THE 2014–2015 MONROE E. PRICE INTERNATIONAL MEDIA LAW MOOT COURT COMPETITION

DERI KUTIK & DIGITUBE

Applicants

v

REPUBLIC OF LYDINA

Respondent

MEMORIAL FOR APPLICANTS

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS *continued*

Page

LIST OF ABBREVIATIONS

ACHPR	African Court on Human and Peoples' Rights
African Charter	African Charter on Human and Peoples' Rights
American Declaration	American Declaration of the Rights and Duties of Man
The Charter	The Social Media Speech Charter
The CIA	The Content Integrity Act
Clarifications	The 2014–2015 Price Media Law Moot Court Competition Clarifications
Compromis	The 2014–2015 Price Media Law Moot Court Competition Case
ECHR	European Court of Human Rights
European Convention	Convention for the Protection of Human Rights and Fundamental Freedoms
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ISP	Internet Service Provider
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGA	United Nations General Assembly
UNHRC	United Nations Human Rights Committee
US	United States of America
Zofftor 3:130	The Zofftor, Chapter 3, Verse 130

LIST OF AUTHORITIES

Page(s)

African Court on Human and Peoples' Rights Cases

European Court of Human Rights Cases

LIST OF AUTHORITIES *continued*

Page(s)

Inter-American Court of Human Rights Cases

Supreme Court of the United States Cases

LIST OF AUTHORITIES *continued*

Page(s)

United Nations Human Rights Committee Cases

Page(s)

Other Court Cases

International Declarations, Charters, and Conventions

LIST OF AUTHORITIES *continued*

Page(s)

Miscellaneous

LIST OF AUTHORITIES *continued*

Page(s)

STATEMENT OF RELEVANT FACTS

I. Statement of the Case

1. The Constitution of the Republic of Lydina embodies the majority's religious values without recognising the values of minorities.[1] The majority of Lydinans are Parduist, constituting seventy-five percent of the population, while twenty percent of Lydinans are Sadujist, and five percent are Hindu, Muslim, and Christian.[2] Parduism and Saduja have fundamental doctrinal differences which have led to some conflicts and unrest between the two religions.[3] Parduism is monotheistic and follows a scripture called the Zofftor, while Saduja is a diversified belief system with no strict religious laws or scriptures.[4]

2. Sadujists have been a part of Lydinan history for over three hundred years, and a significant number of Sadujists and Parduists are ethnic Malanis.[5] Despite the presence of a significant number of Malani Sadujists, Saduja is not equally recognised by the government. The highest Parduist religious leader, the Grand Parder, is a paid member of the Lydinan democratic government.[6] Additionally, the Lydinan Constitution gives preference to the majority's Parduistic values, stating that Lydinans believe in One God.[7] Sadujists, who comprise one-fifth of the population, do not believe in One God.[8]

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[1] Compromis, para 6.

[2] ibid, para 2.

[3] ibid, para 3.

[4] ibid, paras 3, 9.

[5] ibid, para 7.

[6] ibid, para 13; Clarifications, paras 3, 18.

[7] Compromis, para 6.

[8] ibid, paras 2, 6.

3. In 2000, Lydina ratified the ICCPR, reserving that 'Proselytism and other acts that may lead to division between religions are not protected by the Covenant'.[9] Five states objected because it was 'unclear to what extent Lydina consider[ed] itself bound by the obligations of the ICCPR'; the objecting states further 'raise[d] concerns as to the Government's commitment to the object and purpose of the ICCPR'.[10]

4. In 2008, Lydina passed the *Social Media Speech Charter* ('the Charter') to regulate online media.[11] Article 1 of the Charter mandates media adherence by requiring social media to: (a) respect human dignity and the rights of others; (b) comply with the religious and ethical values of Malani culture and society; (c) maintain the social integrity of Malani traditions; (d) refrain from insulting 'God, revealed religions, religious symbols, Holy Scriptures, and holy figures'; and (e) protect Malani identity 'against negative influences of globalization'.[12] Article 2 of the Charter prohibits: (a) incitement of hatred based on race, religion, and ethnicity; and (b) provocation, which is 'speech or conduct that deliberately hurts religious feelings or values of Malani culture and triggers violent protest inspired by Malani solidarity'.[13] Additionally, in 2009, Lydina enacted the Content Integrity Act ('the CIA'), which states that ISPs are not responsible for legal content posted online.[14] An ISP is 'an organization that provides services

[9] ibid, para 18.

[10] ibid.

[11] ibid, para 15.

[12] ibid.

[13] ibid.

[14] ibid, paras 16–17.

for accessing, using, or participating in the Internet'.[15] Speakers and ISPs found in violation of the CIA or the Charter are liable for civil remedies.[16]

5. Social media is accessible to a majority of Lydinans, as sixty-seven percent of households can access the internet and seventy percent of the population owns smart technology.[17] In March 2012, Parduists posted memes on Facebook that caricatured Saminder, the founder of Saduja, with the caption, 'No one takes Saminder seriously except Sadujists. Sadujists take him seriously, and they're a joke'.[18] Although this meme sparked online discussion and resulted in an arson attempt, no violence, destruction of property, or injuries resulted from the online post.[19] Further, the government did not enforce the Charter against the Parduists who posted the meme, nor did anyone bring a lawsuit under the Charter against them.[20]

6. On 17 January 2014, Deri Kutik, a Sadujist, uploaded a sermon on the video-sharing website DigiTube.com.[21] In the sermon, Kutik preached Sadujist values, including the Sadujist belief that every human being is part divine.[22] Kutik spoke about Saduja's integration of reasoning and morality into its values and beliefs and opined that Saduja is superior to Parduism because Parduism relies on 'blind belief' in the Zofftor.[23] Kutik expressed that Parduists should

[15] Clarifications, para 9.

[16] ibid, para 15.

[17] Compromis, para 4.

[18] ibid; Clarifications, para 12.

[19] Compromis, para 4.

[20] ibid.

[21] ibid, para 8.

[22] ibid.

[23] ibid.

be converted to Saduja by any means.[24] Kutik also utilised discoveries of old fossils as scientific evidence to discredit a certain passage of the Zofftor, Chapter 3, Verse 130 ('Zofftor 3:130'), which claimed that a holy man cured a historical plague.[25]

7. Kutik's DigiTube video went viral and circulated throughout Lydina.[26] Some Parduists were infuriated that a Sadujist would criticise and, in their view, insult their religion.[27] Some Parduists rioted and attacked Sadujists, historical and religious sites, homes, and even businesses not affiliated with any religion.[28] This was the first time an online discussion escalated to actual physical violence in Lydina.[29] The rioters injured over one hundred people, mostly Sadujists; however, no one was killed.[30] Over the course of a week, rioters destroyed numerous homes and businesses.[31] Some Sadujists retaliated by attacking Parduists and Parduist places of worship, destroying one site.[32]

8. The Grand Parder made a religious pronouncement condemning Kutik's sermon as blasphemous, provocative, and in violation of the Parduistic creed that 'One God created the world and he gave men the Zofftor so that they may know him'.[33] He also proclaimed that

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[24] ibid.

[25] ibid, para 9.

[26] ibid, para 11.

[27] ibid.

[28] ibid, paras 11–12.

[29] ibid, paras 4, 11–12.

[30] ibid, para 12.

[31] ibid.

[32] ibid, para 11.

[33] ibid, para 13.

Sadujist beliefs insult Parduism.[34] However, the Grand Parder's religious proclamation failed to accurately reflect the views of all Parduists.[35] The New Parduists, a denomination of Parduism, were not offended by Kutik's historical arguments; Kutik's views even supported their interpretation of Zofftor 3:130.[36] The New Parduists believe that 'it is clear that 3:130 is speaking of a spiritual plague and not an actual, historical one; 3:130 refers to a time when there were no believers of Parduism and society had become morally bankrupt, its spiritual health ailing'.[37]

II. Procedural Posture

9. The Lydinan President deferred to the Grand Parder to resolve the conflict surrounding Kutik's sermon.[38] The Grand Parder sued Kutik and DigiTube on 21 April 2014 in a Lydinan domestic court for violations of Articles 1 and 2 of the Charter based on Kutik's statements that: (a) Saduja is superior to Parduism; (b) all Parduists should be converted by any means to believe in Saduja; and (c) Zofftor 3:130 is disproven by historical evidence.[39] Because of the Grand Parder's religious leadership, the domestic court gave him special deference, and he prevailed on all claims.[40] The Lydinan courts also rejected Kutik and DigiTube's counterclaim that the Charter is invalid under the ICCPR.[41] Kutik and DigiTube appealed to the Lydinan Supreme

[34] ibid.

[35] ibid, para 14.

[36] ibid.

[37] ibid.

[38] ibid, para 19.

[39] ibid, para 20.

[40] ibid, para 21.

[41] ibid.

Court, the highest appellate court in Lydina, but the court dismissed their appeals, thereby exhausting all domestic remedies.[42]

[42] ibid, para 22.

STATEMENT OF JURISDICTION

Deri Kutik and DigiTube, the Applicants, hereby submit this dispute before this Honourable Court, the Universal Freedom of Expression Court, a Special Chamber of the Universal Court of Human Rights. This dispute concerns the rights of freedom of expression, religion, and speech in Articles 18–20 of the International Covenant on Civil and Political Rights. This Honourable Court has jurisdiction as the final adjudicator in place of all regional courts once parties have exhausted all domestic remedies. Because the Applicants' claims were rejected on the merits in the domestic courts of Lydina, and because all appeals and other remedies in Lydina have been exhausted, this Honourable Court has jurisdiction in this matter.

Deri Kutik and DigiTube request this Honourable Court to issue a judgment in accordance with relevant international law, including the International Covenant on Civil and Political Rights, conventions, jurisprudence developed by relevant courts, and principles of international law.

QUESTIONS PRESENTED

1. Did Kutik and DigiTube comply with Article 1(b) of the Charter, which discusses the religious, cultural, and ethical values of Malani society, when Kutik, who is a member of a religious minority that is part of Malani culture, posted a sermon online discussing his personal religious beliefs?
2. Did Kutik and DigiTube comply with Article 2(a) of the Charter, which prohibits religious incitement, when Kutik discussed scientific and historical facts and articulated his personal religious beliefs without promoting violence?
3. Did Kutik and DigiTube comply with Article 2(b) of the Charter, which prohibits provocative speech that deliberately hurts religious feelings, when no one was compelled to watch the sermon, Kutik only intended to articulate his religious values, and Malani reactions to the video were diverse and divided?
4. Under the ICCPR, is the Charter invalid when it forbids religious sermons and speeches that discuss personal religious beliefs and historical facts and fails to further clarify or detail what constitutes a violation of its provisions?

SUMMARY OF ARGUMENTS

I. Kutik's sermon complied with Article 1(b) of the Charter, which prohibits speech that upsets the religious values of Malani culture. The freedoms of expression and religion are vital rights, and only narrow restrictions on these rights are permitted. Kutik's sermon complied with Article 1(b) because Kutik, a Sadujist, is a member of Malani culture and did not violate Malani religious values when he uploaded his sermon to DigiTube. Lydina has a duty to promote minority religions and their participation in culture. Although Sadujists are a minority in Lydina, a significant percentage of them are ethnically Malani, and Lydina must view Sadujists as equal members of Malani culture. Because Saduja is a facet of Malani culture, promoting Sadujist values is not equivalent to an offence to Malani culture. Many Malanis, including New Parduists and Sadujists, were ambivalent or even amenable to Kutik's sermon; as such, Kutik's sermon reflected the values of some members of Malani culture. Therefore, because all Malani expression should be treated equally and Kutik's sermon reflected the values of Malanis, Kutik's sermon complied with Article 1(b) of the Charter.

II. Article 2(a) of the Charter prohibits religious incitement. Incitement is speech that is gratuitously offensive, promotes lawless action, and is intended or likely to result in imminent lawless action. Speech that does not advocate violence is protected. In his sermon, Kutik expressed his religious beliefs; he did not promote or discuss violence. Nothing indicated that Kutik's sermon was likely to cause actual violence. Kutik did not know who would watch his sermon or what reaction it would cause; the protests were not foreseeable because there was no history of violence resulting from Lydina's numerous online religious debates. Additionally, speech that contributes to public debate is specially protected. Kutik's sermon contributed to a topic of general public interest because he discussed historical facts and scientific evidence to

support his views. This stimulated public debate as New Parduists joined in the discussion. Therefore, Kutik's sermon complied with Article 2(a) of the Charter because it did not advocate violence and made significant contributions to public debate.

III. Kutik's remarks complied with Article 2(b) of the Charter, which prohibits provocation. Provocation is speech that intentionally hurts Malani religious culture, resulting in unified Malani protests. Provocative speech also directly advocates hatred. Although provocation is unprotected speech, offensive speech is protected; deliberately hurting religious feelings is not equivalent to simply causing offence. Kutik did not intend to hurt Malani religious feelings, as inferred from the words he used and the way he said them. Although Kutik used language that offended some Parduists, Kutik intended to persuade others rather than hurt religious feelings.

For speech to qualify as provocation, the Charter requires that protests must be inspired by Malani solidarity or unity. However, Malanis were not unified in their reactions to Kutik's sermon. Even Parduists were not united in rioting; for example, New Parduists were ambivalent and even sympathetic to Kutik's opinions. Because New Parduists and Sadujists are also significant members of Malani culture and did not protest the sermon, Malanis were not united in rioting. Therefore, because Kutik did not advocate violence, and because no unified Malani response resulted from Kutik's speech, Kutik's sermon complied with Article 2(b) of the Charter.

IV. The Charter is invalid under the ICCPR, which protects freedom of expression and freedom of religion equally online and offline. Restrictions on expression must (1) promote a legitimate governmental interest, and (2) be necessary. First, the Charter fails to promote a legitimate governmental interest in protecting the general welfare of society because its purpose was not to preserve order, but to fortify the feelings of Parduists.

Second, the Charter's restrictions are unnecessary. Restrictions must not be overbroad so as to discourage protected expression. The Charter is overbroad because it forbids all expression that potentially offends Malani culture and traditions. Views that may offend, shock, or disturb should be protected expressions; however, the Charter prohibits insulting Parduist beliefs. Such prohibitions violate freedom of expression. Additionally, restrictions must be narrowly written and must not restrict expression more than necessary to achieve the state's narrow goals. The restrictions in the Charter are not narrow because they categorically ban expressions that neither harm the rights of others nor disrupt public order. Finally, restrictions cannot be discriminatory. Restrictions discriminate when they confer protected status to one religion at the expense of another. Parduism already is promoted explicitly and directly in the Lydinan Constitution. Also, the Grand Parder is a paid employee of the government, acts on Lydina's behalf, and receives deference in judicial determinations because of his religious role. The Charter further discriminates against Saduja by forbidding any expression opposed to Parduism. Therefore, the Charter is invalid because it fails to protect a legitimate government interest and is unnecessary in a democratic society.

ARGUMENTS

'The most certain test by which we judge whether a country is really free is the amount of security enjoyed by minorities.'[43] When a government fails to protect freedom of expression, the voice of the minority is overwhelmed by the majority. Lydina infringed on Deri Kutik's freedom of expression by holding Kutik liable for publishing a sermon in a DigiTube video. By suppressing this expression of a member of a religious minority, the Lydinan government wrongfully silenced the minority's voice. Kutik's sermon was a valid and proper articulation of his religious beliefs. Because his sermon merely preached Sadujist values and invited converts, it complied with Malani religious and ethical values, did not incite hatred, and was not provocative under the Charter. Alternatively, the Charter is invalid because it restricts Sadujist religious expression by conferring favoured status on Parduism.

I. KUTIK AND DIGITUBE COMPLIED WITH THE RELIGIOUS AND ETHICAL VALUES OF MALANI CULTURE UNDER ARTICLE 1(B) OF THE CHARTER BECAUSE SADUJISTS ARE MEMBERS OF MALANI CULTURE AND MUST BE TREATED EQUALLY.

'Every person has the right freely to profess a religious faith, and to manifest and practice it both in public and in private.'[44] Additionally, 'Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas

[43] Lord Acton, 'The History of Freedom in Antiquity' (Bridgnorth Institute, Shropshire, 26 February 1877) <http://www.acton.org/research/history-freedom-antiquity> accessed 14 December 2014.

[44] American Declaration of the Rights and Duties of Man, OAS Res XXX adopted by the Ninth International Conference of American States (1948) reprinted in Basic Documents Pertaining to Human Rights in the International System OEA/Ser L V/II.82 Doc 6 Rev 1 (American Declaration) (1992) art 3. See also Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (European Convention) art 9(1); African Charter on Human and Peoples' Rights (adopted 27 July 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter) art 8.

without interference by public authority and regardless of frontiers'.[45] International courts recognise both freedom of expression and religion.[46] This case concerns the overlap between these freedoms. Kutik had a right to express his beliefs under both freedom of religion and expression because he exercised his rights without violating the religious or ethical values of Malani culture.

Lydina restricted free expression under Article 1(b) of the Charter, which requires that media must comply 'with the religious and ethical values of Malani culture and society',[47] which applies to all Malani culture, including religious minorities.[48] Culture is defined as the 'ideas, customs, [and] social behaviour' of a nation or society,[49] and includes a group's religion and other defining characteristics.[50] There are few, if any, circumstances where it is appropriate to limit a people group's right to culture.[51]

In protecting culture, a government 'may not be hostile to any religion … and it may not aid, foster, or promote one religion or religious theory against another'.[52] Minority religions require protection by the state, and the state must administer laws in a manner that treats majority

[45] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (European Convention) art 10(1).

[46] ibid arts 9–10; *Malawi African Association v Mauritania* (2000) AHRLR 149 (ACHPR 2000), paras 129–31.

[47] Compromis, para 15.

[48] ibid.

[49] 'culture, n' (*OED Online*, OUP September 2014) <www.oed.com/view/Entry/45746?rskey=Nd2ulc&result=1#eid> accessed 14 December 2014.

[50] *Centre for Minority Rights Development v Kenya* (2010) AHRLR 75 (ACHPR 2009), para 241.

[51] ibid, para 172.

[52] *Epperson v Arkansas* 393 US 97, 103–04 (1968).

and minority religions equally.[53] 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground.'[54] Minorities have a right to enjoy and practise religion as a part of culture.[55]

The ICCPR provides that 'minorities shall not be denied the right, in community with the other members of their group … to profess and practise their own religion'.[56] Similarly, the UNHRC holds that 'a member of a minority shall not be denied' his right to culture.[57] Eradicating religious discrimination is imperative, and international law provides extra protection for religious minorities.[58] States have a duty to accept and protect religious diversity,[59] including promoting the existence of minorities and their participation in culture.[60] Accordingly, states must take measures 'aimed at the conservation, development and diffusion of culture' of minorities.[61]

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[53] Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (adopted 18 December 1992) UNGA Res 47/135.

[54] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 26.

[55] Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (adopted 18 December 1992) UNGA Res 47/135 art 2.

[56] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 27.

[57] *Lansman v Finland* Communication No 511/1992 UN Doc CCPR/C/52D/511/1992 (1994) (UNHRC), para 9.4.

[58] *Malawi African Association v Mauritania* (2000) AHRLR 149 (ACHPR 2000), para 131.

[59] *Centre for Minority Rights Development v Kenya* (2010) AHRLR 75 (ACHPR 2009), para 246.

[60] Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (adopted 18 December 1992) UNGA Res 47/135 art 1.

[61] *Centre for Minority Rights Development v Kenya* (2010) AHRLR 75 (ACHPR 2009), para 246.

In this case, although Sadujists are a minority, they are still part of Malani culture. Not all Malanis are Parduists.[62] Twenty percent of Lydina's population is Sadujist, and a significant percentage of Sadujists are ethnically Malani.[63] Accordingly, promotion of Sadujist beliefs and values does not necessarily offend Malani cultural values, as Saduja, like Parduism, is one facet of Malani culture.[64] In fact, many Malanis did not think Kutik offended their values and beliefs; for example, the New Parduists and other Sadujists even agreed with the views Kutik expressed, such as his views on Zofftor 3:130.[65] Therefore, Kutik's sermon reflected the views and values of some members of Malani culture.

Additionally, Sadujists have a right to practise their religion and be treated as equal members of Malani culture. Such equality requires parity in enforcement of Article 1(b) against Parduists and Sadujists alike. In March 2012, after Lydina signed the Charter, Parduists posted memes on Facebook caricaturing the founder of Saduja and proclaiming that all Sadujists are 'a joke'.[66] Sadujists were insulted by the memes, but the Charter was never enforced against Parduist speakers.[67] However, in this case, Lydina enforced the Charter against Kutik, a Sadujist, for similar online religious expressions.[68] The differences between the 2012 Facebook posts and Kutik's DigiTube video were not differences in content but, rather, differences in the religious affiliation of the speaker. Because the Charter was not enforced against Parduists for making

[62] Compromis, para 2.

[63] ibid, paras 2, 7.

[64] ibid.

[65] ibid, para 14.

[66] ibid, para 4; Clarifications, para 12.

[67] Compromis, para 4.

[68] ibid, para 20.

similar statements, Kutik likewise should not be liable, as Lydina must equally protect the participation of both religions in Malani culture and enforce the Charter equally across and between religions.[69] Therefore, because all Malani expression should be treated equally and Kutik's sermon reflected the values of Malanis, Kutik's sermon complied with Article 1(b) of the Charter.

II. KUTIK'S SERMON COMPLIED WITH ARTICLE 2(A) OF THE CHARTER BECAUSE IT WAS NOT INCITEMENT AND CONTRIBUTED TO PUBLIC DEBATE.

A principal 'function of free speech … is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger'.[70] Freedom of expression is highly protected in international courts and is only restricted in extremely narrow circumstances.[71] Speech that offends, shocks, or disturbs is nonetheless protected speech.[72] Speech is still protected even if it embarrasses or coerces others into action.[73] 'Fear of serious injury cannot alone justify suppression of free speech.'[74]

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[69] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 26.

[70] *Terminiello v Chicago* 337 US 1, 4 (1949). See also *Cox v Louisiana* 379 US 536, 551–52 (1965); *Tinker v Des Moines Independent Community School District* 393 US 503, 508–09 (1968); *Coates v Cincinnati* 402 US 611, 615 (1971).

[71] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 19; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (European Convention) art 10(2).

[72] *Handyside v United Kingdom* (1976) 1 EHRR 737, para 49. See also *Freedom and Democratic Party (ÖZDEP) v Turkey* (2000) 31 EHRR 27, para 37; *Refah Partisi v Turkey* (2003) 37 EHRR 1, para 89; *Giniewski v France* (2006) 45 EHRR 23, para 43.

[73] *National Association for the Advancement of Colored People v Claiborne Hardware Co* 458 US 886, 910 (1982).

[74] *Whitney v California* 274 US 357, 376 (1927) (Brandeis J concurring).

'[T]he government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.'[75] Accordingly, speech is presumptively protected under international law, and exceptions to this general principle should be interpreted narrowly. Article 2(a) of the Charter provides an exception to this protection, stating that 'member states must ensure that media under their jurisdiction … prevents incitement of hatred based on race, religion, [and] ethnicity'.[76] Incitement is defined as speech that advocates lawless action and is directed towards a specific person or group.[77] The words used must be intended to produce, or be likely to produce, imminent disorder.[78] Additionally, speech is not incitement unless it is 'gratuitously offensive'.[79] To determine if speech is gratuitously offensive, courts consider the speech's scope of distribution and whether the speech was a vehement attack on a religion or religious beliefs.[80] Kutik's sermon was not incitement because it did not advocate violence and offered significant contributions to public debate.

A. Kutik's sermon was not incitement because it was a non-violent articulation of his religious beliefs.

The ICCPR states that 'Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'.[81] If

[75] *Texas v Johnson* 491 US 397, 414 (1989).

[76] Compromis, para 15.

[77] *Brandenburg v Ohio* 395 US 444, 447 (1969).

[78] *Hess v Indiana* 414 US 105, 109 (1973).

[79] *Otto-Preminger-Institut v Austria* (1994) 19 EHRR 34, para 49; *Giniewski v France* (2006) 45 EHRR 23, paras 43, 52.

[80] *Norwood v DPP* [2003] EWHC 1564 (Admin).

[81] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 20(2).

speech does not advocate violence, it is protected under international law.[82] Additionally, 'mere abstract teaching … of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action'.[83]

Kutik's sermon did not advocate violence because it was not 'directed to inciting or producing imminent lawless action'.[84] Kutik preached a sermon and posted it on DigiTube.[85] He did not recommend rioting, nor did he discuss resorting to violence.[86] His sermon also did not command Sadujists to force religious conversions.[87] Further, Kutik's sermon was not intended to produce or 'directed to' producing lawlessness.[88] Kutik published his sermon online where anyone with internet access could view it; he could not predict who would view the video or what its reception would be.[89] Even if Kutik did have a target audience in posting the video online, his target audience was likely other Sadujists, and Sadujists ultimately were not the ones who initially resorted to violence. Rather Parduists, people not as likely to listen to a Sadujist sermon, reacted violently.[90] Because Kutik's sermon did not include a call to action or cause its

[82] *Malawi African Association v Mauritania* (2000) AHRLR 149 (ACHPR 2000), para 102.

[83] *Noto v United States* 367 US 290, 297–98 (1961).

[84] *Brandenburg v Ohio* 395 US 444, 447 (1969).

[85] Compromis, para 8.

[86] ibid.

[87] ibid.

[88] *Brandenburg v Ohio* 395 US 444, 447 (1969).

[89] Compromis, para 8.

[90] ibid, paras 11–12.

target audience to respond violently, it was not a vehement attack on a religious group. Therefore, the sermon was not 'gratuitously offensive'[91] and did not advocate violence.

Additionally, Kutik's sermon did not advocate violence because it was not likely to produce imminent lawless action.[92] Before Kutik published his sermon, previous religious remarks only instigated online discussion, resulting in no actual injuries or destruction of property.[93] Those previous religious remarks were posted via social media multiple times with no violence occurring on any of those occasions.[94] As there was no history of violence in response to social media speech prior to Kutik's sermon, nothing indicated that his remarks were 'likely'[95] to cause any physical damage or destruction. Therefore, Kutik's sermon was not incitement and complied with Article 2(a) of the Charter.

B. Kutik's sermon significantly contributed to scientific and religious debate.

If speech contributes 'to any form of public debate capable of furthering progress in human affairs', then it is protected.[96] For example, in *Gunduz v Turkey*, the ECHR held that religious commentary was not incitement because it contributed to public debate.[97] In that case, the applicant, who sought to 'destroy democracy and set up a regime based on sharia', used a highly insulting term to describe children born from civil marriages.[98] The ECHR noted that,

[91] *Otto-Preminger-Institut v Austria* (1994) 19 EHRR 34, para 49; *Giniewski v France* (2006) 45 EHRR 23, paras 43, 52.

[92] *Brandenburg v Ohio* 395 US 444, 447 (1969).

[93] Compromis, paras 4, 12.

[94] ibid, para 4.

[95] *Hess v Indiana* 414 US 105, 109 (1973).

[96] *Otto-Preminger-Institut v Austria* (1994) 19 EHRR 34, para 49; *Gunduz v Turkey* (2005) 41 EHRR 59, para 37.

[97] *Gunduz v Turkey* (2005) 41 EHRR 59, para 51.

[98] ibid, paras 49–50.

even though the speaker used pejorative and inflammatory terms, he contributed to discussion of a highly debated topic of general public interest; therefore, the ECHR held that the speech was protected.[99]

Likewise, Kutik's sermon contributed to important public debate on a significant topic. Kutik's discussion of historical facts and fossils encouraged intellectual and public debate on important religious and scientific issues.[100] Moreover, debate was stimulated, as the New Parduists publicly joined the discussion on the topics Kutik raised.[101] Therefore, because Kutik's sermon did not advocate violence and contributed to a discussion on a topic of public interest, it was not incitement and complied with Article 2(a) of the Charter.

III. KUTIK'S SERMON COMPLIED WITH ARTICLE 2(B) OF THE CHARTER BECAUSE IT DID NOT INTENTIONALLY HURT MALANI RELIGIOUS FEELINGS.

Article 2(b) of the Charter forbids provocation, which is defined as 'speech or conduct that deliberately hurts religious feelings or values of Malani culture and triggers violent protest inspired by Malani solidarity'.[102] Provocative language may include 'profane, indecent, or abusive remarks directed to the person of the hearer'.[103] Expression is not likely to be considered provocative if it only devalues a religion,[104] but is provocative when it directly advocates hatred.[105] Kutik's sermon merely preached Sadujist values through comparison to Parduism and,

[99] ibid, para 51.

[100] Compromis, paras 8–9, 14.

[101] ibid, para 14.

[102] ibid, para 15.

[103] *Cantwell v Connecticut* 310 US 296, 309 (1940).

[104] UNHRC 'General Comment 34' in 'Article 19: Freedoms of Opinion and Expression' (2011) UN Doc CCPR/C/GC/34, para 48.

[105] *Dibagula v The Republic* (2003) AHRLR 274 (TzCA 2003), paras 11, 13.

accordingly, did not advocate hatred for two reasons: first, Kutik had no intention of hurting religious feelings; and second, the protests were triggered by religious divisions and tensions rather than Malani cultural solidarity, as is required to find a violation of Article 2(b) of the Charter.

A. Kutik intended to circulate a religious sermon, not deliberately hurt others.

Article 2(b) prohibits deliberately hurting the religious feelings of others.[106] To determine whether a speaker intended to hurt religious feelings, courts examine the speaker's words.[107] Intent is also inferred if the speaker presents the expression in a 'contemptuous, reviling, scurrilous, or ludicrous tone, style and spirit'.[108] For example, in *Dibagula v The Republic*, the Tanzanian Court of Appeals held that religious statements were not deliberately intended to hurt others.[109] In that case, a Muslim preacher stated that Jesus was not the Son of God, and the Court held that those statements, even if offensive to some, merely promoted his religion without demonstrating a deliberate intent to harm religious feelings.[110]

In the same way, Kutik's sermon was an articulation of his religious values, distributed to promote his beliefs.[111] Although some of his statements about Parduism were offensive to some Parduists,[112] and although Kutik used persuasive language, his statements were part of a sermon

[106] Compromis, para 15.

[107] *Dibagula v The Republic* (2003) AHRLR 274 (TzCA 2003), para 11.

[108] *Wingrove v United Kingdom* (1997) 24 EHRR 1, para 48.

[109] *Dibagula v The Republic* (2003) AHRLR 274 (TzCA 2003), para 18.

[110] ibid, paras 2, 18, 31.

[111] Compromis, para 8.

[112] ibid, paras 11, 13.

contrasting Parduism and Saduja, which was intended to inform and persuade.[113] Nothing in the record indicates that Kutik had the intention of presenting his speech in a 'contemptuous, reviling, scurrilous, or ludicrous' manner.[114] Thus, Kutik's sermon was not a deliberate attempt to hurt religious feelings.

Even though Kutik's sermon offended some Parduists, his sermon was protected because Kutik did not deliberately cause harm. Causing offence is not equivalent to deliberately causing harm, and a showing of a deliberate intention to cause harm is required under the Charter's provocation standard.[115] Those who choose to freely and publicly manifest their religious beliefs 'cannot reasonably expect to be exempt from all criticism'.[116] Thus, speech that 'offends, shocks, or disturbs' is protected.[117] Even though some Parduists were offended by Kutik's sermon, mere offence alone, absent a strong showing of an intent to cause harm to listeners, does not rise to the level of deliberately causing harm. Because Kutik's sermon was not a deliberate attempt to hurt religious feelings, it was not provocation.

[113] ibid, para 8.

[114] *Wingrove v United Kingdom* (1997) 24 EHRR 1, para 48.

[115] Compromis, para 15.

[116] *Otto-Preminger-Institut v Austria* (1994) 19 EHRR 34, para 47.

[117] *Handyside v United Kingdom* (1976) 1 EHRR 737, para 49. See also *Freedom and Democratic Party (ÖZDEP) v Turkey* (2000) 31 EHRR 27, para 37; *Refah Partisi v Turkey* (2003) 37 EHRR 1, para 89; *Giniewski v France* (2006) 45 EHRR 23, para 43.

B. The protests were not inspired by Malani solidarity because they resulted from offence to only some Parduists and were not inspired by unified Malani sentiments.

According to Article 2(b) of the Charter, provocation must trigger 'violent protest inspired by Malani solidarity'.[118] Solidarity is defined as 'being perfectly united or at one in some respect'.[119] '[S]olidarity describes the relationship or dynamics within a community, and the commitment towards cooperation [and] support.'[120] Here, not all Malanis were united in violent protest.[121] The protesters were some Parduists who were offended by Kutik's sermon.[122] However, other members of Malani culture were not offended and, subsequently, did not protest in response to the video. For example, Sadujists, who are members of Malani culture, did not protest in response to Kutik's sermon.[123] Even Parduists themselves were not united in their response to Kutik's sermon; New Parduists did not riot and agreed with parts of Kutik's sermon.[124] Therefore, because there was no unified Malani response to Kutik's sermon, the protests were not inspired by Malani solidarity, and Kutik's sermon complied with Article 2(b) of the Charter.

[118] Compromis, para 15.

[119] 'solidarity, n' (*OED Online*, OUP September 2014) <http://www.oed.com/view/Entry/184237> accessed 14 December 2014.

[120] Angela Williams, 'Solidarity, Justice and Climate Change Law' (2009) 10 Melbourne J Intl L 493, 497.

[121] Compromis, para 14.

[122] ibid, para 11.

[123] ibid.

[124] ibid, para 14.

IV. THE CHARTER IS INVALID BECAUSE IT DISPROPORTIONATELY INFRINGES ON FREEDOM OF EXPRESSION WITHOUT APPROPRIATELY PROMOTING ANY ADEQUATE GOVERNMENTAL INTERESTS.

Freedom of expression is essential in a democratic society.[125] The ICCPR recognises that 'Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds … through any other media of [the speaker's] choice'.[126] Additionally, the ICCPR protects freedom of 'thought, conscience and religion', which includes the right to exercise one's religion by 'worship, observance, practice and teaching', and limits when these freedoms can be restricted.[127]

Although Lydina made a reservation to ICCPR Articles 18 through 20,[128] these Articles still fully apply to Lydina because the reservation was invalid. Reservations to treaties must be specific, transparent, and clear in scope.[129] However, Lydina's reservation to the ICCPR states that 'other acts that may lead to division between religions are not protected by the Covenant'.[130] This language is neither specific nor transparent because it fails to explain what acts may lead to division or to further describe regulated speech. Additionally, the reservation is vague, lacking a clearly defined scope and applying to all acts that potentially 'may' cause division. Indeed, five

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[125] UNHRC 'General Comment 34' in 'Article 19: Freedoms of Opinion and Expression' (2011) UN Doc CCPR/C/GC/34, para 2.

[126] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 19(2). See also Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 19.

[127] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 18(1).

[128] Compromis, para 18.

[129] *Cabal and Pasini v Australia* Communication No 1020/2001 UN Doc CCPR/C/78/D/1020/2001 (2003) (UNHRC), para 7.4. See also *Fanali v Italy* Communication No 75/1980 UN Doc CCPR/C/OP/2 (1990), para 11.8.

[130] Compromis, para 18.

state parties objected to Lydina's reservation, arguing that it was 'unclear to what extent Lydina considers itself bound by the obligations of the ICCPR and raise[d] concerns as to the Government's commitment to the object and purpose of the ICCPR'.[131] Thus, Lydina's reservation is invalid; accordingly, Lydina's reservations should be severed, and Lydina should be bound to the ICCPR's protections, including Articles 18 through 20.[132]

The Charter, in essence, restricts religious expression in spite of international protections for the fundamental freedoms of expression and religious exercise. Freedom of expression entails both an individual and social dimension: each individual has a right to express his views, and society has a right to receive the information communicated.[133] Thus, violations of freedom of expression affect both the individual and society.[134] To justifiably restrict expression, the government must show that expression invades others' substantial privacy interests and that such invasion was done in 'an essentially intolerable manner'.[135]

To preserve the fundamental right to freedom of expression, government infringements on expression must be few and limited.[136] Under the ICCPR, any restrictions must be: (1) provided by law; (2) necessary for respect of the rights or reputations of others; and (3) necessary

[131] ibid.

[132] *Belilos v Switzerland* (1988) 10 EHRR 466, para 60; *Loizidou v Turkey* (1995) 20 EHRR 99, para 97; UNGA 'Report of the International Law Commission Guide to Practice on Reservations to Treaties' UNGAOR 66th Session Supp No 10 UN Doc A/66/10/Add.1 (2011) 44; UNHRC 'General Comment 24' in 'Article 41: Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols' (1994) UN Doc CCPR/C/21/Rev.1/Add.6, para 18.

[133] *The Last Temptation of Christ (Olmedo-Bustos) v Chile* IACtHR (2001) Series C No 73, paras 65–66. See also *Bose Corp v Consumers Union of United States Inc* 466 US 485, 503–04 (1984).

[134] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts 13 and 29 of the American Convention on Human Rights), Advisory Opinion OC-5/85, IACtHR Series A No 5 (13 November 1985), para 30.

[135] *Cohen v California* 403 US 15, 21 (1971).

[136] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 19(3).

for the protection of national security, public order, public health, or morals.[137] Similar to the ICCPR's criteria, courts apply a three-prong test to determine the validity of restrictions on expression, requiring that restrictions must: (1) be prescribed by law; (2) protect a legitimate governmental interest; and (3) be necessary in a democratic society.[138]

In this case, Lydina signed the Charter and passed the CIA pursuant to the Charter's terms and requirements; therefore, the Charter is appropriately prescribed by law, and the first prong is satisfied. However, the Charter, which restricts religious expression online, is invalid under the ICCPR for two reasons. First, the Charter fails to promote any legitimate governmental interests. Second, the Charter's restrictions are unnecessary in a democratic society and fail to proportionately promote Lydina's alleged interests.

A. The Charter fails to serve a legitimate governmental interest because it unduly restricts all views contrary to globalisation or Malani religious beliefs without adequate justification.

'[R]estrictions must be justified by reference to governmental objectives which, because of their importance, clearly outweigh the social need for the full enjoyment of [freedom of expression].'[139] One such governmental interest is protecting the general welfare, which provides protection for statements of interest to the public.[140] Society has a general welfare interest in

[137] ibid.

[138] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (European Convention) art 10(2); *The Sunday Times v United Kingdom* (1979) 2 EHHR 245, para 45; *Sürek v Turkey* ECHR 1999-IV 355, para 44; *Herrera Ulloa v Costa Rica* IACtHR (2004) Series C No 107, para 120.

[139] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts 13 and 29 of the American Convention on Human Rights), Advisory Opinion OC-5/85, IACtHR Series A No 5 (13 November 1985), para 46.

[140] *Mémoli v Argentina* IACtHR (2013) Series C No 265, para 145.

open discussion, and statements that are in the public interest, such as political, contribute to the general welfare.[141] Religion is an integral part of society in the same way that politics are, and, therefore, promoting free discussion about religion is in the general welfare of society, entitling such discussion to heightened protection.[142]

Ensuring safety from threats can be a legitimate governmental interest, but should not come at the cost of discouraging the free exercise of fundamental rights. Protecting voters from intimidation and coercion is an important governmental objective, yet cannot come at the cost of impeding political debate,[143] which would discourage the exercise of legitimate rights.[144] In the same way, protecting members of religious groups is an important governmental objective, but cannot come at the cost of unduly impeding religious debate.[145] This, however, is the effect of the Charter. The Charter restricts the ability of some Lydinans to freely exercise their freedom of expression; therefore, it is likely that, upon enforcement of the Charter, others would be discouraged from exercising their legitimate rights, thereby impeding religious debate.

'[A] state may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions.'[146] Additionally, if restrictions on expression are implemented, the need for the restrictions must be convincing and strictly construed.[147]

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[141] *Virginia v Black* 538 US 343, 365 (2003).

[142] *Mémoli v Argentina* IACtHR (2013) Series C No 265, para 145.

[143] UNHRC 'General Comment 34' in 'Article 19: Freedoms of Opinion and Expression' (2011) UN Doc CCPR/C/GC/34, para 28.

[144] *Virginia v Black* 538 US 343, 365 (2003).

[145] UNHRC 'General Comment 34' in 'Article 19: Freedoms of Opinion and Expression' (2011) UN Doc CCPR/C/GC/34, para 28.

[146] *Cantwell v Connecticut* 310 US 296, 308 (1940).

[147] *Zana v Turkey* (1999) 27 EHRR 667, para 51.

Though restrictions that promote safety may be permissible,[148] the ultimate purpose of the Charter is not safety, but protection of the majority's feelings.[149] When the Charter was passed in 2008, there had been no violence inspired by social media; it was not until 2012, well after the Charter was passed, that Lydina first had safety concerns about social media speech.[150]

Additionally, the Charter prohibits speech that 'hurts religious feelings' and requires speech to preserve 'the Malani identity against negative influences of globalization'.[151] The Charter's provisions restrict all manifestations of religion that do not align with Parduist values;[152] such a broad categorical restriction places the rights of free expression and religious exercise in jeopardy for all religious remarks. These restrictions do not aim to preserve order or safety, but, instead, aim to guard the feelings of only a portion of society and keep Parduists from feeling any offence. Therefore, the Charter fails to appropriately serve any governmental interest in safety and contravenes the government's interest in promoting the general welfare of society.

B. The Charter's restrictions on all online statements opposed to Malani culture are unnecessary to further Lydina's asserted governmental interests.

All restrictions on expression must be both necessary to achieve legitimate governmental goals and proportionate to those goals,[153] only minimally interfering with expression and

[148] *Singh Bhinder v Canada* Communication No 208/1986 UN Doc CCPR/C/37/D/208/1986 (1989), para 6.2.

[149] Compromis, para 15.

[150] ibid; Clarifications, para 12.

[151] Compromis, para 15.

[152] ibid.

[153] UNHRC 'General Comment 34' in 'Article 19: Freedoms of Opinion and Expression' (2011) UN Doc CCPR/C/GC/34, para 22. See also *Gauthier v Canada* Communication No 633/1995 UN Doc CCPR/C/65/D/633/1995 (1999), para 13.6; *Constitutional Rights Project v Nigeria* (2000) AHRLR 227 (ACHPR 1999), para 42.

restricting it no further than absolutely necessary.[154] To be necessary, a restriction must address a pressing social need,[155] be narrowly written,[156] be non-discriminatory,[157] and be supported by adequate justification.[158] 'The purpose of any restriction on freedom of expression must be to protect individuals holding specific beliefs or opinions, rather than to protect belief systems from criticism.'[159] Therefore, 'it must be possible to criticize religious ideas, even if such criticism may be perceived by some as hurting their religious feelings'.[160]Additionally, restrictions are unnecessary when they ban expressions that do not 'harm the rights or reputation of others … [or] contain calls to disrupt public order'.[161]

The Charter restricts the expression of potentially any religious information contradictory to Parduistic values. The Charter's restrictions are unnecessary and disproportionate to Lydina's alleged interests for three reasons: (1) the restrictions are overbroad; (2) the restrictions are not narrowly written to further governmental interests; and (3) the restrictions excessively discriminate against all other religions by giving Parduism a protected status.

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[154] *Herrera Ulloa v Costa Rica* IACtHR (2004) Series C No 107, para 123; UNHRC 'General Comment 34' in 'Article 19: Freedoms of Opinion and Expression' (2011) UN Doc CCPR/C/GC/34, para 22.

[155] *The Sunday Times v United Kingdom* (1979) 2 EHRR 245, para 59; *Zana v Turkey* (1999) 27 EHRR 667, para 51.

[156] *Silver v United Kingdom* (1983) 63 EHRR 347, paras 84, 97.

[157] UNHRC 'General Comment 34' in 'Article 19: Freedoms of Opinion and Expression' (2011) UN Doc CCPR/C/GC/34, para 26.

[158] *The Sunday Times v United Kingdom* (1979) 2 EHHR 245, para 61.

[159] European Commission for Democracy Through Law (Venice Commission), 'Report on the Relationship Between Freedom of Expression and Freedom of Religion: The Issue of Regulation and Prosecution of Blasphemy, Religious Insult and Incitement to Religious Hatred' CDL-AD (2008) 026, para 49.

[160] ibid, para 76.

[161] *Zalesskaya v Belarus* Communication No 1604/2007 UN Doc CCPR/C/101/D/1604/2007 (2011), para 10.5.

1. *The Charter's restrictions on potentially offensive religious expression are overbroad restrictions on speech.*

Overbroad restrictions on freedom of expression are invalid.[162] Each person has a right to hold and articulate opinions;[163] any overbroad restrictions on this fundamental right of expression should therefore be carefully scrutinised.[164] '[W]hen a State party imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself.'[165] The government's interest in public order must be balanced against the people's interest in preserving free expression.[166] For example, in *Joseph Burstyn Inc v Wilson*, the Supreme Court of the US held that a law restricting expression was invalid.[167] In that case, a statute prevented any religion from being treated with 'contempt, mockery, scorn and ridicule'.[168] The Court noted that when a broad approach is taken towards restricting freedom of expression, it is 'virtually impossible to avoid favoring one religion over another'.[169] Therefore, restrictions on expression must be limited and must not overreach or constitute an outright ban on otherwise protected expression.

[162] *Amnesty International v Sudan* (2000) AHRLR 297 (ACHPR 1999), para 80.

[163] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 19(1).

[164] *Amnesty International v Sudan* (2000) AHRLR 297 (ACHPR 1999), para 80.

[165] UNHRC 'General Comment 34' in 'Article 19: Freedoms of Opinion and Expression' (2011) UN Doc CCPR/C/GC/34, para 21.

[166] *Zana v Turkey* (1999) 27 EHRR 667, para 55.

[167] *Joseph Burstyn Inc v Wilson* 343 US 495, 506 (1952).

[168] ibid 504.

[169] ibid 504–05.

Notably, even though views may offend, shock, or disturb, they are still protected as free expression and may not be broadly and categorically restricted.[170] '[T]he government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.'[171] Although some expression restricted by the Charter may offend, shock, or disturb some Parduists, the interests of Parduists must be balanced against society's general interest in allowing the free flow of speech and not banning all potentially offensive speech.[172] For example, the Supreme Court of the US applied this balancing principle in *Snyder v Phelps* and held that expression could not be restricted when picketers at a soldier's funeral held highly offensive signs attacking the Catholic Church.[173] In that case, even though the speech concerned a sensitive topic, restrictions would have proscribed permissible speech; therefore, restrictions were invalid.[174] For similar reasons, the ECHR held that a government could not ban all speech claiming that Catholic ideologies led to the Holocaust.[175]

In this case, the Charter forbids speech 'insulting God, revealed religions, religious symbols, Holy Scriptures, and holy figures' and prohibits 'speech or conduct that deliberately hurts religious feelings'.[176] This broad ban on all potential insults directed towards monotheistic religions violates the principle that offensive, shocking, and disturbing speech is nonetheless

[170] *Handyside v United Kingdom* (1976) 1 EHRR 737, para 49. See also *Freedom and Democratic Party (ÖZDEP) v Turkey* (2000) 31 EHRR 27, para 37; *Refah Partisi v Turkey* (2003) 37 EHRR 1, para 89; *Giniewski v France* (2006) 45 EHRR 23, para 43.

[171] *Texas v Johnson* 491 US 397, 414 (1989).

[172] *Zana v Turkey* (1999) 27 EHRR 667, para 55.

[173] *Snyder v Phelps* 131 S Ct 1207, 1213, 1219 (2011).

[174] ibid.

[175] *Giniewski v France* (2006) 45 EHRR 23, paras 27, 59.

[176] Compromis, para 15.

protected; the mere fact that a statement may be insulting is not sufficient justification to forbid the expression.[177] Thus, the Charter is overbroad and has the effect of discouraging speech that is otherwise protected while offering no justification as to why such broad application is necessary. Therefore, because the Charter broadly and categorically forbids potentially insulting speech, which is otherwise protected under international norms, the Charter is overbroad.

2. *The Charter's ban on controversial religious speech fails to use the least restrictive means of achieving legitimate state interests.*

States may not ban or limit the right to 'preach or to disseminate religious views'.[178] If a limit on expression can be written less restrictively, it is not sufficiently narrow.[179] 'Laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not.'[180] Here, the Charter is not narrow because it could have been written utilising more specific terms to avoid ambiguities and overbroad application. For example, it could have described incendiary or provocative language using clearer definitions and tighter parameters, or given specific examples of what constitutes a violation of Malani culture. As written, however, there is no guidance within the Charter explaining what expressions are restricted.[181] Further, restrictions are not narrowly tailored when

[177] *Handyside v United Kingdom* (1976) 1 EHRR 737, para 49. See also *Freedom and Democratic Party (ÖZDEP) v Turkey* (2000) 31 EHRR 27, para 37; *Refah Partisi v Turkey* (2003) 37 EHRR 1, para 89; *Giniewski v France* (2006) 45 EHRR 23, para 52.

[178] *Cantwell v Connecticut* 310 US 296, 304 (1940).

[179] *Ballantyne v Canada* Communication No 359/1989 UN Doc CCPR/C/47/D/359/1989 (1993), para 11.4.

[180] UNHRC 'General Comment 34' in 'Article 19: Freedoms of Opinion and Expression' (2011) UN Doc CCPR/C/GC/34, para 25.

[181] Compromis, para 15.

they prohibit speakers from expressing opinions about historical facts.[182] In this case, Kutik's statements about the historical plague in Zofftor 3:130 were his opinions about historical facts.[183] The Charter restricted the expression of these opinions. Therefore, because the Charter was written in ambiguous terms, lending itself to overbroad application and prohibiting traditionally protected speech about opinions on historical facts, the Charter is not narrowly written and is invalid.

Additionally, the Charter, as enforced by the CIA, is not narrowly written because it holds ISPs liable for expression posted and shared by others. Under the Charter and the CIA, ISPs are liable for speech spread on the internet through merely providing internet use or access to a speaker.[184] Thus, the Charter and the CIA target online speech by forcing ISPs to censor their content, though the Charter does not require offline speech to do the same.[185] However, all fundamental rights that people have offline, especially freedom of expression, should be equally protected online.[186] Because the internet creates and drives social progress and development,[187] it is essential to the development of society for people to continue to express themselves freely[188] while using the internet and technology. Free expression 'includes and cannot be separated from

[182] UNHRC 'General Comment 34' in 'Article 19: Freedoms of Opinion and Expression' (2011) UN Doc CCPR/C/GC/34, para 49.

[183] Compromis, para 9.

[184] Clarifications, para 9.

[185] Compromis, paras 15, 17.

[186] UNHRC Res 20/8 (2012) A/HRC/20/2, para 1; UNHRC 'General Comment 34' in 'Article 19: Freedoms of Opinion and Expression' (2011) UN Doc CCPR/C/GC/34, para 12.

[187] UNHRC Res 20/8 (2012) A/HRC/20/2, para 2.

[188] UNHRC 'General Comment 34' in 'Article 19: Freedoms of Opinion and Expression' (2011) UN Doc CCPR/C/GC/34, para 2.

the right to use whatever medium is deemed appropriate to impart ideas and to have them reach as wide an audience as possible'.[189]

The Charter and the CIA fail to afford the same protection for online expression as is provided for expression in a traditional public forum. Companies that provide internet access to users who disseminate expressions without articulating the expressions themselves should be protected against governmental restrictions and liability.[190] Because Kutik posted his video on DigiTube's website, DigiTube merely facilitated the distribution of Kutik's sermon by allowing him to access and use their website. DigiTube did not plan, create, film, or post the video, and the record does not indicate that it accurately reflects DigiTube's views, or that DigiTube even was aware of the views expressed in Kutik's video. However, under the Charter and the CIA's ISP liability provisions, any organization that provides a speaker access to the internet may be liable for any of the speaker's remarks.[191] This broadly empowers the Lydinan government through the Charter to hold any organization connected to and facilitating internet communication liable for any internet speech. This application is significantly overbroad; therefore, the Charter and the CIA are invalid as they are not narrowly written. Generally, if any portion of a charter is not narrowly tailored, then the entire charter is invalid.[192] Accordingly, here, the entire Charter is invalid.

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[189] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts 13 and 29 of the American Convention on Human Rights), Advisory Opinion OC-5/85, IACtHR Series A No 5 (13 November 1985), para 31.

[190] *Jersild v Denmark* (1995) 19 EHRR 1, para 31.

[191] Clarifications, paras 9–10.

[192] Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331 art 44.

3. *Lydina discriminated against minority religions by giving Parduists protected status and deferring to the Grand Parder in judicial decisions*.

Restrictions on freedom of expression are unnecessary when they are discriminatory.[193] For restrictions to be non-discriminatory, they must be content neutral[194] and must equally protect minorities' religious beliefs and practises.[195] If a state gives preference to one group, the preference must be justified by reasonable and objective criteria.[196] Preference based on religion alone is subjective and invalid; as the UNHRC noted, it is inappropriate 'to discriminate in favour of or against one or certain religions or belief systems … [or] to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith'.[197]

For example, in *Waldman v Canada*, the UNHRC held that Canada's preferential treatment of the Catholic Church was discriminatory.[198] In that case, the only private schools that Canada funded were Catholic schools.[199] The Court invalidated this preferential treatment because it was not based on reasonable and objective criteria.[200] Similarly, in *Joseph v Sri Lanka*, the UNHRC held that deferential treatment of Buddhism was discrimination.[201] In that case, the

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[193] UNHRC 'General Comment 34' in 'Article 19: Freedoms of Opinion and Expression' (2011) UN Doc CCPR/C/GC/34, para 26.

[194] *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council Inc* 425 US 748, 771 (1976).

[195] *Centre for Minority Rights Development v Kenya* (2010) AHRLR 75 (ACHPR 2009), para 241.

[196] *Joseph v Sri Lanka* Communication No 1249/2004 UN Doc CCPR/C/85/D/1249/2004 (2005), para 7.4. See also *Waldman v Canada* Communication No 694/1996 UN Doc CCPR/C/67/D/694/1996 (1999), para 10.6.

[197] UNHRC 'General Comment 34' in 'Article 19: Freedoms of Opinion and Expression' (2011) UN Doc CCPR/C/GC/34, para 48.

[198] *Waldman v Canada* Communication No 694/1996 UN Doc CCPR/C/67/D/694/1996 (1999), paras 10.2, 10.6.

[199] ibid, paras 2.2–2.3.

[200] ibid, para 10.6.

[201] *Joseph v Sri Lanka* Communication No 1249/2004 UN Doc CCPR/C/85/D/1249/2004 (2005), para 7.4.

Sri Lankan Constitution 'gave Buddhism the foremost place' and made it Sri Lanka's duty to foster Buddhism.[202] The government then denied a Catholic order the right to incorporate while allowing twenty-eight other religious groups, most of which were Buddhist, to incorporate.[203] The UNHRC held that no reasonable and objective criteria justified this preferential treatment.[204]

In this case, the Lydinan Constitution states that 'all Lydinans believe in One God',[205] and the Charter requires that all media refrain from 'insulting God';[206] these sentiments are monotheistic beliefs that are not part of Saduja.[207] Further, by paying a portion of the Grand Parder's salary and regarding him as a government actor,[208] Lydina gives preference to Parduism while failing to provide any reasonable and objective criteria justifying this preference. The President permitted the Grand Parder to resolve the religious aspects of a conflict about proper application and enforcement of the Charter, which resulted in the Grand Parder bringing suit on behalf of the government.[209] The Charter is written to prevent insult to only monotheistic religions and is enforced through deference to the determinations of Parduist religious leaders;[210] as such, it discriminates in both purpose and effect against religious minorities. Therefore, the

[202] ibid, para 2.3.

[203] ibid, paras 2.1, 3.1.

[204] ibid, para 7.4.

[205] Compromis, para 6.

[206] ibid, para 15.

[207] ibid, para 6.

[208] ibid, para 13; Clarifications, para 3.

[209] Compromis, para 19.

[210] ibid, para 21.

Charter is invalid because it fails to promote a legitimate governmental interest and unnecessarily restricts free expression.

PRAYER

For the foregoing reasons, Deri Kutik and DigiTube respectfully request this Honourable Court to adjudge and declare the following:

1. Kutik's remarks, published and disseminated by DigiTube, complied with Article 1(b) of the Charter by presenting minority beliefs without offending Malani religious and cultural values.

2. Kutik's remarks, published and disseminated by DigiTube, complied with Article 2(a) of the Charter because Kutik's opinions were not incitement, did not advocate for violence, and contributed to public debate.

3. Kutik's remarks, published and disseminated by DigiTube, complied with Article 2(b) of the Charter because they did not deliberately provoke violence inspired by Malani cultural solidarity.

4. The Charter is invalid under the ICCPR because it fails to serve a legitimate governmental interest and promotes Parduism at the expense of other cultures and religions.

Respectfully submitted this fourteenth day of December,

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Counsel for the Applicants