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Deri Kutik et al. v. Republic of Lydina
Memorial for Kutik and Centiplex

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LIST OF ABBREVIATIONS

ACHR	American Convention on Human Rights
AfCHR	African Charter on Human and Peoples' Rights
CIA	Content Integrity Act
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EP	Equal Protection
FOE	Freedom of Expression
FOR	Freedom of Religion
GP	Grand Parder
ICCPR	International Covenant on Civil and Political Rights
ISP	Internet Service Provider
Rapporteur	United Nations Special Rapporteur on freedom of religion or belief
SMS	Social Media Speech Charter
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGA	United Nations General Assembly
UNHRC	United Nations Human Rights Committee
VCLT	Vienna Convention on the Law of Treaties

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STATEMENT OF RELEVANT FACTS

The Republic of Lydina (“Lydina”) is a coastal republic “located in a region where the ethnicity of most of the population is Malani.”¹ In Lydina and neighboring Malani countries,² there is a “deep religious divide in [the] population: 75% of the population adheres to the religion called Parduism and 20% of the population adheres to the religion called Saduja.”³ While Sadujists have been in Lydina for over three hundred years, beginning in the colonial period, Sadujists “ultimately trace their roots to sub-Saharan Africa, the birthplace of Saduja.”⁴ Nonetheless, “[a] small but significant percentage of Sadujists are ethnic Malanis.”⁵ The remaining 5% of the Lydinan population consists of Hindus, Muslims and Christians.⁶

In Lydina, violent clashes leading to “riots and disruptions in the country” have frequently broken out between the Parduist and Sadujist populations.⁷ These clashes may in part be attributed to the fundamental differences between Parduism, a monotheistic religion, and Saduja, “best described as a diverse set of intellectual and moral beliefs without strict religious laws or a central scripture.”⁸ With increasing access to the Internet and social media use in Lydina, “[t]he religious violence has increased markedly between the adherents of the two

¹ *Compromis*, para 5

² *Compromis*, para 5

³ *Compromis*, para 2

⁴ *Compromis*, para 7

⁵ *Compromis*, para 7

⁶ *Compromis*, para 2

⁷ *Compromis*, para 3

⁸ *Compromis*, para 3

religions....”⁹ This increase in violence can be attributed in part to the ability of religious extremists to take to the Internet and social media to attack believers of other religions.¹⁰ For example, Parduists have, “[o]n numerous occasions,... posted memes on Facebook caricaturing the founder of Saduja, Saminder.”¹¹ One such meme, which triggered a social media uproar as well as “at least one confirmed arson attempt on the home of a Parduist who had posted the meme on his Facebook page,”¹² “depicted Saminder as a mime with the words, ‘No one takes Saminder seriously except Sadujists. Sadujists take him seriously, and they’re a joke.’”¹³ Notwithstanding the violent reaction to the anti-Saduja meme, no litigation resulted from the Parduist attack on Sadujists.¹⁴

Parduism exerts a strong influence on the Lydinan government: “[t]he Lydinan Constitution, while not mentioning Parduism by name, states that all Lydinans believe in One God . . . a critical distinction between Parduism and Saduja.”¹⁵ Thus, Parduism represents a “strong cultural bond for Lydinan Malanis.”¹⁶ The cultural influence of Parduism on Malani countries is profound: Parduist influences can be found “in diet, music, dress, and social values.”¹⁷

⁹ *Compromis*, para 4

¹⁰ *Compromis*, para 4

¹¹ *Compromis*, para 5

¹² *Compromis*, para 4

¹³ *Compromis*, para 4

¹⁴ *Compromis*, para 4

¹⁵ *Compromis*, para 6

¹⁶ *Compromis*, para 6

¹⁷ *Compromis*, para 5

Deri Kutik is a young Sadujist man living in Lydina.¹⁸ Wanting to promote the values of Saduja, Kutik uploaded a video to DigiTube.com, a video-sharing website, on January 17, 2014.¹⁹ In Kutik’s video, Kutik preached various values of Saduja, “including the Saduja teaching that every human being is part divine.”²⁰ Kutik also “assert[ed] that Saduja is superior to Parduism because [Saduja] integrates reasoning and morality into its set of values and belief system—unlike Parduism, which Kutik says relies only on its scripture and stresses ‘blind belief’ in everything stated in the scripture.”²¹ Kutik also asserted that Verse 3:130 of the Zofftor, the Parduist scripture, was false because scientific evidence showed that there was no plague at the time described by the verse.²² At least one group of Parduists known as the “New Parduists” expressed agreement with Kutik’s claims that no plague actually occurred as suggested by Verse 3:130, explaining that Verse 3:130 refers to a “spiritual plague.”²³

Kutik’s video “went viral and was circulated all over Lydina.”²⁴ Parduists began to riot because they felt that Kutik had insulted Parduism.²⁵ Parduists engaged in violent attacks against Sadujist individuals and sites, causing some Sadujists to retaliate.²⁶ The Lydinan President was

¹⁸ *Compromis*, para 8

¹⁹ *Compromis*, para 8

²⁰ *Compromis*, para 8

²¹ *Compromis*, para 8

²² *Compromis*, para 9

²³ *Compromis*, para 14

²⁴ *Compromis*, para 11

²⁵ *Compromis*, paras 9, 11

²⁶ *Compromis*, paras 11, 12

“deeply concerned” about the protests and whether Kutik had violated certain provisions of the SMS Charter in the DigiTube video.²⁷

In 2008, Lydina had entered into a “regional charter called the Social Media Speech (SMS) Charter [requiring] signatory countries to establish rules to promote Malani culture while also encouraging the use and development of modern technology.”²⁸ Pursuant to Lydina’s obligations under the SMS Charter, Lydina enacted the Content Integrity Act (“CIA”) in 2009, which states “Internet service providers are not responsible for the content of any posts, blogs, or videos on its website so long as they do not broadcast illegal conduct,”²⁹ which is defined as “conduct that violates any Lydinan, regional, or international law.”³⁰

Because of the religious claims made by Kutik in the DigiTube video, the Lydinan President expressed confidence that the Grand Parder, Parduism’s highest religious leader who is employed by the Lydinan government,³¹ would “take appropriate steps to resolve the conflict” resulting from the DigiTube video.³²

The Grand Parder brought claims against Kutik and DigiTube in the Lydinan courts, asserting that both Kutik and DigiTube had “violated Article 1 and 2 of the SMS Charter.”³³ The

²⁷ Compromis, para 19

²⁸ Compromis, para 15

²⁹ Compromis, para 17

³⁰ Compromis, para 17

³¹ Compromis, para 13

³² Compromis, para 19

³³ Compromis, para 20

Grand Parder prevailed because the court gave special deference to the Grand Parder’s claims.³⁴ Kutik and DigiTube appealed to the Lydina Supreme Court, who “dismissed all the appeals.”³⁵ Following exhaustion of all domestic remedies, Kutik and DigiTube commenced this proceeding requesting reversal of the Lydinan court’s decision holding Kutik and DigiTube liable under the SMS Charter.³⁶

Lydina is a signatory to the International Covenant on Civil and Political Rights (“ICCPR”).³⁷ At the time Lydina ratified the ICCPR, it entered a “reservation to Articles 18-20 of the ICCPR that ‘Proselytism and other acts that may lead to division between religions are not protected by the Covenant.’”³⁸ Five other signatories to the ICCPR objected to Lydina’s reservation because 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.”³⁹

³⁴ Compromis, para 21

³⁵ Compromis, para 22

³⁶ Compromis, para 22

³⁷ Compromis, para 18

³⁸ Compromis, para 18

³⁹ Compromis, para 18

STATEMENT OF JURISDICTION

The Universal Court of Human Rights has jurisdiction to hear cases arising under the International Covenant on Civil and Political Rights (“ICCPR”), and the citizens of Lydina enjoy the rights guaranteed by the ICCPR.⁴⁰ The parties have submitted their differences under Articles 18, 19, 20, 26, and 27 of the ICCPR to the Universal Freedom of Expression Court.⁴¹ No law, domestic or international, restricts Applicants’ standing to bring these challenges.⁴² The domestic courts of Lydina have decided Applicants’ claims, on the merits, in favor of the Government of Lydina.⁴³ All legal remedies within the Lydinan legal system have been exhausted.⁴⁴ This Court has jurisdiction over Deri Kutik and Centiplex, as Applicants, and the Government of Lydina, as Respondent.⁴⁵

⁴⁰ Compromis, para 18.

⁴¹ Compromis, para 23.

⁴² Price Media Law Moot Court Competition Rules, 2014-2015, § 5.4.

⁴³ Compromis, para 21.

⁴⁴ Compromis, para 22.

⁴⁵ Price Media Law Moot Court Competition Rules, 2014-2015, § 5.4.

QUESTIONS PRESENTED

- I. Does the Lydinan Court's holding, prohibiting manifestations of religious beliefs that fail to comply with the majority religious values of Malani culture and society, violate international law?
- II. Does the Lydinan Court's holding, finding that Kutik engaged in hate speech, violate international law?
- III. Does the Lydinan Court's holding, finding that Kutik deliberately hurt religious feelings and the values of Malani culture and triggered violent protest inspired by Malani solidarity, violate international law?
- IV. Does the Lydinan Court's holding that the SMS Charter complies with the International Covenant on Civil and Political Rights violate international law?

SUMMARY OF ARGUMENT

I. Lydina's restriction of Kutik's freedom of religion pursuant to Article 1(b) of the SMS Charter violates ICCPR Article 18. Freedom of religion is universally recognized and religious pluralism is an essential component of a democratic society. In order to manifest one's religion, individuals have the right to bear witness to their faith. While states may impose some restrictions on religious manifestations, a restriction must be precise and necessary to protect a legitimate governmental aim, such as public order. The restriction should prevent imminent threats. Lydina's legislation does not meet this standard. The key terms of the restriction are imprecise and unnecessary because Kutik's video did not create an imminent threat to Lydina. Accordingly, this restriction is in violation of ICCPR Article 18.

II. Lydina's restriction of Kutik's freedom of expression pursuant to Article 2(a) of the SMS Charter violates ICCPR Article 19. The freedom of expression is universally recognized and is an essential component of a democratic society. It serves to foster dialogue and ease tensions that exist within a state. Lydina has a history of religious tension within its borders. While states may impose some restrictions on speech, the appropriate standard for restriction should include a narrow definition of hate speech. Furthermore, the restriction must be precise, serve a legitimate government interest, and be necessary and proportionate to achieving that interest. Lydina's legislation does not meet this standard. The key terms of the restriction are imprecise, the government's interest is discriminatory toward minority groups, and the effect of the restriction is overbroad because it chills all speech against the majority religious group in Lydina. Accordingly, this restriction is in violation of the ICCPR.

III. Lydina's restriction of Kutik's freedom of expression pursuant to Article 2(b) of the SMS Charter is not required under ICCPR Article 20(2) and violates ICCPR Article 19. Kutik's statements do not exhibit intent to incite discrimination, hostility or violence within the meaning

of ICCPR Article 20(2) because Kutik was preaching the values of reasoning and morality, core tenets of Sadjua. Intent to incite discrimination, hostility or violence are contrary to the tenets of Saduja and the Sadujist belief that all humans are part divine. Further, Lydina's restriction of Kutik's freedom of expression pursuant to Article 2(b) fails to comply with the requirements of ICCPR Article 19(3). Accordingly, this restriction is inconsistent with ICCPR Article 20(2).

IV. The SMS Charter is invalid under the ICCPR because it violates equal protection under the law guaranteed by ICCPR Article 26, the freedom of religion of religious minorities under ICCPR Article 27, and impermissibly imposes intermediary liability on Internet service providers in violation of international law. The SMS Charter provides Parduists with the exclusive right to speak on religious matters, thereby providing a benefit to Parduists that is denied to Lydina's minorities. The SMS Charter expresses a preference for Parduist beliefs such as the belief in "One God" that impermissibly restricts Lydina's minority religions' freedom of religion. The Content Integrity Act, implemented pursuant to Lydina's obligations under the SMS Charter, impermissibly restricts freedom of expression by imposing intermediary liability on Internet service providers. Accordingly, the SMS Charter is invalid under the ICCPR.

ARGUMENT

I. THE LYDINAN COURT’S HOLDING THAT KUTIK MANIFESTED RELIGIOUS BELIEFS THAT FAILED TO COMPLY WITH THE MAJORITY RELIGIOUS AND ETHICAL VALUES OF MALANI CULTURE VIOLATES INTERNATIONAL LAW

Article 18 of the International Covenant on Civil and Political Rights (“ICCPR”) provides every individual has the freedom of religion (“FOR”) and the right to manifest his or her religion in worship, observance, practice, and teaching.⁴⁶ Every individual requires other human rights, particularly the freedom of expression, to fully exercise his or her FOR.⁴⁷

The Lydinan Court’s holding that Kutik violated Article 1(b) of the Social Media Speech Charter (“SMS”) by manifesting religious speech that does not “comply” with Malani religious values impermissibly restricts Kutik’s FOR. Even if Kutik’s speech is not a religious manifestation under ICCPR Article 18(1), SMS Article 1(b) fails to comply with the requirements for restricting FOR under ICCPR Article 18(3).⁴⁸

⁴⁶ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (‘ICCPR’) art 18

⁴⁷ UNGA ‘Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir, and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudou Diène, further to Human Rights Council decision 1/107 on incitement to racial and religious hatred and the promotion of tolerance’ UN Doc A/HRC/2/3 (2006); Githu Muigai, Asma Jahangir & Frank La Rue ‘Freedom of Expression and Incitement to Racial or Religious Hatred’ Statement at OHCHR Side Event During the Durban Review Conference (Apr. 22, 2009), <<http://www2.ohchr.org/english/issues/opinion/docs/SRJointstatement22April09New.pdf>> accessed 28 November 2014

⁴⁸ ICCPR art 18

A. The Lydina Court’s holding under Article 1(b) of the SMS Charter impermissibly restricts Kutik’s freedom of religion

Article 18 protects individuals’ freedom of religion, not religions themselves.⁴⁹ Despite the need for democratic societies to “permit open debate” on religious matters,⁵⁰ Lydina has “structurally or indirectly”⁵¹ restricted Kutik’s FOR by holding he violated SMS Article 1(b).

1. *Lydina’s Article 1(b) holding impermissibly interferes with Kutik’s freedom to manifest his religion*

The need to secure religious pluralism is an inherent feature of democracy.⁵² A state’s legislative action can impermissibly prohibit pluralism.⁵³ Lydina seeks to promote Parduism over other religions by restricting proselytization, a means of manifesting religion.⁵⁴

In *Manoussakis and Others v. Greece*, the European Court of Human Rights (“ECtHR”) held Greece impermissibly restricted Jehovah’s Witnesses when the state prevented this minority religious group from operating a church without authorization.⁵⁵ There, the “local ecclesiastical

⁴⁹ UNGA ‘Report of the Special Rapporteur on freedom of religion or belief’ UN Doc A/HRC/25/58 (2013); UNGA ‘Report of the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred’ U.N. Doc. A/HRC/22/17/Add.4 (2013); 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’ <[http://www.venice.coe.int/webforms/documents/default.aspx?pdf=CDL-AD\(2008\)026-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdf=CDL-AD(2008)026-e)> accessed 28 November 2014

⁵⁰ Parliamentary Assembly of the Council of Europe, Recommendation 1805 (2007), Blasphemy, religious insults and hate speech against persons on grounds of their religion” (29 June 2007) <<http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta07/erec1805.htm>> accessed 28 November 2014

⁵¹ UNGA ‘Report of the special Rapporteur on freedom of religion or belief’ UN Doc A/HRC/22/51 (2012)

⁵² App no 18748/91 (ECtHR, 26 September 1996) [44]

⁵³ *ibid* [53]

⁵⁴ *Krupko and others v Russia*, App no 26587/07 (ECtHR, 26 June 2014) [47], [11] (De Albuquerque); *Metropolitan Church of Bessarabia and Others v Moldova*, App no 45701/99 (ECtHR, 13 December 2001) [114]; *Kokkinakis v Greece*, App no 14307/88 (ECtHR, 25 May 1993) [31]

⁵⁵ *Manoussakis* (n 52); *Kokkinakis* (n 54) [12], [43]

authority” had a “consultative role” in granting authorization.⁵⁶ The ECtHR determined that because “administrative and ecclesiastical authorities” used domestic legislation “to restrict activity of faiths” outside the majority Orthodox Church, the state violated the Jehovah’s Witnesses’ FOR.⁵⁷

In Lydina, administrative and ecclesiastical authorities have similarly used legislation to restrict the practice of minority religions.⁵⁸ When Kutik expressed his beliefs about Sadujism in the DigiTube video, the Lydinan government issued a press release that the President trusted the Grand Parder (“GP”), the state-employed, Parduist religious leader,⁵⁹ to “resolve the conflict” arising from Kutik’s alleged SMS violation.⁶⁰ The GP sued Kutik and prevailed after the Lydinan Court deferred to the GP’s claims.⁶¹ Lydina’s actions are impermissible because Kutik used his video to preach about Sadujist values of reasoning and morality.⁶² His expressions should not be restricted because they are protected manifestations.⁶³

Moreover, Lydina’s holding under Article 1(b) restricts Kutik’s ability to manifest his religion by implying that “Malani culture”⁶⁴ is synonymous with Parduism. Parduism has been Lydina’s majority religion for centuries and has pervasively influenced cultural “diet, music,

⁵⁶ *Manoussakis* (n 52); *Kokkinakis* (n 54) [47]-[48]

⁵⁷ *Compromis*, paras 19, 20, 21; *Manoussakis* (n 52); *Kokkinakis* (n 54) [47]-[48]

⁵⁸ *Manoussakis* (n 52); *Kokkinakis* (n 54) [48]

⁵⁹ *Compromis*, para 13

⁶⁰ *Compromis*, para 19

⁶¹ *Compromis*, paras 19, 20

⁶² *Compromis*, para 8.

⁶³ ICCPR art 18

⁶⁴ *Compromis*, para 15(b)

dress, and social values.”⁶⁵ Thus, where Article 1(b) requires compliance with Malani culture, expression against Parduism is noncompliant. Further, while the Lydinan constitution does not explicitly mention Parduism, it states all Lydinans believe in “One God...[,] a critical distinction between Parduism and Sajuda.”⁶⁶ Other articles of the SMS, such as Article 1(d) prohibiting insulting “God,”⁶⁷ show that Article 1(b) was intended to have this interpretation.

Article 1(b)’s language incorporating Parduism is comparable to impermissible regulations drafted in the Maldives.⁶⁸ The United Nations (“UN”) Special Rapporteur (“Rapporteur”) deemed these regulations⁶⁹ incompatible with ICCPR Articles 18 and 19⁷⁰ because the regulations intended to prohibit “inciting people to disputes” and “talking about religions other than Islam.”⁷¹ The Rapporteur determined the Maldives’ prohibitions could “seriously hamper the manifestation of [FOR]...and stifle related debate.”⁷² Article 1(b) renders anti-Parduistic expression incompatible with the SMS, thus hampering manifestations of, and public debate on, religion.

2. *Kutik’s expression complies with Article 1(b)*

In any event, Kutik’s conduct does not violate Article 1(b) because it does not conflict with Malani culture. When Kutik spoke, his expression complied with Article 1(b) because

⁶⁵ Compromis, paras 5, 6

⁶⁶ Compromis, para 6

⁶⁷ Compromis, para 15(d)

⁶⁸ UNHRC, ‘Report of the Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt’ (2011) UN Doc, A/HRC/16/53/Add.1 [227]

⁶⁹ *ibid.*

⁷⁰ *ibid* [236–244]

⁷¹ *ibid* [241]

⁷² *ibid*

speech about Saduja relates to Malani culture. Despite Parduism’s pervasive influence in Lydina,⁷³ 20% of Lydinans practice Saduja.⁷⁴ Saduja has been practiced in Lydina for over 300 years⁷⁵ and a “significant percentage of Sadujists are ethnic Malanis.”⁷⁶ As such, their religious manifestations comply with the values of Malani culture. Accordingly, the Lydinan Court’s Article 1(b) holding impermissibly restricts Kutik’s religious manifestation.

B. Article 1(b) is invalid under ICCPR Article 18(3)

Any attempt by Lydina to restrict Kutik’s FOR must comply with Article 18(3)’s three-prong test providing that “freedom to manifest one’s religion”⁷⁷ may only be limited by restrictions that are: (1) prescribed by law and (2) necessary (3) to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.⁷⁸ Although “silent on the effect of reservations,” the ICCPR follows the general international rule “expressed in the Vienna Convention on the Law of Treaties” (“VCLT”), that a reservation will stand if it is consistent “with the object and purpose of the” ICCPR.⁷⁹ If the reservation is incompatible, it is severable and the reserving party is bound “without benefiting from its reservation.”⁸⁰

⁷³ See memorial Part (I)(A)(1)

⁷⁴ Compromis, para 2

⁷⁵ Compromis, para 7

⁷⁶ Compromis, para 7

⁷⁷ ICCPR art 18

⁷⁸ *ibid*

⁷⁹ UN Fact Sheet No. 15 (rev. 1), *Civil and Political Rights: The Human Rights Committee* 8

⁸⁰ UNHRC General Comment 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’ (1994) UN doc. HRI/GEN/1/Rev.7 [36]; *Belilos v Switzerland*, App no 10328/83 (ECtHR, 29 April 1988)

1. *Lydina's Article 18-20 reservation is invalid*

When Lydina ratified the ICCPR, it submitted a reservation to Articles 18-20, stating: “[p]roselytism and other acts that may lead to division between religions are not protected by the Covenant.”⁸¹ Proselytization is an integral means to manifest religious beliefs.⁸² Lydina’s reservation is inconsistent with Article 18’s object and purpose and therefore invalid. Thus, Lydina is bound to the ICCPR.⁸³

2. *Lydina's Article 1(b) holding fails the Article 18(3) test*

A state’s restriction on FOR is prescribed by law within the meaning of Article 18(3) if it is “formulated with sufficient precision to enable” individuals to either anticipate consequences of noncompliance or regulate his or her conduct accordingly.⁸⁴ “[V]ague [regulatory] terms such as ‘religious unity’ or ‘disagreement’” are prone to interpretive abuse, to the detriment of religious minorities.⁸⁵ A law cannot grant those who administer it “unfettered discretion” to restrict expression⁸⁶ or determine right and wrong based on majority beliefs.⁸⁷

⁸¹ Compromis, para18

⁸² *Krupko* (n 54); *Metropolitan* (n 54); *Kokkinakis* (n 54); Peter G. Danchin, ‘Of Prophets and Proselytes: Freedom of Religion and the Conflict of Rights in International Law’ (2008) 49 Harv. Int’l L. J. 249, 257.

⁸³ UNHRC General Comment (n 80) [36]; *Belilos* (n 80); UN Fact Sheet No. 15 (n 79)

⁸⁴ *Krupko* (n 54) [53]; *Bayatyan v Armenia*, App no 23459/03 (ECtHR, 7 July 2011) [113]; UNHRC General Comment No 34, ‘Article 19: Freedoms of opinion and expression’ (2011) UN Doc CCPR/C/GC/34 [25]; *de Groot v The Netherlands*, Comm No 578/1994 (HRC UN Doc CCPR/C/54/D/578/1994, 14 July 1995); *Tae Hoon Park v Republic of Korea*, Comm No 628/1995 (HRC, UN Doc CCPR/C/64/D/628/1995, 3 November 1998); *Hashman and Harrup v United Kingdom*, App no 25594/94 (ECtHR, 25 November 1999) [35]

⁸⁵ Report of the Special Rapporteur (n 68)

⁸⁶ UNHRC CCPR/C/GC/34 (n 84); UN Doc A/HRC/22/17/Add.4 (n 49) [21]; *The Camden Principles on Freedom of Expression and Equality* (April 2009) [12.1] <www.article19.org/data/files/pdfs/standards/the-camdenprinciples-on-freedom-of-expression-and-equality.pdf> accessed 28 November 2014

⁸⁷ *Hashman and Harrup* (n 84)

a. Article 1(b) is too imprecise to be prescribed by law

Article 1(b) is not prescribed by law because it is imprecise.⁸⁸ Article 1(b) uses language such as: “*complies with the religious and ethical values of Malani culture and society.*”⁸⁹ These terms are not defined, so Lydinans do not know how to comply with the SMS. Given Pardusim’s pervasive influence on Malani culture,⁹⁰ the inclusion of vague terms grants Lydinan authorities unfettered discretion to discriminate against minority religious expressions.

b. Article 1(b) promotes an illegitimate aim

Where a state restricts FOR, the state must specify “the precise nature of the threat” prompting the restriction.⁹¹ Tension alone is not enough for a state to limit religious freedom; restrictions must be limited to narrow conduct that is immediately problematic.⁹² States must ensure restrictive measures do not chill “people’s willingness to communicate freely and frankly”⁹³ on “controversial religious issues.”⁹⁴ Expression of religious manifestations can foster dialogue between adversaries and may ultimately reduce tensions.⁹⁵

⁸⁸ *Krupko* (n 54); *Bayatyan* (n 84); UNHRC CCPR/C/GC/34 (n 84); *de Groot* [n 84]; *Tae Hoon Park* (n 84); *Hashman* (n 84)

⁸⁹ *Compromis*, para 15(b) (emphasis added)

⁹⁰ See memorial Part (I)(A)(1)

⁹¹ UNHRC CCPR/C/GC/34 (n 84) [36]

⁹² *Serif v Greece* App. no. 38178/97 (ECtHR, 14 December 1999) [53]; *Agga v Greece* App no 50776/99 and 52912/99 (ECtHR, 17 October 2002) [60]; *Vona v Hungary*, App no 35943/10 (ECtHR, 9 July 2013) [63]

⁹³ UN Doc A/HRC/25/58 (n 49) [54]; *Velichkin v Belarus*, Comm no 1022/2001 (UNHRC CCPR/C/85/D/1022/2001, 3 November 2005)

⁹⁴ UN Doc A/HRC/25/58 (n 49); *Velichkin* (n 93)

⁹⁵ UNGA Press Release ‘Adopting Consensus Resolution, General Assembly Affirms Mutual Understanding, Interreligious Dialogue As Important Dimensions Of Culture Of Peace’ (13 November 2008) <<http://www.un.org/press/en/2008/ga10784.doc.htm>> accessed 28 November 2014; *Serif* (n 92); *Agga* (n 92) [60]; *Vona* (n 92)

Although there have been instances of religious violence in Lydina,⁹⁶ the government used public safety concerns⁹⁷ as a pretext. As applied, Article 1(b) has exacerbated tensions in Lydina⁹⁸ because it advances the discriminatory purpose of restricting minority religious manifestation.⁹⁹ Parduists “have posted memes on Facebook caricaturing the founder of Saduja” and calling his followers a joke.¹⁰⁰ “Despite the unrest” arising from those memes, they “never led to any litigation.”¹⁰¹ If Article 1(b) actually aimed to protect public safety, Lydina would have prosecuted the creators of these “anti-Saduja memes.”¹⁰²

c. Article 1(b) is not necessary or proportional because it is overbroad

While a state may restrict FOR to protect others’ religious rights and public order,¹⁰³ any interference with FOR must be necessary and proportional to the harm sought to be addressed.¹⁰⁴ Lydina’s restriction is unnecessary because religious manifestation like Kutik’s video about Saduja do not prevent Parduists from exercising their own FOR.¹⁰⁵ As the majority religious

⁹⁶ Compromis, para 3

⁹⁷ Compromis, para 15.

⁹⁸ Compromis, paras 4, 11.

⁹⁹ See memorial Part (I)(A)(1)

¹⁰⁰ Compromis, para 4

¹⁰¹ Compromis, para 4

¹⁰² Compromis, para 4

¹⁰³ ICCPR art 18

¹⁰⁴ *Lingens v Austria* App no 9815/82 (ECtHR, 8 July 1986) [39]; *Erbakan v Turkey* App no. 59405/00 (ECtHR, 6 July 2006) [68]; *Kokkinakis* (n 54); *I.A. v Turkey* App no 42571/98 (ECtHR, 13 December 2005); *D.H. and Others v the Czech Republic* App no 57325/00 (ECtHR, 13 November 2007) [175]; *Burden v the United Kingdom* App no 13378/05 (ECtHR, 29 April 2008) [60]

¹⁰⁵ *Dubowska and Skup v Poland* App No 33490/96 (ECtHR, 18 April 1997)

group in Lydina, their societal influence¹⁰⁶ remains unhindered.¹⁰⁷ Rather, Article 1(b) discourages non-Parduistic speech by prohibiting differences of religious opinion.

Lydina's restriction is not proportional because the SMS requires all media to comply with "Malani" religious values, "Malani" being synonymous with Parduism.¹⁰⁸ Article 1(b)'s overbroad application does not protect public order; by restricting minority expression it instigates violence.¹⁰⁹ Additionally, important aspects of Sadujist values conflict with Parduist values.¹¹⁰ Even if Kutik never mentioned Parduism, but merely professed the Sadujist belief that "every human is part divine,"¹¹¹ which conflicts with Parduism's belief in "One God",¹¹² Kutik's statements would still violate the SMS.

II. THE LYDINA COURT'S HOLDING THAT KUTIK VIOLATED SMS ARTICLE 2(a) BY ENGAGING IN "HATE SPEECH" VIOLATES INTERNATIONAL LAW

Like FOR, freedom of expression ("FOE"), enumerated in Article 19 of the ICCPR, is a universal human right.¹¹³ It is a foundational principle for progress and development because it

¹⁰⁶ Compromis, para 5

¹⁰⁷ Wibke Timmermann, 'Counteracting Hate Speech as a Way of Preventing Genocidal Violence' (2014) 3 *Genocide studies and Prevention: An International Journal* 353

¹⁰⁸ Compromis, para 15

¹⁰⁹ Compromis, paras 4, 11

¹¹⁰ Compromis, para 10

¹¹¹ Compromis, para 10

¹¹² Compromis, para 6

¹¹³ UDHR art 19; ICCPR art 19; ECHR art 10; ACHR art 13; AfCHPR art 9; Githu Muigai, 'Freedom of Expression and Incitement to Racial or Religious Hatred' (n 47)

protects both accepted speech and ideas “that offend, shock or disturb the [s]tate...or sector of the population.”¹¹⁴

A. The Lydinan Court’s holding, under Article 2(a) of the SMS Charter, incorrectly categorizes Kutik’s expression as hate speech

Freedom of expression includes the right to engage in religious discourse,¹¹⁵ off and online.¹¹⁶ States should encourage a “free, uncensored and unhindered” media¹¹⁷ to protect the right to receive a wide range of information and ideas for all media users, especially members of ethnic and linguistic minorities.

1. Kutik’s expression was not hate speech

Hate speech is not universally defined.¹¹⁸ Hatred and hostility generally refer to “intense and irrational emotions of opprobrium, enmity and detestation towards the target group.”¹¹⁹ Notably, “[h]ate speech denies the members of the victimized group the right to participate as members of equal worth” in society.¹²⁰ States must adopt a narrow definition of hate speech that prohibits egregious expression, yet allows individuals to contribute potentially controversial

¹¹⁴ *Handyside v United Kingdom* App no 5493/72 (ECtHR, 7 December 1976); *De Haes and Gijssels v Belgium* App no 19983/92 (ECtHR, 24 February 1997) [46]

¹¹⁵ UNHRC CCPR/C/GC/34 (n 84) [11]

¹¹⁶ ICCPR art 19(2); ECHR art 10(1); ACHR art 13; ACHPR art 9; UNGA ‘The promotion, protection and enjoyment of human rights on the Internet’ U.N. Doc. A/HRC/20/L.13 (2012); UNHRC CCPR/C/GC/34 (n 84) [12]; Nicola Wenzel, ‘Opinion and Expression, Freedom of, International Protection’ *Max Planck Encyclopedia Of Public International Law* (Mepil, Rüdiger Wolfrum Ed., 2009) [14-15]; Peeter Malanczuk, ‘Information and Communication, Freedom of’ *Max Planck Encyclopedia Of Public International Law* (Heidelberg, Ed. 2011) [97]; *Fatullayev v Azerbaijan* App no 40984/07 (ECtHR, 22 April 2010) [95].

¹¹⁷ UNHRC CCPR/C/GC/34 (n 84) [13-14]; *Rafael Marques de Morais v Angola*, Comm No. 1128/2002 (HRC, UN Doc CCPR/C/83/D/1128/2002 18 April 2005), [6.8]

¹¹⁸ *Onder Bakircioglu*, ‘Freedom of Expression and Hate Speech’ 16 *Tulsa J. Comp. & Int’l L.* 1, 4 (2008); *Perincek v Switzerland* App No 27510/08 (ECtHR, 17 January 2013)

¹¹⁹ *Camden Principles* (n 86)

¹²⁰ *Wibke Timmermann*, ‘Counteracting Hate Speech as a Way of Preventing Genocidal Violence’ (n 107)

content as part of public debate. Such a definition can protect free expression, foster debate to reduce overall tensions, and promote cross-cultural understanding.¹²¹

Harsh speech is not necessarily hate speech.¹²² In *Dicle v. Turkey*, Dicle printed a newspaper article claiming Turkey was a hypocritical state, promoting peace on the international level while exterminating Kurds and denying freedom internally.¹²³ The ECtHR found that although some of the passages were “acerbic” and “paint[ed] an extremely negative picture of the Turkish State,”¹²⁴ they did not “encourage violence, armed resistance or insurrection” and thus did “not constitute hate speech.”¹²⁵

Further, FOE can protect controversial speech related to issues of public concern that impact on society as a whole.¹²⁶ In *Gunduz v. Turkey*, Gunduz was a self-proclaimed member of an Islamist sect who spoke critically about Turkish democracy and called for the introduction of Sharia law, on a live broadcast television program.¹²⁷ The ECtHR determined Gunduz’s remarks could not be regarded as “hate speech” based on religious intolerance¹²⁸ because Gunduz had

¹²¹ Onder Bakircioglu, ‘Freedom of Expression and Hate Speech’ (n 118); Githu Muigai, ‘Freedom of Expression and Incitement to Racial or Religious Hatred’ (n 47)

¹²² *Dicle v Turkey* App no 34685/97 (ECtHR, 10 November 2004) [17]; *Sürek v Turkey* (No. 1) App no 26682/95 (ECtHR, 8 July 1999) [62]; *Gerger v Turkey* App no 24919/94 (ECtHR, 8 July 1999) [50]

¹²³ *Dicle* (n 122) [6]

¹²⁴ *ibid* [17]

¹²⁵ *Dicle* (n 122) [17]; *Sürek* (n 122), *Gerger* (n 122)

¹²⁶ *Gundez v Turkey* App no 35071/97 (ECtHR, 4 December 2003) [46]; *Jersild v Denmark* App No 15890/89 (ECtHR, 22 August 1994); *Dicle* (n 122); *Axel Springer AG v Germany* App no 39954/08 (ECtHR, 7 February 2012) [90]; *von Hannover and von Hannover v Germany* App no 40660/08 (ECtHR, 7 February 2012) [117]-[118]; *Fressoz and Roire v France* App no 29183/95 (ECtHR, 21 January 1999) [50].

¹²⁷ *Gundez* (n 126) [10], [46]

¹²⁸ *ibid*

been actively participating in a public discussion concerning a problem of general interest¹²⁹ and his extremist views had already been discussed in the public arena.”¹³⁰

Similarly, Kutik is actively participating in a discussion of public concern¹³¹ because religion has been debated throughout the history of Lydina.¹³² Young Parduists with extremist leanings posted memes on Facebook caricaturing Saduja’s founder, Saminder,¹³³ and calling Sadujists who take him seriously a joke.¹³⁴ Kutik’s expression is comparable to that of the Young Parduists because they are both critical of a religion.¹³⁵ Furthermore, New Parduists agree with Kutik’s falsehood statement about 3:130,¹³⁶ and believe the scriptural “plague” should not be taken as historic fact, but as a spiritual characterization.¹³⁷ This alternative interpretation of 3:130,¹³⁸ while inconsistent with traditional Parduistic beliefs, was not considered hate speech.¹³⁹ Accordingly, Kutik did not express religious hate speech¹⁴⁰ through his contrary opinions, but rather contributed to Lydina’s religious debate.

¹²⁹ *Gunduz* (n 126); *MGN Limited v United Kingdom* App no 39401/04 (ECTHR, 19 January 2011) [147]; *Axel Springer* (n 126) [99]; *von Hannover and von Hannover* (n 92); *Fressoz and Roire* (n 126)

¹³⁰ *Gundez* (n 126) [51]

¹³¹ *Compromis*, paras 2, 3, 6, and 7

¹³² *Compromis*, paras 3, 4

¹³³ *Compromis*, para 4

¹³⁴ *ibid*

¹³⁵ *ibid*

¹³⁶ *Compromis*, paras 9, 14

¹³⁷ *ibid*

¹³⁸ *Compromis*, para 14

¹³⁹ *Compromis*, para 20

¹⁴⁰ *Compromis*, para 8

2. *Kutik's speech was proselytization*

Proselytization, or religious outreach,¹⁴¹ is a fundamental means of manifesting religion because “bearing witness in words and deeds is bound up with the existence of religious convictions.”¹⁴² A religious observer can assert the superiority of her religion as a legitimate part of a religion’s principles.¹⁴³ Although such a claim may be unsettling, the expression cannot be restricted just because it makes citizens uneasy or may be perceived as disrespectful.¹⁴⁴

In *Otto-Preminger-Institut v. Austria*, the ECtHR found that Austria’s seizure of Otto-Preminger-Institut’s film was not a violation of its FOE because, in such extreme cases where the film included “[sexually] provocative portrayals of objects of religious veneration,”¹⁴⁵ a depiction can inhibit believers of that religion from exercising their FOR because “such portrayals can be regarded as malicious violation of the spirit of tolerance.”¹⁴⁶ In *Giniewski v. France*, however, the ECtHR held France violated Giniewski’s FOE because his newspaper article was not a gratuitous attack on religion, but instead was a clash of ideas.¹⁴⁷ Giniewski argued the “Catholic Church [considers itself] the sole keeper of divine truth and assumes the

¹⁴¹ Peter G. Danchin ‘Of Prophets and Proselytes: Freedom of Religion and the Conflict of Rights in International Law’ (n 82)

¹⁴² *Krupko* (n 54); *Metropolitan* (n 54); *Kokkinakis* (n 54);

¹⁴³ Githu Muigai, Asma Jahangir & Frank La Rue ‘Freedom of Expression and Incitement to Racial or Religious Hatred’ (n 47)

¹⁴⁴ *Vona* (n 92) [63]; *Church of Scientology and 128 of its Members v Sweden* App no 8282/78 (ECtHR, 14 July 1980); UNGA ‘Incitement to racial and religious hatred and the promotion of tolerance: report of the High Commissioner for Human Rights’ UN Doc A/HRC/2/6 (2006) [45]

¹⁴⁵ *Otto-Preminger-Institut v Austria* App no 13470/87 (ECtHR, 20 September 1994 [47])

¹⁴⁶ *ibid*

¹⁴⁷ *Giniewski v France* App no 6401/00 (ECtHR, 31 January 2006) [23], [50], [52]; UNGA ‘Incitement to racial and religious hatred and the promotion of tolerance: report of the High Commissioner for Human Rights’ (n 144)

'duty' of disseminating its doctrine as the sole universal teaching”¹⁴⁸ and that “scriptural anti-Judaism” ultimately led to the tragedy at Auschwitz.¹⁴⁹ The ECtHR distinguished this article as an offensive contribution to ongoing debate rather than hate speech,¹⁵⁰ because it did not “spark[] off any controversy that was gratuitous or detached from the reality of contemporary thought.”¹⁵¹

Kutik’s statements that “all Parduists are inferior and should be converted—by any means—to believe in Saduja,”¹⁵² should not be equated to an attack on Parduists because although they may be offensive, they are criticisms of Parduism, not hate speech. Kutik’s statements are a substantive part of his preaching about Saduja’s values of reasoning and morality rather than “blind belief” in scripture.¹⁵³ Although some Parduists perceived the content of the video as “criticizing” and “insulting” their religion,¹⁵⁴ this is not problematic¹⁵⁵ because it is not an insult to Parduists themselves¹⁵⁶ and thus should not be viewed as hate speech. Kutik’s

¹⁴⁸ *Giniewski* (n 147) [23(1)]

¹⁴⁹ *ibid*

¹⁵⁰ *Giniewski* (n 147); UNGA ‘Incitement to racial and religious hatred and the promotion of tolerance: report of the High Commissioner for Human Rights’ (n 144)

¹⁵¹ *Giniewski* (n 147) [50]

¹⁵² *Compromis*, para 8

¹⁵³ *Compromis*, para 8

¹⁵⁴ *Compromis*, para 11

¹⁵⁵ *Giniewski* (n 147) [51]

¹⁵⁶ 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’ [66], [77]; The Canadian Criminal Code, R.S., 1985, c. C-46, <www.efc.ca/pages/law/cc/cc> accessed 28 November 2014

expression contributed to an ongoing public debate about religion,¹⁵⁷ so any controversy that resulted was connected with reality of life in Lydina.¹⁵⁸

B. Article 2(a) is an impermissible restriction on Kutik’s freedom of expression

A state’s interference with FOE is only permissible if the interference complies with Article 19(3).¹⁵⁹ Article 19(3) mandates the restriction must be (1) prescribed by law; (2) in pursuit of an enumerated aim; and (3) necessary.¹⁶⁰

1. *Article 2(a) is imprecise*

To be sufficiently precise, a law must be formulated to enable a person to regulate his conduct and reasonably foresee the consequences of a given action.¹⁶¹ Further, a law must define “key terms such as hatred, discrimination, violence, hostility”¹⁶² and avoid granting “unfettered [restrictive] discretion” to those administering the law.¹⁶³

Lydina’s Article 2(a) holding is impermissible because it applies imprecise legislation; individuals are unable to anticipate consequences of noncompliance or regulate their conduct accordingly. Article 2(a) fails to define what expression constitutes “incitement” or “hatred” and,

¹⁵⁷ Compromis, paras 3, 4

¹⁵⁸ *Giniewski* (n 147) [50]

¹⁵⁹ UDHR art 29(2); ECHR art 19(2); ACHR art 13(2); *Ross v Canada* App no 736/1997 (UNHRC, 18 October 2000)

¹⁶⁰ UDHR art 29(2); ECHR art 19(2); ACHR art 13(2); *Ross* (n 159)

¹⁶¹ *Krupko* (n 84) [53]; *Bayatyan* (n 84) [113]; UNHRC CCPR/C/GC/34 (n 84) [25]; *de Groot* (n 84); *Tae Hoon Park* (n 84); *Hashman and Harrup* (n 84) [35]

¹⁶² Camden Principles (n 86)

¹⁶³ UNHRC CCPR/C/GC/34 (n 84); UNGA ‘Report of the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred’ (n 49) [21]; Camden Principles (n 86)

therefore, Lydinans like Kutik cannot reasonably foresee what behavior violates Article 2(a).¹⁶⁴ This vague language grants the Lydinan government “unfettered discretion”¹⁶⁵ to discriminate against minority religious groups, like Sadujists, if such groups express undesired speech.

2. *Article 2(a) has an illegitimate aim*

A state may only restrict expression if they show a precise threat to a 19(3) ground.¹⁶⁶ The anticipated danger should not be remote, conjectural or far-fetched.”¹⁶⁷ Furthermore, an illegitimate “purpose or...effect can invalidate legislation.”¹⁶⁸

While a state can restrict actual hate speech,¹⁶⁹ Lydina neither aimed to nor in fact restricted hate speech through Article 2(a). Lydina did not specifically demonstrate the precise nature of the threat Article 2(a) was intended to address. Again, Lydina uses public safety as a pretext¹⁷⁰ to restrict minority speech through Article 2(a). Lydina’s unfair application of Article

¹⁶⁴ *Krupko* (n 84) [53]; *Bayatyan* (n 84) [113]; UNHRC CCPR/C/GC/34 (n 84) [25]; *de Groot* (n 84); *Tae Hoon Park* (n 84); *Hashman and Harrup* (n 84) [35]

¹⁶⁵ UNHRC CCPR/C/GC/34 (n 84) [25]; UNGA ‘Report of the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred’ (n 49) [21]; Camden Principles (n 86)

¹⁶⁶ UNHRC CCPR/C/GC/34 (n 84) [36]; *Lingens* (n 104) [39]; *Erbakan* (n 104) [68]; *Kokkinakis* (n 54); *I.A* (n 104)

¹⁶⁷ Nihal Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional, and International Jurisprudence* (Cambridge University Press 2002); *Grigoriades v Greece* App no 24348/94 (ECtHR, 25 November 1997); *Dennis v USA* 341 US 494 (1951); *Whitney v California*, 274 US 357 (1927); *S. Rangarajan v P.J. Ram* [1989](2) SCR 204; *Lingens* (n 104) [39]

¹⁶⁸ *R. v Big M Drug Mart Ltd.* [1985] 1 SCR 295 (CANADA)

¹⁶⁹ *Fatullayev* (n 116); *Erbakan* (n 104); *Virginia v Black*, 538 US 343 (2003); *Brandenburg v Ohio*, 395 US 444 (1969).

¹⁷⁰ See memorial Part (I)(B)(2)(b)

2(a)¹⁷¹ shows that its true aim is to prevent anti-Parduistic expression. A state cannot use a single religious tradition to define public order or restrict non-coercive conversion attempts.¹⁷²

Even if Lydina’s express aim had been to protect the rights of others,¹⁷³ Article 2(a) has been impermissibly applied. Kutik’s speech does not deny Parduists the right to participate equally in society because they are the dominant presence in Lydina,¹⁷⁴ nor does it inhibit Parduists from exercising their expressive beliefs by making Parduists feel unworthy,¹⁷⁵ “subhuman,”¹⁷⁶ or “excluded”¹⁷⁷ from society.

The effect of Article 2(a) is further impermissible because it disproportionately restricts speech of minority religious groups in Lydina.¹⁷⁸ The prohibition discriminates in favor of Parduism and impermissibly prevents and punishes minority commentary on religion;¹⁷⁹ the government cannot suffocate minority voices to promote peace and harmony.¹⁸⁰

¹⁷¹ Compromis, paras 4, 20, 21

¹⁷² UNGA ‘Elimination of all forms of religious intolerance’ UN Doc A/67/303 [58]

¹⁷³ ICCPR art 19(3)

¹⁷⁴ Compromis, para 2, 5

¹⁷⁵ Wibke Timmermann, ‘Counteracting Hate Speech as a Way of Preventing Genocidal Violence’ (n 107); Friedrich Kubler, ‘How Much Freedom for Racist Speech?: Transnational Aspects of a Conflict of Human Rights’ 27 Hofstra Law Review 335, 363 (1998)

¹⁷⁶ *ibid*

¹⁷⁷ *ibid*

¹⁷⁸ Amnesty Int’l, *Pakistan: Use and Abuse of Blasphemy Laws* AI Index ASA 33/08/94, July 1994, <<http://www.amnesty.org/en/library/asset/ASA33/008/1994/en/0f6f2146-ebfc-11dd-9b3b-8bf635492364/asa330081994en.pdf>> accessed 30 November 2014

¹⁷⁹ UNHRC CCPR/C/GC/34 (n 84) [48]; UNHRC Concluding observations of the Human Rights Committee ‘United Kingdom of Great Britain and Northern Ireland-the Crown Dependencies of Jersey, Guernsey and the Isle of Man’ UN Doc CCPR/C/79/Add.119

¹⁸⁰ Onder Bakircioglu, ‘Freedom of Expression and Hate Speech’ (n 118)

3. *Article 2(a) is not necessary or proportional because it is overbroad*

A state's restriction on FOE must be rationally connected to its objective¹⁸¹ of protecting a legitimate interest and be the least intrusive measure;¹⁸² the benefit of the restriction must outweigh the harm.¹⁸³

Lydina's restriction on the Applicants' free expression under Article 2(a) is not necessary in a democratic society,¹⁸⁴ nor is it proportional¹⁸⁵ to its stated public safety goal, because it restricts substantially more speech than is necessary to achieve this goal. While there has been a history of religious unrest in Lydina, the violence has disproportionately affected Sadujists.¹⁸⁶ After Kutik's video went viral, violence continued to disproportionately affect Sadujists.¹⁸⁷ The law is unnecessary because it protects Parduists' hurt feelings rather than the predominate victims of religious violence.¹⁸⁸ The necessary and proportional response would be to punish the perpetrators of violence, not restrict minority speakers like Kutik.

¹⁸¹ R. v Oakes [1986] 1 SCR 103

¹⁸² Toby Mendel, Restricting Freedom of Expression: Standards and Principles Background Paper for Meetings Hosted by the UN Special Rapporteur on Freedom of Opinion and Expression < <http://www.law-democracy.org/wp-content/uploads/2010/07/10.03.Paper-on-Restrictions-on-FOE.pdf>> accessed 30 November 2014; Shelton v Tucker, 364 US 479 (1960); Gooding v Wilson, 405 US 518 (1972)

¹⁸³ *Lingens* (n 104); Article 19, 'The Johannesburg Principles on National Security, Freedom of Expression and Access to Information' (1 October 1995) <<http://www.article19.org/data/files/pdfs/standards/joburgprinciples.pdf>> accessed 30 November 2014.

¹⁸⁴ R.A.V. v City of St. Paul, Minn., 505 US 377, 414 (1992); Texas v Johnson, 491 US 397, 414 (1989); Papish v The Bd. of Curators of the Univ. of Mo., 410 US 667, 670-71 (1973); Street v New York, 394 US 576, 592 (1969); Tinker v Des Moines Indep. Cmt. Sch. Dist., 393 US 503, 508 (1969).

¹⁸⁵ *Texas* (n 184); Ward v Rock Against Racism, 491 US 781, 791 (1989)

¹⁸⁶ Compromis, para 12

¹⁸⁷ *ibid*

¹⁸⁸ Githu Muigai, Asma Jahangir & Frank La Rue 'Freedom of Expression and Incitement to Racial or Religious Hatred' (n 47)

III. THE LYDINA COURT’S HOLDING THAT KUTIK VIOLATED SMS ARTICLE 2(b) BY ENGAGING IN “PROVOCATION” VIOLATES INTERNATIONAL LAW

The Lydina Court’s holding that Kutik violated Article 2(b) by engaging in provocation impermissibly restricts Kutik’s FOE. Interpreting Article 2(b) in view of the ICCPR, Kutik’s speech is inconsistent with “incitement to discrimination, hostility or violence,” which states have an obligation to prohibit under ICCPR Article 20(2).¹⁸⁹ Even if Kutik’s speech could be considered “incitement” within the meaning of ICCPR Article 20(2), Article 2(b) fails to comply with the requirements for restricting FOE under ICCPR Article 19(3).

A. Kutik’s conduct fails to meet SMS Article 2(b)’s definition of “provocation”

Article 2(b) defines provocation as “speech or conduct that *deliberately* hurts religious feelings or values of Malani culture and triggers violent protest inspired by Malani solidarity.”¹⁹⁰ The VCLT governs interpretation of the SMS,¹⁹¹ a regional charter.¹⁹² VCLT Article 31 provides, *inter alia*, that “[a]ny relevant rules of international law applicable in relations between the parties” must be taken into account when interpreting treaties.¹⁹³ Accordingly, the SMS must be interpreted by taking into account the ICCPR.

ICCPR Article 20(2) imposes an affirmative obligation on states to restrict certain types of particularly harmful speech, including speech that amounts to an incitement to violence.¹⁹⁴ In order for speech to be restricted, however, “the speaker must have the *intention* of promoting

¹⁸⁹ ICCPR art 20(2).

¹⁹⁰ Compromis para 15 (emphasis added)

¹⁹¹ Vienna Convention on the Law of Treaties (VCLT) (Vienna, 23 May 1969, 1155 UNTS 331) art 1.

¹⁹² Compromis, para 15

¹⁹³ VCLT art 31(3)(c).

¹⁹⁴ *Faurisson v France* Comm No 550/1993 (UNHRC, 8 November 1996) [4]

hatred on one of the proscribed grounds with his or her speech.”¹⁹⁵ Without requiring intent, Article 20(2) would amount to a “‘heckler’s veto,’ which would mandate the stifling of speakers when those who are offended choose to show their displeasure through harmful acts.”¹⁹⁶ Furthermore, restrictions on FOE under ICCPR Article 20(2) must comply with the requirements of ICCPR Article 19(3).¹⁹⁷

Interpreting the SMS in view of ICCPR Article 20(2), the modifier “deliberately,” in Article 2(b), must be construed as requiring that Kutik intended to *both* hurt religious feelings or values of Malani culture *and* trigger violent protest inspired by Malani solidarity. In the DigiTube video, Kutik merely discussed religious matters of public concern and did not intend to engage in hate speech that would hurt religious feelings or values of Malani culture.¹⁹⁸ Nor did Kutik intend to incite violence against Parduists. Indeed, as a result of Kutik’s DigiTube video, it was primarily Parduists who engaged in violence by rioting and attacking Sadujist individuals and sites.¹⁹⁹ Most of the victims of violent acts were Sadujists.²⁰⁰ Accordingly, the finding that Kutik violated Article 2(b) amounts to granting Parduists a “heckler’s veto” by permitting those who took offense to Kutik’s statements to engage in harmful acts in order to stifle Kutik’s FOE.

¹⁹⁵ Evelyn Aswad ‘To Ban or Not to Ban Blasphemous Videos’ 44 Geo. J. Int’l L. 1313, 1319 (2013)

¹⁹⁶ *ibid*

¹⁹⁷ UN Doc CCPR/C/GC/34 (n 84)

¹⁹⁸ See memorial Part (II)(A)(1).

¹⁹⁹ Compromis, para 11

²⁰⁰ Compromis, para 12

B. Kutik's statements are inconsistent with speech considered to advocate hatred and violence under international law

ICCPR Article 20(2) has routinely been invoked in the context of individuals who promote Nazi ideologies and anti-Semitic sentiment.²⁰¹ Indeed, “the stated general animating purpose behind Article 20(2) was that, in the aftermath of the Nazi atrocities, it was viewed as necessary to proscribe speech that was intended to and would lead to such atrocities.”²⁰² In such cases, the UN Human Rights Committee (“UNHRC”) and the ECtHR have both indicated that the expression of anti-Semitic speech can lead to religious hatred and violence against Jewish persons, both individually and as a group.²⁰³ For example, in *JRT and WT Party v Canada*, the applicants asserted that Canada violated ICCPR Article 19 when it shut down the applicants’ telephone line where callers could listen to pre-recorded messages “warn[ing] the callers ‘of the dangers of international finance and international Jewry leading the world into wars, unemployment and inflation and the collapse of world values and principles.’”²⁰⁴ The UNHRC found that the application was inadmissible because “the opinions which [the applicant] seeks to disseminate through the telephone system clearly constitute the advocacy of racial or religious hatred which Canada has an obligation under [A]rticle 20 (2) of the Covenant to prohibit.”²⁰⁵

Likewise, in *Faurrison v. France*, France invoked ICCPR Article 20(2) as justifying its conviction of Faurrison under domestic law forbidding any speech that calls into question the

²⁰¹ *Ross* (n 159); *JRT and WG Party v Canada* Comm no 104/1981 (UNHRC, 6 April 1983); *Faurrison* (n 194); *X v Federal Republic of Germany* App no 9235/81 (ECtHR, 14 July 1982).

²⁰² Evelyn Aswad ‘To Ban or Not to Ban Blasphemous Videos’ (n 195)

²⁰³ *JRT* (n 201); *Ross* (n 201)

²⁰⁴ *JRT* (n 201) [2.1]

²⁰⁵ *ibid* [8(b)]

genocide of the Jewish people during the Holocaust.²⁰⁶ During an interview, Faurrison questioned the use of gas chambers by the Nazis, stating “I have excellent reasons not to believe in this policy of extermination of Jews.... I would wish to see...all French citizens realize that the myth of the gas chambers is a dishonest fabrication.”²⁰⁷ While the UNHRC decided that Faurrison’s conviction was consistent with ICCPR Article 19(3) without addressing ICCPR Article 20(2), a concurring opinion submitted by Mr. Rajsoomer Lallah argued that under the circumstances, the case should more appropriately have been resolved under ICCPR Article 20(2). Mr. Lallah suggested that the law at issue in *Faurrison v France*, while potentially overbroad in the abstract, was consistent with Article 20(2) as applied to Faurrison because the French courts had determined that Faurrison’s statements “amounted to the advocacy of racial or religious hatred constituting incitement, at the very least, to hostility and discrimination towards people of the Jewish faith...”²⁰⁸

The speech at issue here is drastically different than the anti-Semetic speech that has been found to fall within the scope of ICCPR Article 20(2). Kutik’s aim was to “preach[] the values of the Saduja religion, including the Saduja teaching that every human being is part divine,”²⁰⁹ not denounce the evils of Parduists. In this connection, Kutik stated that “Saduja is superior to Parduism”²¹⁰ and that “all Parduists are inferior and should be converted—by any means—to believe in Saduja.”²¹¹ It would be against Kutik’s beliefs to advocate violence against Parduists

²⁰⁶ *Faurrison* (n194) [7.7]

²⁰⁷ *ibid* [3]

²⁰⁸ *ibid* (Lallah) [9]

²⁰⁹ *Compromis*, para 8

²¹⁰ *ibid*

²¹¹ *ibid*

who, as humans, are also part divine.²¹² Indeed, this would be inconsistent with Saduja’s tenets of reasoning and morality.²¹³ Thus Kutik’s language cannot be seen as advocating hostility or violence,²¹⁴ or suggesting that Parduists be treated with contempt.²¹⁵

Indeed, Kutik’s statements are markedly different than statements made by Parduist extremists on Facebook.²¹⁶ Unlike Kutik’s statements, directed at Parduism generally, the extremists’ memes are directed at Sadujists adherents individually and as a group. Further, the extremists go beyond proselytization and treat Sadujists with ridicule and contempt.²¹⁷

C. The restriction on Kutik’s freedom of expression fails to comply with ICCPR Article 19(3)

In addition to requiring intent to provoke hatred and cause violence, ICCPR Article 20(2) requires that any restriction on FOE comply with the requirements of ICCPR Article 19(3). However, like SMS Article 2(a) discussed above,²¹⁸ Article 2(b) also fails the ICCPR Article 19(3). Article 2(b) is imprecise because it fails to define what it means to “deliberately hurt religious feelings or values of Malani culture” with adequate precision to permit citizens to comply with the law.²¹⁹ Furthermore, because applying Article 2(b) to Kutik does not satisfy the “intent” requirement for restrictions under ICCPR Article 20(2), Article 2(b) is not necessary in a

²¹² *ibid*

²¹³ *ibid*

²¹⁴ *Ceylan v Turkey* App no 23556/94 (ECtHR, 8 July 1999) [32]-[38]

²¹⁵ *JRT* (n 201) [2.4]

²¹⁶ *Compromis*, para 4

²¹⁷ *ibid*

²¹⁸ See memorial Part (II)(B)

²¹⁹ See memorial Part (II)(B)(1)

democratic society. Rather, SMS Article 2(b) amounts to a “heckler’s veto” that allows those who disagree with the speech to stifle FOE by engaging in harmful acts.

Accordingly, because Kutik’s statements do not amount to intentional advocacy of hatred and incitement to violence under ICCPR Article 20(2) and fail to meet the requirements for restricting FOE under ICCPR Article 19(3), the Lydina court’s holding that Kutik violated SMS Article 2(b) unduly burdens Kutik’s FOE and violates international law.

IV. THE SMS IS INVALID BECAUSE IT VIOLATES EQUAL PROTECTION OF THE LAW, IMPERMISSIBLY RESTRICTS THE FREEDOM OF RELIGION OF RELIGIOUS MINORITIES, AND IMPERMISSIBLY RESTRICTS FREEDOM OF EXPRESSION BY IMPOSING INTERMEDIARY LIABILITY ON INTERNET SERVICE PROVIDERS

The SMS is invalid under the ICCPR because: (1) application of the SMS is a violation of equal protection of the law (“EP”) guaranteed by ICCPR Article 26; (2) the SMS facially violates the FOR of religious minorities guaranteed by ICCPR Article 27; and (3) the SMS impermissibly restricts FOE by imposing intermediary liability on Internet service providers (“ISPs”).

A. The SMS discriminates against minorities in Malani countries

The SMS violates EP under ICCPR Article 26 by granting special rights to Parduists while failing to offer effective protection against discrimination to adherents of minority religions. ICCPR Article 26 provides that “[a]ll persons are equal before the law and entitled without any discrimination to 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 such as ... religion....”²²⁰ Article 26 provides a distinct right,²²¹ which the

²²⁰ ICCPR art 26

²²¹ UNHRC ‘General comment adopted by the human rights committee under article 40, paragraph 4, of the international covenant on civil and political rights’ UN Doc CCPR/C/21/Rev.1/Add.5 (1994)

UNHRC has construed broadly by relating it to all provisions of the law, not just the ICCPR.²²² Accordingly, if a state “confers a particular benefit of any kind on a person or group of persons, it must be accorded in a non-discriminatory fashion.”²²³ By implicitly and explicitly expressing a preference for Parduism, the SMS violates ICCPR Article 26.

SMS Article 1(b) implicitly refers to Parduism because of Parduism’s pervasive influence in Malani culture.²²⁴ Thus, the SMS grants the exclusive right to Parduists to engage in speech concerning Malani religion and culture. This is demonstrated by the fact that while Kutik was found liable for the DigiTube video wherein Kutik expressed views concerning Saduja,²²⁵ no litigation resulted from the Young Parduists’ memes caricaturing Saminder.²²⁶

B. The SMS violates the freedom of religion of adherents of minority religions

In addition to being an invalid restriction of FOR under ICCPR Article 18,²²⁷ the SMS violates the specific guarantee of FOR to minorities under ICCPR Article 27, which provides that “persons belonging to [religious] minorities shall not be denied the right, in community with the other members of their group, ... to profess and practise their own religion....”²²⁸ ICCPR Article 27 grants an individual right independent of other rights protected by the ICCPR.²²⁹

²²² UN Fact Sheet No. 15 (n 79)

²²³ *ibid*

²²⁴ *Compromis*, para 5; see memorial Part (I)(A)(1)

²²⁵ *Compromis*, para 21

²²⁶ *Compromis*, para 4

²²⁷ See memorial Part (I)

²²⁸ *ibid*

²²⁹ UN Doc CCPR/C/21/Rev.1/Add.5 (n 221)

Assuming that SMS Article 1(b)'s command that all speech "[c]ompl[y] with the religious and ethical values of Malani culture and society" would not impermissibly restrict Sadujists' FOR,²³⁰ it would still violate the FOR of Lydina's Hindu, Muslim and Christian minorities. Because adherents to these religions comprise only 5% of the population,²³¹ it cannot be said that their beliefs "[c]ompl[y] with the religious and ethical values of Malani culture and society"²³² that, as discussed in Section IV(A), necessarily embodies Parduism. Moreover, SMS Article 1(d) clearly violates the FOR of Lydina's Hindu minority since Hinduism is a polytheistic religion²³³ and SMS Article 1(d) restricts speech "insulting God," a reference to the singular Parduist deity.²³⁴

Therefore, even if the Court determines the SMS does not violate Kutik's FOR under ICCPR Article 18, the SMS impermissibly restricts the FOR of Lydina's other religious minorities in violation of ICCPR Article 27.

C. The SMS impermissibly restricts freedom of expression by imposing intermediary liability upon Internet service providers

The SMS impermissibly restricts FOE by imposing intermediary liability upon ISPs through Lydina's Content Integrity Act (CIA). The SMS should be construed as incorporating the CIA because the CIA was enacted pursuant to Lydina's obligations under the SMS.²³⁵ The CIA provides that "[ISPs] are not responsible for the content of any posts, blogs, or videos on its

²³⁰ See memorial Part (I)(A)(2)

²³¹ Compromis para 2

²³² Compromis, para 15

²³³ "Hinduism | Hindooism, n." *OED Online*. Oxford University Press, September 2014.

²³⁴ See memorial Part (I)(A)(2)

²³⁵ Compromis, para 16

website so long as they do not broadcast illegal conduct,” which includes “all conduct that violates any Lydian, regional, or international law.”²³⁶

Freedom of expression comprises the freedom to “seek, receive and impart information and ideas of all kinds....”²³⁷ FOE is not limited to traditional means of expression; it extends to expression through information technology such as the Internet and social media.²³⁸ “Any restrictions on the operation of websites, blogs or any other internet-based, electronic or other such information dissemination systems, including systems to support such communication, such as internet service providers or search engines, are only permissible to the extent that they are compatible with paragraph 3 [of ICCPR Article 19].”²³⁹ While jurisdictions such as the United States and the European Union have adopted different approaches to intermediaries’ liability online, there is a consensus among these jurisdictions that intermediaries are not liable for content generated by third parties where the intermediary acts a “mere conduit.”²⁴⁰ This consensus reflects a policy concern that imposing liability would stifle development of the Internet as a means of communication.²⁴¹

Lydina’s imposition of liability against Centiplex for hosting Kutik’s video constitutes an impermissibly broad restriction on FOE that pursues an illegitimate aim of stifling discourse on

²³⁶ Compromis, para 17

²³⁷ ICCPR art 19(2)

²³⁸ UN Doc CCPR/C/GC/34 (n 84) [12]; Nicola Wenzel, ‘Opinion and Expression, Freedom of, International Protection’ (n 116) [14]

²³⁹ UN Doc CCPR/C/GC/34 (n 84); EU ‘Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce)’ (2000) <http://www.wipo.int/wipolex/en/text.jsp?file_id=181678> accessed 10 December 2014

²⁴⁰ EU Directive 2000/31/EC (n 239) art 12; cf *Communications Decency Act*, 47 U.S.C. sect. 230(b)

²⁴¹ EU Directive 2000/31/EC (n 239) [40]; Felix T. Wu, ‘Collateral Censorship and the Limits of Intermediary Liability’ 87 *Notre Dame Law Review* 293, 295-96 (2011)

religious issues of public concern²⁴² and is unnecessary in a democratic society.²⁴³ Accordingly, the SMS and the CIA constitute an impermissible restriction on the FOE.

²⁴² See memorial Part (II)(B)(2)

²⁴³ See memorial Part (II)(B)(3)

PRAYER FOR RELIEF

For the foregoing reasons, Deri Kutik and Centiplex respectfully request this Court to adjudge and declare that:

- I. The liability imposed on Kutik under Article 1(b) of the SMS Charter violates freedom of religion, in contravention of Article 18 of the ICCPR.
- II. The liability imposed on Kutik under Article 2(a) of the SMS Charter violates freedom of expression, in contravention of Article 19 of the ICCPR.
- III. The liability imposed on Kutik under Article 2(b) of the SMS Charter is impermissible under Article 20(2) of the ICCPR and violates Article 19 of the ICCPR.
- IV. The SMS Charter is invalid under the ICCPR.

On behalf of Deri Kutik and Centiplex,

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Agents for the Applicants