6 [3]; UN Report of the International Law Commission, 63rd session, General Assembly Official Records 66th Session Supplement No.10, p.74 [1.3], p.547 [4.7.1]; General Comment No. 31 (n 39) [4].

[45] General Comment No. 24 (n 71) [6]; United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, art 19(3).

[46] *Hämäläinen v Finland* (n 42) [66]; *Gaskin v The United Kingdom* App no. 10454/83 (ECtHR, 07 July 1989), [49]; *X and Y v the Netherlands* (n 8) [27]; *Dink v Turkey* App nos. 2668/07, 6102/08, 30079/08, 7072/09, 7124/09 (ECtHR, 14 September 2010) [73]-[74].

[47] *Hämäläinen v. Finland* (n 42) [66]; *Botta v. Italy* App no. 21439/93 (ECtHR, 24 February 1998) [35].

14. In light of the Magentonian Constitution[48] and the PIDPA[49] explicitly protecting the right to be forgotten, Ras being a Magentonian citizen,[50] is entitled to request the delisting of the search results depicting the 2001 CT Story.

15. Concomitantly, the Magentonian IDPC and High Court were obliged to consider his request under the PIDPA.[51] However, they refused to grant his request and appeal respectively.[52] Such refusal constitutes a breach of Magentonian's positive obligation to protect Ras from UConnect's unlawful and arbitrary interference to his right to privacy under Article 17.

B. Magentonia's decision was an unlawful and arbitrary interference of Ras' right to privacy

16. Although Article 17 does not explicitly stipulate a set of permissible restrictions, it is trite law that the test of 'unlawfulness' and 'arbitrariness' under Article 17 is subject to the three-part analysis, namely whether the interference: (i) is 'provided for under the law';[53] (ii) 'in accordance with the provisions, aims and objectives' of the ICCPR;[54] and (iii) 'reasonable in the particular circumstances'.[55]

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[48] Magentonian Constitution, Article 7

[49] PIDPA, S22

[50] Fact Pattern, [2.2].

[51] Fact Pattern, [4.6].

[52] Fact Pattern, [4.7] & [6.1].

[53] General Comment No. 16 (n 3) [3]-[4]; *Toonen v Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (HRC, 31 March 1994) [8.3]. Article 19: Freedom of Expression Unflitered: How blocking and filtering affect free speech' (December 2016) p. 20

[54] *Van Hulst v The Netherlands*, Communication No. 903/2000, U.N. Doc CCPR/C/82/D/903/1999 (HRC, 01 November 2004) [7.3]; *G v Australia*, Communication No. 2172/2012, U.N. Doc CCPR/C/119/D/2172/2012 (HRC, 15 June 2017) [4.5].

[55] Special Rapporteur 2013 (n 10) [28-29]; ICCPR (n 1), art 12(3), art 18(3), art 21, art 22(2).

(i) Magentonia's decision was not provided by law

17. For an interference to be provided by law, the law must be accessible to the public [56] and formulated with sufficient precision to enable individuals to regulate their conduct accordingly.[57] The relevant legislation must specify in detail the precise circumstances in which interferences may be permitted.[58] Otherwise, it would confer unfettered discretion that would impair the right to privacy.[59]

18. The GDPR is a comprehensive overhaul of EU data protection law, codifying new rules on the right to be forgotten.[60] The 'public interest' exception under the GDPR is restricted to matters concerning "*legal obligations by Union and Member State law*",[61] "*public health*"[62] and "*scientific, historical research purposes or statistical purposes*".[63] Such identical terms

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[56] *The Sunday Times v The United Kingdom (Sunday Times No.1)* App no. 6538/74 (ECtHR, 26 April 1979) [49]; UN Human Rights Committee (HRC), General comment no. 34, Article 19, Freedoms of opinion and expression, 12 September 2011, CCPR/C/GC/34 [2]; Hartford Casualty Insurance Company v Corcino & Associates et al CV 13-3728 GAF (JCx) 7 October 2013, p. 7.

[57] *Margaret A. Acara v Bradley C. Banks, M.D.* No. 06-30356 (5th Cir. 2006) p. 2-3; *Groppeara Rodio AG and Others v Switzerland* App no. 10890/84 (ECtHR, 28 March 1990) [68]; *Silver and Others v The United Kingdom App* nos. 5947/72, 6205/73, 7052/75, 7061/75, 7107/75 (ECtHR, 25 March 1983) [88]; *Herczegfalvy v Austria* App No. 10533/83 (ECtHR, 24 September 1992) [89]; *Leander v Sweden* (n 11) [51].

[58] General Comment No. 16 (n 3) [8]; *MM v United Kingdom* Appl. No. 24029/07 (ECtHR 13 November 2012) [193]; *Huvig v France* Appl. No. 11105/84 (ECtHR 24 April 1990) [32]; *Malone v The United Kingdom* App no. 8691/79 (ECtHR, 2 August 1984) [66]-[68]; *Rotaru v Romania* App. No 28341/95 (ECtHR, 4 May 2000) [52] & [55]; *Liberty and Others v The United Kingdom* App no. 58243/00 (ECtHR, 1 July 2008) [59]; *S. and Marper v The United Kingdom* (n 4) [95].

[59] UN Human Rights Committee (HRC), *CCPR General Comment No. 27: Article 12 (Freedom of Movement)*, 2 November 1999, CCPR/C/21/Rev.1/Add.9 [13]; *The Observer and Guardian v The United Kingdom* App No. 13585/88 (ECtHR, 24 October 1991) [65]; *Sunday Times No.1* (n 56) [63]; *Kruslin v France* App no. 11801/85 (ECtHR, 24 April 1990) [33].

[60] W. Gregory Voss, European Union Data Privacy Law Reform: General Data Protection Regulation, Privacy Shield, and the Right to Delisting *Business Lawyer* (2017), Vol.72, No. 1,p.225–26; Daphne Keller, 2018 (n 20), p. 317.

[61] GDPR (n 18), art 17(3)(b).

[62] GDPR (n 18), art17(3)(c), (h), (i), art. 9(2),(3).

[63] GDPR (n 18), art 17(3)(d) and art 89(1).

are similarly found in the data protection legislations of the UK,[64] Germany[65] and Austria.[66]

19. Both the Magentonian IDPC and High Court justified their decision to retain the search results depicting the 2001 CT Story due to 'public interest'.[67] However, the term is left undefined in both Article 7 of the Magentonian Costitution and Article 22(c) of the PIDPA.[68] Given its high susceptibility for ambiguity, arbitrariness and abuse, their decisions are therefore not provided by law.

(ii) Magentonia's decision did not pursue a legitimate aim

20. The only permissible restrictions under the ICCPR are to protect national security, public order, public health or morals, and to respect the rights and reputation of others.[69] According to the ICCPR's *travaux préparatoires*,[70] such restrictions are exhaustive.[71]

21. Hence, since 'public interest' is not a recognized restriction, the refusal to grant Ras' request did not pursue a legitimate aim.

(iii) Magentonia's decision was not reasonable, necessary nor proportionate

22. Alternatively, even assuming (but not conceding) that 'public interest' is a legitimate aim,

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[64] Data Protection Act 2018 (n 26), s.15 & Schedule 2, Part 1.

[65] Federal Data Protection Act 2017 (n 23), s27.

[66] Data Protection Act 2018 (n 24), s7.

[67] Fact Pattern, [4.7] & [6.1].

[68] Fact Pattern, [4.6].

[69] ICCPR (n 1), art 12(3), art 18(3), art 19(3), art 21, art 22(2).

[70] Marc J. Bossuyt, Guide To The "Travaux Préparatoires" of the International Covenant on Civil and Political Rights (Martinus Nijhoff Publishers,1987), p.375.

[71] Agnes Callamard, 'Expert meeting on the links between articles 19 and 20 of the ICCPR:Freedom of expression and advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence' (OHCHR Experts Papers, Geneva, 2 – 3 October 2008); Manfred Nowak, *U.N.Covenant on Civil and Political Rights* (2nd revised edition, N.P. Engel Publisher, 2005), pp.468-480.

the decision to refuse Ras' request was not reasonable in the particular circumstances.[72]

23. According to the ICCPR's *travaux préparatoires*, the term 'reasonableness' in Article 17 means that any interference must be proportionate to the legitimate end sought.[73]

a) <u>Disclosure of information on search results is an infringement to privacy</u>

24. Although information which enters into the public domain ceases to be confidential,[74] its reproduction may still interfere with one's privacy.[75]

25. Disclosure of personal information on Internet search engines has an even greater impact on privacy than any other form of publication.[76] This is because search engines can potentially reveal a vast array of aspects of a person's private life[77] in an interconnected way to create a detailed profile of the person. [78]

26. Hence, the importance of the right to be forgotten – to allow individuals to have a second chance to start-over by removing stigmatization caused by excessive and ubiquitous

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[72] General Comment No. 16 (n 3) [3]-[4].

[73] *Toonen v Australia* (n 78) [6.4] & [8.3]; *Van Hulst v The Netherlands* (n 78) [7.6]; *G v Australia* (n 46) [4.5] & [7.4].

[74] *Aleksey Ovchinnikov v Russia* App no. 24061/04, (ECtHR, 16 December 2010) [49]; *Éditions Plon v France* App no. 58148/00 (ECtHR, 18 May 2004) [53]; The *Sunday Times v The United Kingdom (No. 2)* App no. 13166/87 (ECtHR, 24 October 1991) [54]-[55].

[75] *Aleksey v Russia* (n 74) [50]; *Satakunnan v Finland* (n 4) [134]; *Von Hannover No. 1* (n 41) [74]-[75].

[76] *NT1 and NT2 v Google LLC and The Information Commissioner* [2018] EWHC 799 (QB) [33].

[77] *Google Spain* (n 14) [80]; Joined Cases C-509/09 and C-161/10, *eDate Advertising CmbH v X and Olivier Martinez and Robert Martinez v MGN Limited* [2011] ECLI:EU:C:2011:192 [45].

[78] Article 29 Data Protection Working Party, Guidelines on the Implementation of the Court of Justice of the European Union Judgmnent on *"*Google Spain and Inc v *Agencia Española de Protección de Datos (AEPD), Mario Costeja González"* C-131/12, 26 November 2014, p. 5.

exposure of personal information on the Internet.[79]

b) *Ras' right to privacy overrides UConnect's economic interest*

27. As a general rule, the right to be forgotten overrides the interests of search engines, as well as internet users accessing information on search engines.[80]

28. According to the CJEU in *Google Spain*, the "*economic interest which the operator of such an engine has in that processing*" cannot be a basis of interference with such right.[81]

29. Hence, Ras' request to delist search results hinges solely upon the conflicting interest between Ras and UConnect users.[82]

c) *The 2001 CT Story was not of public interest*

30. The 'public interest' exception involves a balancing test between the individual's right to privacy and the public's right to seek, receive and impart information.[83] This invariably turns on the nature and sensitivity of the information, and the 'preponderant interest' of the general public in having access to such information.[84]

31. Public interest must be distinguished from public curiosity.[85] Mere satisfaction of readers'

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[79] Norberto Nuno Gomes de Andrade, *Computers, Privacy and Data Protection: an Element of Choice* (editted by Serge Gutwirth, Yves Poullet, Paul De Hert,Ronald Leenes, Springer, 2011) p. 65-97; *M.L. and WW v Germany* (n 11) [20-21].

[80] *Google Spain* (n 14) [81].

[81] *ibid*

[82] *Google Spain* (n 14) [97]; *Delfi As v Estonia* App no. 64569/09 (ECtHR, 16 June 2015) [56].

[83] *Google Spain* (n 14) [81]; *NT1 and NT2 v Google* (n 76) [37]; *Timciuc v Romania* App no. 28999/03 (ECtHR, 12 October 2010) [144]; *Mosley v The United Kingdom* App no. 48009/98 (ECtHR, 10 May 2011) [111].

[84] *Google Spain* (n 14) [97].

[85] *Alkaya v Turkey* App no. 42811/06 (ECtHR, 9 October 2012) [52]; *Satakunnan v Finland* (n 4) [169]-[170]; *Jaime Campmany y de Revenga and Juan Luís Lopez-Galiacho Perona v Spain* (dec.) App no. 54224/00 (ECtHR, 12 December 2000) ; *Julio Bou Gibert and El Hogar Y La Moda J.A. v Spain* (dec.) App no. 14929/02 (ECtHR, 13 May 2003); *Prisma Press v France* (dec.) App nos.66910/01 and 71612/01 (ECtHR, 1 July 2003).

wishes[86] for sensationalism and voyeurism does not constitute public interest.[87] Although public interest typically includes matters connected to public figures,[88] not all information related to public figures must be of interest to the public.[89]

32. There was no preponderant interest for the public to search for the 2001 CT Story on UConnect.

33. First, the story merely referred to an investigation during Ras' previous tenure as a professor with his former university in 1995 in Cyanisia.[90] This is a private employment matter,[91] wholly unconnected with his role as a Magentonian politician in 2018[92].

34. Second, although an arrest warrant was issued against Ras, he was not actually arrested nor charged.[93] His former university fully exonerated him upon investigation.[94] The rehabilitative nature of criminal law recognizes that spent convictions may recede into the past as to become an aspect of private life.[95] Since the allegation of misappropriation was

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[86] *Couderc and Hachette Filipacchi Associés v France* App no. 40454/07 (ECtHR, 10 November 2015) [101]*; Standard Verlags GmbH v Austria (No.2*) App no. 21277/05 (ECtHR, 4 June 2009) [52]*; Von Hannover No.1* (n 41) [65]*; MGN Ltd v UK* App no 39401/04 (ECtHR, 18 January 2011)[143].

[87] *Couderc v France* (n 86) [101].

[88] *Karhuvaara and Iltalehti v Finland* App no. 53678/00 (ECtHR, 16 Novermber 2004) [11] & [44].

[89] *Von Hannover No. 1* (n 41) [69]; *Campbell v MGN Ltd* [2004] UKHL 22 [2004] 2 AC 457 [2004] 2 WLR 1232 [2004] EMLR 247 [12 & 36]; *A v B plc (Flitcroft v MGN Ltd)* [2003] EWCA Civ 337 [2003] QB 195 [2002] EMLR 371 [2002] 3 WLR 542 [2002] 2 All ER 545 [11(xi)].

[90] Fact Pattern, [1.2].

[91] *Niemietz v. Germany* (n 9) (ECtHR, 16 December 1992) [29].

[92] Fact Pattern, [2.2]; Clarifications, [8].

[93] Fact Pattern, [1.2]; Clarifications, [8]-[10].

[94] Fact Pattern, [1.2].

[95] *NT1 and NT2 v Google* (n 76) [48]; *R (L) v Com'r of Police for the Metropolis* (n 13) [27]; *R (T) v Chief Constable of Greater Manchester Police* (n 13) [18] & [158]; *Gaughran v Chief Constable for the Police Service of Northern Ireland* (n 13) [37]; *CG v Facebook Ireland Ltd* (n 13) [44]; *R (P) v Secretary of State for the Home Department* (n 13) [63].

unfounded, the 2001 CT Story ought to remain buried in the past.

35. Third, public interest ebbs and flows over time. Publications on public figures who have withdrawn themselves from the civil service or politics is "*no longer a matter of serious public* interest and concern".[96] Initially, the IDPC refused to grant Ras the right to delisting as he *"was a public figure and a candidate at an upcoming election"*.[97] However, after his electoral loss on 4 June 2018,[98] he no longer remains in the political spotlight. Hence, the Magentonian High Court on 1 July 2018 ought to have allowed his request for delisting.

d) The 2001 CT Story caused significant reputational harm to Ras

36. The content, form, and consequences of publication is a relevant factor in balancing competing private and public interests.[99]

37. Despite the 2001 CT Story being factually true,[100] it was distorted by the *Magentonian Mail* article to falsely portray Ras as having fled Cyanisia in 2001 following a 'corruption scandal' in his university.[101]

38. The 2001 CT Story trended on two occasions: first, *Magentonian Mail's* so-called 'exposé' on 1 April 2018;[102] and *TakeBackMag200*'s republication with the caption "*you can't erase*

[96] *Tammer v Estonia* App no. 41205/98 (ECtHR, 6 February 2001) [50].

[97] Fact Pattern, [4.7].

[98] Fact Pattern, [5.6].

[99] *Fuchsmann v Germany* Application no. 71233/13 (ECtHR, 19 October 2017) [34]; *Couderc v France* (n 86) [93]; *Axel Springer AG v. Germany* Application no. 39954/08 (ECtHR, 7 February 2012) [78]-[88]; *Von Hannover v Germany (No. 2)* (n 41) [109]-[113]; *Satakunnan v Finland* (n 4) [165]; *Sürek v Turkey* App no.26682/95 (ECtHR, 8 July 1999) [62]; *NT1 and NT2 v Google* (n 76) [83]; *Lord Ashcroft v Attorney General* [2002] EWHC 1122 (QB) [22].

[100] Clarifications, [8].

[101] Fact Pattern, [4.1].

[102] Fact Pattern, [4.1].

history" on 29 April 2018.[103]

39. Even after their removal, the 'witch-hunt' against Ras did not subside. In early May 2018, TBM regularly characterized Ras as a 'thief' and a 'fraudster' on UConnect.[104] This caused Ras to unexpectedly lose his seat during the 4 June 2018 parliamentary elections.[105]

40. Further, established search engines like Google employ a host of complex algorithms examining variables ranging from freshness of content and good user experience, to prevent manipulative links from trying to 'game' their way to the top of search results.[106] However, UConnect's search functionality is heavily influenced by user preference, behaviour,[107] and the popularity of 'trending' posts on its social media platform.[108]

41. Due to the inherent unreliability of UConnect's search functionality, the prominence of the 2001 CT Story on its search results casted a highly distorted profile on Ras that hangs as a spectre forever haunting his professional and private life. Hence, its removal was justified.

e) Ras' request to delist search results is the least intrusive remedy

42. The right to be forgotten can be broken into 5 types of differing levels of protection on a

[103] Fact Pattern, [4.4].

[104] Fact Pattern, [5.1].

[105] Fact Pattern, [5.6].

[106] Google, 'How Search Algorithms Work' <https://www.google.com/search/howsearchworks/algorithms/> accessed on 3 November 2018.

[107] Fact Pattern, [3.4].

[108] Clarifications, [22].

spectrum: right to rehabilitation[109], right to deletion[110], right to delisting[111], right to obscurity[112], and right to digital oblivion.[113] The right to delisting is the least intrusive remedy since it only removes the web link on search engines, and still preserves the source of the article.[114]

43. Indeed, the ECtHR has constantly opined that rather than censoring or anonymizing articles reporting criminal activity, applicants should apply to delist the links to the articles from search engines.[115]

44. Ras's delisting request [116] does not erase the 2001 CT Story entirely and permanently, but is merely *"trying to make it hard to find*".[117] Hence, since the article remains accessible to Internet users,[118] de-listing is a proportionate remedy.

f) <u>The 2001 CT Story was no longer 'news-worthy'</u>

45. The lack of updating information on the Internet leads to erosion of veracity through

[109] Voss & Renard, 2016, p. 299 (n 7).

[110] Voss & Renard, 2016, p. 302 (n 7) ; OECD Privacy Framework (2013) <http://www.oecd.org/sti/ieconomy/oecd_privacy_framework.pdf > accessed on 3 November 2018.

[111] *Google Spain*, (n 14) [92]; Voss & Renard, 2016, p 326.

[112] Hartzog, W and Stutzma, 'The Case for Online Obscurity' *California Law Review* (2013), Vol. 101 No. 1, p. 334.

[113] Voss & Renard, 2016 (n 7), pp. 338-339.

[114] Voss & Renard, 2016 (n 7), p. 326; *NT1 and NT2 v Google* (n 76) [37]; Article 29 Working Party (n 78), p. 2.

[115] *Fuchsmann v Germany* (n 99) [53]; *M.L. and WW v Germany* (n 11) [114].

[116] Fact Pattern, [4.6].

[117] Evan Selinger and Woodrow Hartzog, 'Google Can't Forget You, But It Should Make You Hard To Find' (*WIRED*, 20 May 2014) < http://www.wired.com/2014/05/google-cant- forget-you-but-it-should-make-you-hard-to-find > accessed on 3 November 2018.

[118] *Cartier International AG and others v British Sky Broadcasting Limited and others* [2014] EWHC 3354 (Ch) [214].

passage of time, which impairs the public's right to information.[119]

46. The CJEU in *Google Spain* held that since Mr Costeja's attachment proceedings have been fully resolved for 16 years, any reference to them now is "*irrelevant, inadequate or excessive*" and ought to be delisted from Google's search results irrespective of prejudice.[120]

47. Similarly, the Chilean Supreme Court of Justice[121] and the Columbian Supreme Court[122] held that publications that are no longer 'news-worthy' through the passage of time should be removed.[123]

48. Section 22(a) of the PIDPA itself provides for rectification, erasure or blocking of data for "*irrelevant, incomplete or inaccurate data*".

49. The 2001 CT Story was no longer 'news-worthy'. First, it merely covered one side of the coin – the allegation on Ras' misappropriation of university funds, but not the university's clarification on his full exoneration.124 Second, the incident took place in 1995, yet only reported in the Cyanisian Times in 2001125 – this casts doubt as to whether the reporting

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[119] *Gloria v. Casa Editorial El Tiempo* Decision T-277/15, 12 May 2015, Supreme Court of Columbia [9.4] – [9.5].

[120] *Google Spain* (n 14) [92]-[98]; Directive 95/46/EC (n 17), art 6(1)(c) to (e) & art. 12(b); Causa nº 22243/2015 (Apelación), Resolución nº 36142 of Corte Suprema.

[121] Decisión No. 22243-2015, 21 January 2016, Supreme Court of Justice.

[122] *Gloria v Casa* (n 134) [9.5].

[123] Geert Van Calster, Alejandro Gonzalez Arreaza, Elsemiek Apers, 'Not Just One, But Many 'Rights To Be Forgotten'. A Global Status Quo.' *Internet Policy Review* (2018) Vol.7, No.2, p. 16. <https://policyreview.info/articles/analysis/not-just-one-many-rights-be-forgotten#footnote25_tdgpur3> accessed on 3 November 2018.

[124] Fact Pattern, [1.2].

[125] Fact Pattern, [1.2].

was done in good faith and in accordance with the ethics of journalism.[126]

50. Hence, since the article is both incomplete and irrelevant in 2018, its removal from UConnect's search results is reasonable.

[126] *Fuchsmann v Germany* (n 99) [42]; *Fressoz and Roire v. France* Application no. 29183/95 (ECtHR, 21 January 1999) [54]; *Pedersen and Baadsgaard v. Denmark* Application no. 49017/99 (ECtHR, 19 Jun 2003) [78].

II. MAGENTONIA'S DECISION OF SUSPENDING ALL OF UCONNECT'S OPERATIONS UNTIL THE CONCLUSION OF THE TRIAL VIOLATED ARTICLE 19 OF THE ICCPR

51. Freedom of expression is the foundational stone for every free and democratic society,[127] and is enshrined under Article 19 of the ICCPR.[128] Such freedom can only be subjected to restrictions that are (A) provided by law; (B) in pursuance of a legitimate aim under Article 19(3) of the ICCPR; and (C) necessary in a democratic society.[129]

A. Magentonia's suspension was not provided by law

52. For a restriction to be 'provided by law', the law must be accessible to the public[130] and formulated with sufficient precision to enable individuals to regulate their conduct accordingly.[131] The level of precision required depends on the content of the law in question

[127] General comment No. 34 (n 56) [2]; *Tae-Hoon Park v Republic of Korea Communication* No. 628/1995 UN Doc CCPR/C/57/D/628/1995 (HRC, 20 October 1998) [10.3]; *Stephen Benhadj v Algeria* Communication No. 1173/2003, UN Doc. CCPR/C/90/D/1173/2003 (HRC, 20 July 2007); *Handyside v United Kingdom* App no 5493/72 (ECtHR, 7 December 1976)[49]; *Perna v Italy* App no. 48898/99 (ECtHR, 6 May 2003) [38]; *Steel & Morris v UK* App no. 68416/01 (ECtHR,16 February 2005) [87]; *Stoll v Switzerland* Application No 69698/01 (ECtHR, 10 December 2007) [101]; *Hachette Filipacchi Associes v France* App no. 71111/01 (ECtHR, 12 November 2007) [40]; *Mouvement Ralien Suisse v Switzerland* App no. 16354/06 (ECtHR, 13 July 2012) [48]; *MedžlisIslamskeZajedniceBrčko And Others v Bosnia And Herzegovina* App no. 17224/11 (ECtHR, 13 October 2015) [75]; *Bédat v Switzerland* App no. 56925/08 (ECtHR, 29 March 2016) [48].

[128] ICCPR (n 1); ECHR (n 2), art 10; ACHR (n 2), art 13.

[129] General Comment No. 34 (n 56) [22]; *Velichkin v Belarus* Communication No. 1022/2001, U.N. Doc. A/61/40, Vol. II, at 90 (HRC,12 September 2011) [7.3]; *Delfi AS v Estonia* (n 82) [119]; *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* Application no. 22947/13 (ECtHR, 2 February 2016) [46].

[130] *Muller v Switzerland* App no. 10737/82 (ECtHR, 24 May 1988) [29]; *Kokkinakis v Greece* App no. 14307/88 (ECtHR, 25 May 1993) [40]; *The Sunday Times No.1* (n 56) [49]; *Wingrove v The United Kingdom* App no. 17419/90 (ECtHR, 25 November 1996) [40]; *Lindon, Otchakovsky-Laurens and July v France* App no. 21275/02 (ECtHR, 22 October 2007) [41]; *Editorial Board of* Pravoye Delo *and Shtekel v Ukraine* App no. 33014/05 (ECtHR, 5 May 2011) [52]; 'Siracusa Principles on the Limitation and Derogation of Provisions in the ICCPR' (1984) UN Doc E/CN4/1984/4, Principle 17.

[131] General Comment No. 34 (n 56) [25]; General Comment No.16 (n 33) [3]; *de Groot v The Netherlands* Communication No. 578/1994,UN Doc. CCPR/C/54/D/578/199 (HRC, 14 July 1995); *Sanoma Uitgevers BV v The Netherlands* App no 38224/03 (ECtHR, 14 September 2010) [82, 62]; *VgT Vereingegen Tierfabriken v Switzerland* App no. 24699/94, (ECtHR, 28 June 2001) [52]; *Rotaru v Romania* (n 58) [52]; *Gaweda v Poland* App no. 26229/95 (ECtHR, 14 March 2012) [39]; *Maestri v Italy* App no. 39748/98 (ECtHR, 17 February 2004) [30]

and the field it is designed to cover.[132]

53. First, UConnect's prosecution under Sections 3 and 5 of the PIDPA was not provided by law as it requires some form of active participation. This is apparent from the terms "*No person shall engage…*" followed by "*in the advocacy*" or "*in the dissemination*".[133] Such provisions are aimed to catch first-hand 'content producers' or second-hand 'publishers'.[134] However, intermediaries are 'mere conduits' which enable the access, transmission and caching of information.[135] Since UConnect played no active role in the publication of TBM's posts, its charges under Sections 3 and 5 were unforeseeable.

54. Second, even if Section 3 and 5 provided for intermediary liability, there are no explicit legal framework stipulating for prior restraints.[136] Hence, the suspension of UConnect's operations pending trial was not provided by law.

B. Magentonia's suspension did not pursue a legitimate aim

55. Freedom of expression can be restricted for the respect of the rights and reputation of others, or the protection of national security, public order, public health or morals.[137]

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[132] *Magyar v Hungary* (n 129) [49]; *Centro Europa 7 S.r.l. and Di Stefano v Italy* App no. 38433/09 (ECtHR, 7 June 2012) [142]; *Lindon v France* [41]; *Delfi v Estonia* (n 82) [121].

[133] Fact Pattern, [5.5].

[134] 'Article 19; Internet Intermediaries: Dilemma of Liability' < https://www.article19.org/resources.php/resource/37242/en/internet-intermediaries:-dilemma-of-liability > accessed 31 October 2018; A Global Civil Society Initiative, 'Manila Principles on Intermediary Liability' < https://www.eff.org/files/2015/10/31/manila_principles_1.0.pdf > accessed 3 November 2018.

[135] *Manila Principles on Intermediary Liability, Principle I(b)*; Council Directive 2000/21/EC of 8 June 2000 on certain legal aspects of information society services in particular electronic commerce, in the Internal Market [2000] OJ L178/1, art 14; Joint Declaration on Freedom of Expression and the Internet (UN, OSCE, OAS, ACHPR) (OSCE, 1 June 2011), p.2; 'Intermediary Service Providers' *Santa Clara High Technology Law Journal* (2003), Vol. 19, No.1, p119.

[136] *RTBF v Belgium* App no. 50084/06 (ECtHR, 15 September 2011) [105] & [115]; *Ahmet Yıldırım v Turkey* App no. 3111/10 (ECtHR, 18 December 2012) [64]; *Association Ekin v France* App no. 39288/98 (ECtHR, 17 October 2001) [58]; *Editorial Board of* Pravoye *v. Ukraine* [55] (n 130).

[137] ICCPR (n 1), art 19(3).

56. However, regardless of the justification to institute charges against UConnect under the PIDPA, the Respondent must further demonstrate that there was a pressing social need[138] to suspend its entire operations in Magentonia that could not wait until trial.

57. The proliferation of anti-Cyanisian posts on UConnect did not spill over into the streets, nor incited any acts of physical violence. There was no actual or imminent risk to public order or the safety of Cyanisian refugees[139] and that such a right should not be restricted unless there is a real risk of harm to a legitimate interest and there is a close causal link between the risk of harm and the expression.[140]

58. Hence, the suspension of UConnect's operations in Magentonia during the electoral period did not pursue any legitimate aim.

C. Magentonia's suspension was not necessary in a democratic society.

59. The test of 'necessity in a democratic society' turns on the principle of proportionality – in that the measures taken by States must be proportionate to the legitimate aim pursued.[141]

(i) Magentonia did not adopt less restrictive technical means of restriction

60. Proportionality dictates that the least restrictive technical means must be adopted when restricting content deemed unlawful.[142] Prior restraints on the media must be subjected to

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[138]*Mac TV S.R.O. v Slovakia* App no. 13466/12 (ECtHR, 28 November 2017) [39]; *Ungváry and Irodalom Kft v. Hungary* App no. 64520/10, (ECtHR, 3 December 2013) [37-48].

[139] UNHRC, 'Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence' (11 January 2013) UN Doc A/HRC/22/17/Add 4 [29]; ACHR (n 2), art 9(2); UNESCO, 'Countering Online Hate Speech' (UNESCO Series on Internet Freedom, 2015) <http://unesdoc.unesco.org/images/0023/002332/233231e.pdf> accessed on 3 November 2018.

[140] ACHR, art 9(2); UNESCO, 'Countering Online Hate Speech' (2015) *UNESCO Series on Internet Freedom* at page 24<http://unesdoc.unesco.org/images/0023/002332/233231e.pdf Accessed on 7 November 2018

[141] General Comment No 34 (n 79) [33]; *Perna v Italy* (n 49) [38]; *Nikula v Finland* App no. 31611/962 (ECtHR,1 March 2002) [47]. Article 19: Freedom of Expression Unflitered: How blocking and filtering affect free speech' (December 2016) p. 23. (n 53)

[142] *Manila Principles* (n 135), *Principle IV (b); Soltsyak v Russia* App no. 466/05 (ECtHR, 10 February 2011) [52]-[53]; Francis D. Wormuth and Harris G. Mirkin, 'The Doctrine of The Reasonable Alternative *UTAH Law*

a tight legislative framework and effective judicial review to prevent potential abuses.[143]

61. As a general rule, generic bans is an extreme and disproportionate measure (analogous to banning a newspaper or broadcaster), which can only be justified in exceptional cases (such as child pornography).[144] Total system shutdowns are pernicious means of censorship typically resorted by regimes with dubious human rights record, such as Brazil,[145] Bangladesh,[146] Burundi,[147] Congo,[148] India[149] and Pakistan.[150] Any restriction on the

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Review (1964), Vol.9, pp. 254- 255; Guy Miller Struve, 'The Less-Restrictive-Alternative Principle and Economic Due Process *Havard Law Review* (1967), Vol.80, No.7, p.1487; Joined Cases T-125/96 and T-152/96, Boehringer Ingelheim Vetmedica GmbH and C.H. Boehringer Sohn v Council of the European Union and Commission of the European Communities, ECLI:EU:T:1999:302 [27].

[143] *RTBF v Belgium* (n 136) [105] & [115]; *Ahmet Yıldırım v. Turkey* [64] (n 136); *Association Ekin v. France* (n 136) [58]; *Editorial Board of Pravoye Delo and Shtekel v. Ukraine* (n 130) [55].

[144] *General Comment No 34* (n 135) [43]; Joint Declaration on Freedom of Expression and the Internet 2011 (n 148), p. 2.; EU Guidelines on Freedom of Expression Online and Offline (2014), p 18

[145] 'Brazil Shut Down WhatsApp for roughly 100 million people for 12 hours' (*Quartz Time Out* 17 December 2015) <https://qz.com/576485/brazil-has-shut-down-whatsapp-for-roughly-100-million-people/> accessed on 3 November 2018; 'Brazil Court lifts suspension on Faceboook's Whatsapp Service' (*Reuters* 17 December 2015) < https://www.reuters.com/article/us-brazil-whatsapp-ban-idUSKBN0U000G20151217> accessed on 3 November 2018.

[146] M. Raheela, 'Bangladesh Shuts Down Mobile Internet in Protest Crackdown' Aljazeera < https://www.aljazeera.com/news/2018/08/bangladesh-shuts-mobile-internet-protest-crackdown-180805171232346.html> accessed on 3 November 2018; Arafatul Islam, 'Internet users defy Facebook ban in Bangladesh' (*DW* 10 November 2015) <https://www.dw.com/en/internet-users-defy-facebook-ban-in-bangladesh/a-18863635> accessed 3 November 2018.

[147] CIPESA, (CIPESA: Promoting Effective and Inclusive ICT Policy In Africa, 11 July 2018) 'New Interception Law and Blocked Websites: The Deteriorating State of Internet Freedom in Burundi' < https://cipesa.org/2018/07/a-new-interception-law-and-blocked-websites-the-deteriorating-state-of-internet-freedom-in-burundi/> accessed on 3 November 2018.

[148] 'Congo Orders Internet Slowdown to Restrict Social Media: Telecoms Source' (Reuters, 8 August 2017) <https://www.reuters.com/article/us-congo-violence-internet/congo-orders-internet-slowdown-to-restrict-social-media-telecoms-source-idUSKBN1AN2DE> accessed 3 November 2018.

[149] Vinod, Sai, (Scroll India, 9 July 2018) 'India's Internet Shutdown Rules Are Encouraging Online Censorship' https://scroll.in/article/885573/indias-internet-shutdown-rules-are-encouraging-online-censorship accessed on 3 November 2018.

[150] UNHRC, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (11 May 2016) UN Doc A/HRC/32/38 [48]; Berhan Taye, 'Pakistan Shuts Down the Internet Three Times in One Week' < https://www.accessnow.org/pakistan-shuts-down-the-internet-three-times-in-one-week/> accessed on 3 November 2018.

operations of intermediaries should be limited to the specific impugned content itself.[151]

62. Here, the content at issue were TBM's controversial posts in May 2016.[152] There are plenty of technical means to restrict such content specifically, including flagging their posts with warnings, temporarily blocking access to their posts, complete removal of their posts, or even suspending or banning their account.[153] UConnect clearly had the technical capability to target content and users, as proven by its deletion of TBM6000's posts and account.[154]

63. However, the Magentonian High Court instead took the most intrusive measure possible – suspending UConnect's operations in Magentonia completely.[155] 60% of Magentonian citizens are active users of UConnect.[156] The suspension deprived them of their access and use of UConnect for a period of 1 month and 10 days.[157] Essentially, the suspension was punishing the majority for the acts of a minority.

(ii) UConnect employed sufficient measures to restrict possible unlawful content

64. Based on the 'mere conduit principle', intermediaries have no general obligation to monitor third-party content posted on their platform.[158] At most, they may be required to institute

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[151] General Comment No 34 (n 79) [43]; *Manila Principles* (n 135), *Principle IV (a).*

[152] Fact pattern, [5.1], [5.2] & [5.4].

[153] *Manila Principles, Principle IV (b)* (n 135).

[154] Fact pattern, [5.3].

[155] Fact pattern, [5.5].

[156] Fact pattern, [3.1].

[157] Fact pattern, [6.2].

[158] *Manila Principles*, *Principle I(b)* (n 135) *;* EU E-Commerce Directive (n 135), art 14; Ugandan Electronic Transactions Act 2011, s29 &30. Article 19: Freedom of Expression Unflitered: How blocking and filtering affect free speech' (December 2016) p. 14 (n 53); 'Intermediary Service Providers' *Santa Clara High Technology Law Journal* (2003), Vol. 19, No.1, p 126. (n 135)

technical mechanism to detect and remove manifestly unlawful content (i.e. hate speech).[159]

65. The sufficiency of such mechanisms turns on three factors:[160] (a) whether the intermediary operated an up-to-date software to detect and remove violations; (b) whether it had responded promptly and appropriately to possible violations; and (c) whether an expectation of a faster response would create an undue burden, in costs or resources on the intermediary.

66. First, UConnect has formulated the 'Community Standards' to set out grounds for content removal, maintains a Complaints Portal to receiver user complaints, and employs a team of human reviewers to assess the complaints within 72 hours.[161] Such mechanism mirrors the EU's notice-and-takedown model,[162] which is widely perceived as the most effective model in balancing the interests of intermediaries and their users.[163]

67. Second, upon receiving complaints on TBM's post on 26 May 2018, UConnect consulted with its lawyers the next day to assess the contents of the post.[164] Four days later, they removed the post. As for the TBM's second post on 30 May 2018 which trended as the most viewed post until 1 June, they received no complaints which called for any further action.

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[159] EU E-Commerce Directive (n 135), art 14; 2004 Information Society Services Act, s5(1)(b); Digital Millennium Copyright Act, s512(c); *Delfi v Estonia* (n 82) [154].

[160] James Rickard Boston, 'Going Live: The Role of Automation in the Expeditious Removal of Online Content' *University Law Review* (2016), Vol.96, No.6, p.2189 <https://www.bu.edu/bulawreview/files/2017/01/RICKARD.pdf > accessed on 3 November 2018.

[161] Fact Pattern, [3.5].

[162] EU E-Commerce Directive (n 135), art 14; Alhert, C. Marsden, C, Yung, Chester, 'How 'Liberty Dissapeared from Cyberspace' the Mystery Shopper Tests Internets Content Self-Regulation' p. 9

[163] Grunde Jørgen Svensøy, 'The E-Commerce Directive Article 14: Liability Exemptions for Hosting Third Party Content' (Master's thesis, University of Oslo 2011), p.17; EU E-Commerce Directive (n 135), art 14; *Delfi v Estonia* (n 82) [139].

[164] Fact Pattern, [3.5].

68. Third, constant monitoring is not legally mandatory, nor technologically feasible. Just as it is impossible for YouTube to manually review all 400 hours of videos uploaded per minute by its user,[165] it would be impracticable for UConnect's employees to review each and every post published by its 100 million users 24-hours round the clock.[166] Also, during May 2018, a wave of new users signed-up on UConnect, presumably due to the electoral season frenzy.[167]

69. Hence, UConnect's mechanism was quite robust and effective in filtering unlawful content. There was no compelling need to suspend them.

(iii) Magentonia's suspension of UConnect's operations was aimed at suppressing political discourse and dissent

70. Restrictions on political discourse – especially blocking access of the public and opposition politicians to media outlets – impede the freedom of expression and democratic process.[168]

71. Suspending UConnect's operations during the electoral period of Magentonia would significantly deprive its citizens from a major source of political information and opinion. The traditional broadcast media is not a viable alternative, as airtime is typically expensive and dominated by powerful interest groups.[169]

72. It is no secret that the majority of trending posts in May 2018 was fuelled by anti-UMP sentiments.[170] The timing of UConnect's suspension just as such sentiments were peaking

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[165] Daphne Keller, 2018, p. 297.(n 20)

[166] Fact Pattern, [3.1].

[167] Fact Pattern, [5.4].

[168] General Comment No 34 (n 79) [37].

[169] *Animal Defenders International v United Kingdom* App no. 48876/08 (ECtHR, 22 April 2013) [112] & [117].

[170] Fact Pattern, [5.4].

is rather suspicious, and could not be purely coincidental.[171] Hence, it is quite likely that the suspension was motivated for an improper collateral purpose – to stifle political dissent.

III. MAGENTONIA'S PROSECUTION AND CONVICTION OF UCONNECT UNDER SECTIONS 3 AND 5 OF THE PIDPA VIOLATED ARTICLE 19 OF THE ICCPR

73. A free, uncensored and unhindered media is essential in any democratic society to ensure freedom of expression.[172] Not only does the media have the task of imparting information and ideas, the public also have a corresponding right to receive them.[173]

74. Magentonia's prosecution and conviction of UConnect under Sections 3 and 5 of the PIDPA did not fulfil the three-part test of Article 19(3) of the ICCPR, hence violated the right to freedom of expression of both UConnect and its users.

A. Magentonia's prosecution and conviction of UConnect was not provided by law

75. As adumbrated above,[174] Sections 3 and 5 of the PIDPA were not formulated with sufficient precision for UConnect to reasonably foresee that it could be criminally liable for TBM's post on May 2018.

[171] Fact Pattern, [5.5].

[172] General Comment No 34 [13].

[173] *Mavlonov and Sa'di v Uzbekistan,* Communication No. 1334/2004, UN Doc. CCPR/C/95/D/1334/2004 (HRC, 19 March 2009); *Lingens v Austria* App no. 9815/82 (ECtHR, 8 July 1986) [41] *Fuentes Bobo v Spain* App no. 39293/98 (ECtHR, 29 February 2000) [38]; *Nagla v Latvia* App no. 73469/10 (ECtHR, 16 July 2013) [98]; *Times Newspapers Ltd (nos. 1 and 2) v the United Kingdom* App nos. 3002/03 and 23676/03 (ECtHR, 10 March 2009) [27]; *Kalda v Estonia* App no.17429/10 (ECtHR, 6 June 2016) [44]; *Jankovskis v Lithuania* App no. 21575/08 (ECtHR, 17 January 2017) [52].

[174] Arguments [53] – [55].

B. Magentonia’s prosecution and conviction of UConnect did not pursue a legitimate aim.

76. Aside from TBM’s posts in May 2018 going viral on UConnect, there were no reports of any incidents of violence nor public disorder spilling outside the digital realm of UConnect.

77. Their impact on the Magentonian society is merely tangential and temporal, hence does not warrant criminal prosecution on the basis of ‘*de minimis non curat lex*’ (the law does not concern itself with trifles).[175]

C. Magentonia’s prosecution and conviction of UConnect were unnecessary in a democratic society

78. Magentonia’s prosecution and conviction of UConnect were not necessary for two reasons: (a) TBM’s posts on 26 and 30 May 2018 were not unlawful under Sections 3 and 5 of the PIDPA; and alternatively, (b) UConnect sufficiently discharged its duty as an intermediary in responding to such posts.

(i) TBM’s post on 26 and 30 May 2018 were not unlawful

79. In determining whether publication amounts to an incitement to hatred, violence or public disorder, several factors ought to be considered: content, source and context of publication.[176]

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[175] *Korolev v. Russia (No. 2)* Application no. 25551/05 (ECtHR,1 April 2010) [41]-[43]; *Finger v Bulgaria* Application no. 37346/05 (ECtHR,10 May 2011) [67]-[71]; *Ionescu v Romania* Application no. 36659/04 (ECtHR,1 June 2010) [30]-[36]; *Vasilchenko v Russia* Application no. 34784/02 (ECtHR,23 September 2010) [49]; *The "Reward"* (1818) 2 Dods 265, 165 ER 1482, p. 1484; *Canadian Foundation for Children, Youth and the Law v Attorney General* [2004] SCR 76, p. 170-174 (Arbour J); *R v Hinchey* [1996] 3 SCR 1128 [69]; Max L Veech and Charles R Moon, ‘De Minimis Non Curat Lex’ *Michigan L Rev* (1947), Vol.45,No.5, p.38.

[176] Rabat Plan of Action, 2013 [29] (n 139).

a) Content of publication

80. Freedom of expression protects not only the substance of ideas, but the form and style in which ideas are conveyed.[177] The use of vulgarities in itself is not decisive in the assessment of offensive expression, as it may well serve merely stylistic purposes.[178] Furthermore, crude colloquialism is common in Internet portals, hence the impact of online statements is lower than if they were uttered in real-life conversations.[179]

81. TBM's post on 26 May 2018 described the Cyanisian refugees with the unflattering derogatory term "bottom feeders", and accused them of "plotting terrorist attacks" and "protecting thieves and fraudsters".[180] Albeit strongly-worded and highly distasteful, such statements border on hyperbole[181] to the point that they would more likely elicit incredulity and bemusement from the public, rather than stir hatred[182].

82. TBM's second post on 30 May 2018 was more measured in tone.[183] Albeit framed as a statement of fact rather than opinion,[184] a one-liner allegation citing a source without

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177 *Savva Terentyev v Russia* App no. 10692/09 (ECtHR, 28 August 2018) [68] & [74]; *Gül and Others v. Turkey* Application no. 4870/02 (ECtHR,8 June 2010) [41]; *Grebneva and Alisimchik v. Russia* Application no. 8918/05 (ECtHR,22 November 2016) [52].

178 *Savva Terentyev v Russia* (n 177) [68]; *Magyar v. Hungary* (n 129) [76].

179 *Magyar v. Hungary* (n 129) [77].

180 Fact Pattern, [5.1].

181 *Savva Terentyev v. Russia* (n 177) [45]; *GRA Stiftung Gegen Rassismus UND Antisemitismus v Switzerland* App no. 18597/13 (ECtHR, 9 April 2018) [40]; *Morar v Romania* App no. 25217/06 (ECtHR, 7 July 2015) [21]-[22]; *Kuliś and Różycki v Poland* App no. 27209/03 (ECtHR, 6 January 2010) [30];

182 *Prager and Oberschlick v Austria* App no. 15974/90 (ECtHR, 26 April 1995) [38]; *Uj v Hungrary* App no. 23954/10 (ECtHR, 19 July 2011) [24].

183 Fact Pattern, [5.4].

184 *Magyar v Hungary* (n 129) [76]; *Bladet Tromsø and Stansaas v Norway* Application no. 21980/93 (ECtHR, 20 May 1999) [66]; *Lingens v Austria* (n 173) [46]; *Mihaiu v Romania* App no. 42512/02 (ECtHR,4 November 2008) [71]; *Stângu and Scutelnicu v Romania* App no. 53899/00 (ECtHR, 31 January 2006) [56]; *Kasabova v Bulgaria* App no.22385/03 (ECtHR, 19 April 2011) [65]

credible links would likewise be treated as sensationalist spin.[185]

83. Hence, whilst the substance and style of TBM's posts may offend, shock and disturb, it still falls within the sphere of protected expression.[186]

b) Source of publication

84. The speaker's status in society is also a relevant factor.[187] For instance, politicians have a special duty to refrain from advocating racial discrimination because the considerable influence they wield within society amplify their voices and trigger stronger reactions.[188]

85. Here, TBM is a partisan underground organisation notorious for anti-Ras and anti-Cyanisian rhetoric.[189] Their members are unnamed and unknown.[190] Given such limited credibility in the public's eye, their posts have minimal likelihood in inciting acts of violence or hostility.

c) Context of publication

86. Context include sensitive social and political background, tense security situation, or atmosphere of hostility and hatred.[191]

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[185] *Bladet Tromsø v Norway* [63]; *Bartnik v Poland* App no. 53628/10 (ECtHR, 11 March 2014) [30]; *Cumpana si Mazare v Romania* App no. 33348/96 (ECtHR, 17 December 2004) [98]-[99]; *Lombardo and others v Malta* App no. 7333/06 (ECtHR, 24 July 2007) [60].

[186] *Savva v Russia* (n 177) [61]; *Morice v France* App no. 29369/10 (ECtHR, 23 April 2015) [124]; *Pentikäinen v. Finland* App no. 11882/10 (ECtHR, 20 October 2015) [87]; *Perinçek v Switzerland* App no.27510/08 (ECtHR, 15 October 2015) [196]; *Bédat v Switzerland* [48] (n 127).

[187] Rabat Plan of Action, 2013 (n139) ; *Ojala and Etukeno Oy v Finland* App no. 69939/10 (ECtHR, 14 January 2014) [52]; *Affaire Almeida Leitão Bento Fernandes v Portugal* App no. 25790/11 (ECtHR, 12 June 2015); *Petrenco v Moldova* App no. 20928/05 (ECtHR, 4 October 2010) [60].

[188] *Féret v. Belgium* App no. 15615/07 (ECtHR,16 July 2009) [76].

[189] Fact Pattern, [5.1].

[190] Clarifications, [24].

[191] *Savva Terentyev v Russia* (n 177) [78].

87. It is true that MPF has inserted anti-Cyanisian rhetoric in their propaganda in the months leading up to the 2018 Magentonian elections.[192] Nevertheless, there is not a single reported incident of any actual social backlash inflicted upon Cyanisian residents in Magentonia. Hence, TBM's posts is nothing more than political hot air.

(ii) UConnect sufficiently discharged its duty as a passive intermediary in responding to TBM's posts

a) UConnect is a passive intermediary

88. Intermediaries, as a general rule, are exempt from liability arising the third-party content published on their system.[193] They should be treated as mere distributors "*akin to a public library or newsstand"*, and not content creators or publishers, since they do not exercise editorial control over third-party content.[194]

89. In *Telecinco*,[195] the Spanish court found *YouTube* to be a mere host provider, hence not obliged to supervise the lawfulness of videos posted by its users. The Court further reasoned that its 'suggested video' function was purely automated based on an objective criterion (user preference), hence did not amount to an editorial function.

90. Posts appearing on the 'live feed' of UConnect users are primarily driven by user preference and the popularity of posts.[196] User preference, in turn, is dependent on the themes that the

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[192] Fact Pattern, [2.3].

[193] *Manila Principles*, *Principle I(b)* (n 135)*; Joint Declaration on Freedom of Expression and the Internet*, 2011, p. 2. (n 135)

[194] *Cubby Inc. v CompuServe Inc. Southern District of New York 776 F. Supp. 135 (S.D.N.Y. 1991); Stratton Oakmont Inc. v Prodigy Services Co.* 1995 N.Y. Misc. LEXIS 229*; Payam Tamiz v Google Inc* [2013] EWCA Civ 68 [16].

[195] Decision 289/2010 of Mercantile Court of Madrid no. 7, 20 September 2010; Bonadio Enrico and Mula Davide, 'Madrid Court Confirms YouTube's Host Status' *Journal of Intellectual Property Law & Practice* (2011), Vol.6, No.2, pp.82-84.

[196] Fact Pattern, [3.2.1].

users personally select themselves, and their own behavioural patterns in posting and sharing content.[197] Since such variables are objective and automated, UConnect qualifies as a passive intermediary.[198]

b) *UConnect did not have knowledge of any manifest unlawfulness in TBM's posts*

91. A passive intermediary is only liable for unlawful third-party content if it: (i) possessed actual or constructive knowledge of its manifest unlawfulness; and (ii) failed to expeditiously removed such content.[199]

92. There must be "*actual, positive, human knowledge"* as opposed to *"virtual, automated computer knowledge"*[200]. Mere allegations that are insufficiently precise or inadequately unsubstantiated cannot constitute as knowledge of illegal activity.[201] Instead, such allegations should be directed to independent governmental authorities for further investigation to ascertain its legality.[202]

93. Although offensive and provocative, the 26 May 2018 post lacked the obvious characteristics of 'hate speech'.[203] Hence, it was reasonable for UConnect to delay its

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[197] Fact Pattern, [3.2.2].

[198] EU E-Commerce Directive (n 135), Recital 42; *Google Spain* (n 14).

[199] EU E-Commerce Directive (n 135), art 4; 2004 Act on the Information Society Services Act (n 159); s5(1)(b);Digital Millennium Copyright Act (n 159), s512(c) ; PIDPA, s3.

[200] Grunde Jørgen Svensøy, 2011, p.37. (n 163)

[201] Case C-324/09 *L'Oréal SA v eBay Int'l AG* ECLI:EU:C:2011:474 [122]; Szegedi, Marton. 'Facebook, Twitter, Youtube and The Others: Our Online Representatives With and Without Free Speech Immunity, The Manifestation of the Website Operators' Genuine Role In the United States and their Misconceived Function in Europe' (Master's Thesis, Central European University 2018) p 12.

[202] *Royo v. Google* 76/2013, 13 February 2013, Barcelona Appellate Court; *Asociación de Internautas v SGAE* 773/2009, 9 December 2009 Spanish Supreme Court; *Davison v. Habeeb* [2011] EWHC 3031 (QB) [68].

[203] *Delfi v Estonia* (n 82) [115] & [117] .

removal upon receipt of user complaints.

94. The 30 May 2018 post cited a study by the University of Magentonia as its source.[204] Imposing the duty to fact-check and verify content would accord UConnect the role of an illegitimate 'judge of content'.[205] Unless ordered by court, UConnect had no basis removing it.

95. Hence, UConnect did not neglect nor overstep its role as a passive intermediary.

c) *Intermediary liability is merely an alternative to author liability*

96. Criminal action against intermediaries should only be resorted to if steps to identify, investigate and prosecute the actual authors have been exhausted or prove to be futile or unduly burdensome.[206] Although anonymity is sacrosanct for many Internet users, investigative or judicial authorities can still issue injunction orders compelling intermediaries to disclose the personal data of its users (such as email address, banking authentication information, or even IP address).[207]

97. However, the Magentonian authorities made no attempt to investigate the authors behind TBM's posts. Hence, UConnect was deprived the opportunity to cooperate in the search of the true culprits, and take remedial steps to improve its content monitoring system if deemed lacking.

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[204] Fact pattern, [5.4]

[205] *Royo v Google* ; Decision No. 2004-496 (French Constitutional Council judgment DC 2004-496 of 10 June 2004) (n 202) [29]; Grunde Jørgen Svensøy, 2011, (n 163) p.38.

[206] *Delfi v Estonia* (n 82) [148]-[151]; *Magyar v Hungary* (n 129) [79].

[207] *Delfi v Estonia* (n 82) [148]-[151].

d) The conviction of UConnect would cast a chilling effect on Magentonian society

98. User-generated expressive activity on the Internet provides an unprecedented platform for the exercise of freedom of expression.[208] Due to the ease of accessibility and capacity to store and share vast amounts of information, Internet intermediaries play an vital role in enhancing the public's access to news and facilitating the dissemination of information.[209]

99. To hold UConnect liable for TBM's content would compel UConnect to review its system and service. In the future, it would err at the side of caution by introducing more restrictive mechanisms to filter and moderate content. Ultimately, this would cast a chilling effect on freedom of expression in Magentonia's thriving online environment.[210]

e) The fine imposed on UConnect was disproportionate

100. When an intermediary is found liable for inadequate monitoring, the appropriate penalty is imposition of a governmental co-monitoring regime with the intermediary to ameliorate their deficiencies, and not fines of exorbitant quantum.[211]

101. However, upon finding UConnect liable under Sections 3 and 5 of the PIDPA, the

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[208] *Delfi v Estonia* [110] (n 82); *Ahmet Yıldırım v. Turkey* [48](n 136); *Times Newspapers v the United Kingdom* (n 98) [27].

[209] *Savva Terentyev v. Russia* (n 177) [79].

[210] *Phil v Sweden* App no. 74742/14 (ECtHR, 7 February 2017) [35]; Lisa Horner, 'Freedom of Expression and the Internet' Report from Regional Consultation Meetings Convened by the Demos Institute (*Global Dialogue*, May 2011), p.3 < http://www.global-dialogue.eu/sites/global-dialogue.clients.homemadedigital.com/files/Freedom_of_Expression_and_the_Internet.pdf > accessed on 3 November 2018.

[211] Directive 95/46 (n 17) [5]; Council Directive 2007/65/EC of 11 December 2007 on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities [2007] OJ L 332/27, Recital 36; Dennis D Hirsch, 'In Search of the Holy Grail: Achieving Global Privacy Rules Through Sector-Based Code of Conduct' *Ohio State Law Journal* (2013), Vol.74, No.6, pp. 1046 & 1065; 'Internet Intermediaries in Advancing Public Policy Objectives' (*OECD*, 16 June 2010), pp.20-21 < https://www.oecd.org/internet/ieconomy/45997042.pdf> accessed on 3 November 2018.

Magentonian High Court imposed a fine of USD100,00.[212]

102. Furthermore, the High Court failed to consider the suspension UConnect's operations in Magentonia for 1 month and 10 days previously ordered.[213] During this prolonged period, UConnect would have lost substantial advertising revenue earned from its users, and more importantly, precious stock value due to shareholder panicking and cashing out. The full financial costs of the suspension would far exceed USD100,000.

103. Since UConnect had already suffered greatly from the suspension order, a further fine was unwarranted.

[212] Fact Pattern, [6.3].

[213] Fact Pattern, [5.5].

PRAYER

For the foregoing reasons, the Applicants respectfully request this Court to adjudge and to declare that:

1. Magentonia's decision to not grant Ras any rectification, erasure, or blocking of search results depicting the 2001 Cyanisian Times story violated Article 17 of the ICCPR.
2. Magentonia's suspension of UConnect's operations violated Article 19 of the ICCPR.
3. Magentonia's prosection and conviction of UConnect violated Article 19 of the ICCPR.

Respectfully submitted 7 November 2018,

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