

2014/2015

DERI KUTIK & DIGITUBE

(APPLICANTS)

v

REPUBLIC OF LYDINA

(RESPONDENT)

MEMORIAL FOR APPLICANTS

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LIST OF ABBREVIATIONS

&	And
2d	Second Series
3d	Third Series
AC	Appeals Cases
ACLU	American Civil Liberties Union
ACtHR	African Court of Human Rights
AIR	All India Reporter
AJIL	American Journal of International Law
App	Application
art	Article
Cal	California
Cir	Circuit
Cl	Clause
Ct	Court
CUP	Cambridge University Press
Doc	Document
DR	Decisions and Reports
ECOSOC	United Nations Economic and Social Council
ECR	European Court Reports
ECtHR	European Court of Human Rights
ed/ eds	Editor(s)
edn	Edition

E.D. Pa.	Eastern District of Pennsylvania
EHRR	European Human Rights Reports
et al	Et alia
EU	European Union
F	Federal Reporter
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ILC	International Law Commission
ILM	International Legal Materials
ISP	Internet Service Provider
ND Cal	Northern District of California
No/ no	Number
OAS	Organization of American States
OECD	Organization for Economic Co-operation and Development
OUP	Oxford University Press
para	Paragraph
PLD	All Pakistan Legal Decisions
QB	Queen's Bench
s/ S	Section
SCC	Supreme Court Cases
SCI	Supreme Court of India
SCR	Supreme Court Reports
SDNY	Southern District of New York

SMS Charter	Social Media Speech Charter
Supp	Supplement
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UKPC	United Kingdom Privy Council
UN	United Nations
UNGA Res.	United Nations General Assembly Review
UNHRC/ HRC	United Nations Human Rights Committee
UNTS	United Nations Treaty Series
US	United States
v	Versus
Vol	Volume
W.D. Pa.	Western District of Pennsylvania

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STATEMENT OF RELEVANT FACTS

Socio-Political Background

The demographics of the Lydinan Republic are characterized by diverse religious groups. 75% of the population adheres to Parduism and 20% of the population adheres to Saduja. The remaining 5% of the population comprises Hindus, Muslims and Christians. There are frequent incidents of violence between the Parduists and Sadujists.

Lydina is located in an area where the ethnicity of most of the population is Malani. Parduism, being the majority religion of Lydina has strongly influenced secular aspects of the culture such as diet, dress, music, and social values. However, a significant percentage of ethnic Malanis in Lydina adhere to Sadujist beliefs. Saduja has been present in Lydinan society for over three hundred years.

The Social Media Speech Charter

67% of Lydinan households have internet access and social media is believed to be a cause of the increasing religion- based violence in Lydina. In the past, Parduists have posted memes on Facebook about the founder of Saduja: Saminder. These memes have caused an uproar on social media. In light of the link between social media and religious violence, the Republic of Lydina signed a regional charter in 2008, called the Social Media Speech (SMS) Charter. The provisions include content-based restrictions that obligate media to comply with standards such as ‘religious and ethical values of Malani culture and society’ and the ‘social integrity of Malani traditions’. It also prohibits speech that incites hatred or triggers violence based on religion.

Pursuant to the SMS Charter, the Content Integrity Act was enacted in 2009, which determined the liability of internet service providers for content of their websites. It is pertinent in this regard to note that Lydina has ratified the International Covenant on Civil and Political Rights (ICCPR) subject to the reservation that “*Proselytism and other acts that may lead to division between religions are not protected by the Covenant.*”

Deri Kutik’s DigiTube Video

On January 17, 2014, Deri Kutik posted a video on DigiTube, a website owned by the foreign company Centiplex Corporation. The video featured him preaching values of Saduja, including the Sadujist belief in the divinity of all humans. He also asserted that Saduja was superior to Parduism because of the former’s emphasis on reasoning and morality. In the video, he attempted to disprove events mentioned in the Zofftor, the religious scripture of the Parduists. He relied on scientific discoveries mentioned in a reputable academic journal to assert that events mentioned in Chapter 3, Verse 130 (3: 130) did not actually take place in history. The video went viral. Parduists denied these assertions by citing other evidence.

Many Parduists were outraged that the video criticized their religion. They responded by attacking Sadujist individuals and sites owned by them. In retaliation, Sadujists attacked Parduist individuals and places of worship. On January 20, 2014, while the riots were still going on, the religious leader of Parduism issued a pronouncement of religious law stating that the DigiTube video was blasphemous. However, some Parduists called the New Parduists agreed with Deri Kutik’s analysis and considered it compatible with their interpretation of the Zofftor.

The State’s Response

The Lydinan Government issued a press statement wherein the President stated that the video violated Article 2 of the SMS Charter. She also stated that she was not equipped to evaluate the religious significance of the statements and that she trusted the Grand Parder to take steps to resolve the conflict. It is to be noted that a portion of the Grand Parder's salaries was paid by the Government of Lydina. The courts of Lydina were also frequently influenced by him in their decisions, though not in a formal manner.

The Grand Parder sued DigiTube and Deri Kutik for violation of Article 1 and 2 of the SMS Charter. The violations were attributed to three assertions in the video: that Saduja was superior to Parduism; that Parduists should be converted by any means to believe in Saduja; and that 3: 130 is false. The Grand Parder prevailed on all grounds. Special deference was given to his claims regarding Article 1(b) and 1(d) of the SMS Charter.

After exhausting all domestic remedies, the Applicants have challenged all of the following holdings of the domestic Courts:

- a) The video violated Article 1(b) of the SMS Charter in its failure to comply with the 'religious and ethical values of Malani culture and society'.
- b) The video constituted incitement of hatred based on religion under Article 2(a) of the Charter.
- c) The video amounted to provocation under Article 2(b) of the Charter, 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" within the provisions of the Charter.

Deri Kutik and DigiTube have challenged all of the above holdings for violation of provisions of the Universal Declaration of Human Rights [“UDHR”]. There is no legal bar to the claims brought by the Applicants.

STATEMENT OF JURISDICTION

Deri Kutik and DigiTube (Applicants) have approached the Universal Freedom of Expression Court, the special chamber of the Universal Court of Human Rights hearing issues relating to the right of freedom of expression under Article 19 of the Universal Declaration of Human Rights.

All appeals or other remedies within the Lydian court system have been exhausted. No law, domestic or international, restricts the Applicants' standing to bring the present challenges.

On the basis of the foregoing, the Honourable Court is hereby requested to adjudge the dispute according to the rules and principles of international law, including any applicable declarations and treaties.

QUESTIONS PRESENTED

- I. WHETHER THE SMS CHARTER IS VALID UNDER THE ICCPR?
- II. WHETHER THE HOLDINGS OF THE SUPREME COURT OF LYDINA VIOLATED THE PROVISIONS OF THE UDHR?

SUMMARY OF ARGUMENTS

I. THE SMS CHARTER IS VALID UNDER THE ICCPR.

The Lydinan reservation to Articles 18-20 of the ICCPR that “*proselytism and other acts that may lead to division between religions*” covering the SMS Charter is invalid under the ICCPR. For a reservation to be valid under the ICCPR, it has to be compatible with the object and purpose of the ICCPR. The object and purpose of the ICCPR is to create legally binding human rights standards on states ratifying it. A ‘vague and imprecise’ reservation like the one made by Lydina creates great uncertainty as to the extent of obligations undertaken by it and hence invalid under the ICCPR. Additionally, a reservation to Article 19 is incompatible with the object and purpose of the ICCPR.

Further, the SMS Charter constitutes an interference with the rights under Article 18 and 19 of the ICCPR. Such an interference would be valid if it is “prescribed by law” and necessary for the protection of rights of others, maintaining public order and for the protection of public order. The SMS Charter does not fulfil any of these requirements. It is not prescribed by law as it is not sufficiently precise so as to enable persons subject to it to regulate their conduct and does have sufficient safeguards against abuse. Further, it is not necessary and pursuant to any of legitimate aims under the ICCPR. Hence, the SMS Charter conflicting with Article 18 and 19 of the ICCPR is invalid as it is the later treaty.

II. THE HOLDINGS OF THE SUPREME COURT OF LYDINA VIOLATED THE PROVISIONS OF THE UDHR.

The Lydinan Courts erred in holding DigiTube and Deri Kutik liable under provisions of the SMS Charter. This is because the provisions of an international treaty such as the SMS

Charter cannot directly create obligations for private parties without incorporation in domestic legislation, especially where the language of the treaty does not reflect an intention to do so. Further, the Lydinan Courts lacked personal jurisdiction over DigiTube, owned by Centiplex Corporation as the defendant was based outside the territory of the State and the effect of the video could not be considered maliciously directed at Lydina. *In any case*, the video did not violate the relevant provisions of the SMS Charter. *First*, ‘religious and ethical values of Malani culture and society’ under Article 1(b) cannot be derived only from Parduism to the exclusion of Sadujist beliefs. Accordingly, the Court erred in applying this to the video in this case and violated the principle of non-discrimination. *Second*, Article 2(a) was not violated as the video did not satisfy the *imminent lawless action* test, which is a necessary threshold to restrict freedom of expression on the basis of incitement of hatred. *Finally*, ‘provocation’ under Article 2(b) could not be applied to the video as there was no deliberate hurt caused to Parduism, and a direct link between the riots and the video was missing.

In holding as above, the Courts violated provisions of the UDHR. The right to an independent and impartial tribunal under Article 10 was violated due to the appearance of the influence of the Executive and the special deference given to the claim of the plaintiff, the Grand Parder. Further, the present video did not amount to improper proselytism and hence, it should have been protected within the scope of freedom of religion under Article 18. Furthermore, the holdings violated Article 19 as controversial speech was protected within the scope of this right. Holding the intermediary liable also created a chilling effect on the right to seek and receive information under Article 19 as it encourages self-censorship. Finally, such restrictions do not fall within the exception of Article 29(2) as they lack basis in domestic

legislation (legality), they cannot be justified on grounds of public order or rights of others (legitimacy) and they cannot be considered proportional to the legitimate aim (necessity).

ARGUMENTS

I. THE SMS CHARTER IS INVALID UNDER THE ICCPR.

The Lydinan reservation covering the SMS Charter is invalid under the ICCPR. [A] Further, the SMS Charter is in conflict with the provisions of the ICCPR and is therefore, invalid. [B]

[A] The Lydinan Reservation covering the SMS Charter is invalid under the ICCPR.

The matter of reservations under the ICCPR is governed by the principles of international law¹ codified in the VCLT.² Article 19(3) of the VCLT stipulates that where a reservation is not prohibited by a treaty, a State may make a reservation provided it is compatible with the object and purpose of the treaty.³

The object and purpose of the ICCPR is to create legally binding standards for human rights on States ratifying it.⁴ Lydina's reservation is incompatible with the object and purpose of the ICCPR as it is of a general and vague character [1] and it unduly curbs lack of freedom of expression [2].

¹ UNHRC, 'General comment No 24' on '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 CCPR/C/21/Rev.1/Add.6.

² Mark Eugen Villiger, *Commentary on the Vienna Convention on the Law of Treaties, 1969* (Martinus Nijhoff 2009) 325.

³ UNHRC, 'General comment No 24' on '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 CCPR/C/21/Rev.1/Add.6.

⁴ UNHRC, 'General comment No 24' on '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 CCPR/C/21/Rev.1/Add.6.

1. The reservation is of a general and vague character.

Reservations of a general character create great uncertainty as to the extent of legal obligations undertaken by a State under a treaty.⁵ Therefore, these widely formulated reservations that are ‘vague and imprecise’ render all the rights to the Convention ineffective,⁶ and are considered to be invalid for not being compatible with the object and purpose of the treaty. For instance, a reservation made by the Republic of Lao seeking to exclude proselytism and “*all acts creating division among religions*”⁷ was held to be incompatible with the object and purpose of the ICCPR by the Special Rapporteur on the Right to Religion or Belief.⁸ The term “acts creating division among religions” was held to be highly subjective and vague, which increased the risk of it being abused to prohibit religious activities that are protected under international law.⁹

Accordingly, the Lydian reservation to Article 18-20 of the ICCPR excluding “*Proselytism and other acts that may lead to division of religion*” is vague and imprecise, creating great uncertainty as to the extent of Lydian obligations under Articles 18-20 of the ICCPR. This is evidenced by five other State Parties objecting to the Lydian reservation.¹⁰ Thus, the Lydian reservation to the ICCPR is invalid.

⁵ *Belilos v Switzerland* (1988) 10 EHRR 466.

⁶ UNHRC, ‘General comment No 24’ on ‘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 CCPR/C/21/Rev.1/Add.6; *Belilos v Switzerland* (1988) 10 EHRR 466.

⁷ International Covenant on Civil and Political Rights, Declarations and Reservations, Lao People’s Democratic Republic, < <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-4.en.pdf> > accessed 17th October 2014.

⁸ UNGA, ‘Report of the Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir’ (24 December 2012) UN Doc A/HRC/13/40/Add.4, para 67.

⁹ *ibid.*

¹⁰ The Case, para 18.

2. The reservation unduly curbs the freedom of expression.

The freedom of expression is essential for the exercise of all other human rights under the ICCPR.¹¹ It facilitates the exercise of right to participation, religious freedom, education, ethnic and cultural identity and equality. Accordingly, lack of freedom of expression contributes to lack of respect for other human rights.¹² Therefore, a reservation to Article 19 of the ICCPR defeats the object and purpose of the ICCPR¹³ and renders the Lydianan reservation to Articles 18-20 of the ICCPR invalid.

[B] The SMS Charter is in violation of the provisions of the ICCPR.

1. The SMS Charter violates the freedoms enshrined under Article 18 and 19 of the ICCPR.

Article 19(2) of the ICCPR requires State Parties to guarantee the right to freedom of expression, including right to seek, receive and impart information and ideas of all kinds.¹⁴ Further, the ICCPR recognizes the freedom of a person to manifest one's religion¹⁵ through

¹¹ UNHRC, 'General comment No 24' on '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 CCPR/C/21/Rev.1/Add.6.

¹² *Hugo Bustíos Saavedra v Peru* Case 10.548 (IACtHR, 16 October 1997), para 72.

¹³ UNHRC, 'General comment No 34' on 'Article 19 (Freedom of Opinion and Expression)' (2011) UN Doc CCPR/C/GC/34.

¹⁴ UNHRC, 'General comment No 34' on 'Article 19 (Freedom of Opinion and Expression)' (2011) UN Doc CCPR/C/GC/34, para 11; *Handyside v United Kingdom* (1976) 1 EHRR 737.

¹⁵ UNHRC, 'General comment No 24' on '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 CCPR/C/21/Rev.1/Add.6, para 4.

any medium of communication as being integral to its object and purpose.¹⁶ Further, the SMS Charter that imposes civil sanctions on already published expression¹⁷ amount to an ‘interference’ with freedoms protected under Article 18 and 19 of the ICCPR; the justification being that such post publication civil sanctions have an adverse impact on the future exercise of these freedoms.¹⁸ Thus, in the instant case, the conduct of Deri Kutik and DigiTube are protected by Article 18 and 19 of the ICCPR.

2. The SMS Charter is not a valid limitation/restriction under Articles 18(3) and 19(3), ICCPR.

Admittedly, the aforementioned freedoms are not absolute in nature. The ICCPR permits interference by public authorities with such freedoms only if they are ‘prescribed by law’ and are necessary to protect the rights of the others and maintain public order.¹⁹ However, the SMS charter is not a valid limitation/ restriction as it is not ‘prescribed by law, [a] pursuant to a legitimate aim[b]and necessary in a democratic society [c].

¹⁶ *Olmedo-Bustos et al. v Chile*, Merits, Reparations and Costs, Inter-American Court of Human Rights Series C No 73 (5 February 2001), para 36; *Ivcher-Bronstein v Peru*, Merits, Reparations and Costs, Inter-American Court of Human Rights Series C No 74 (6 February 2001), para 147; *Herrera-Ulloa v Costa Rica*, Preliminary Objections, Merits, Reparations and Costs, Inter- American Court of Human Rights Series C No 107 (2 July 2004), para 109; *Ricardo Canese v Paraguay*, Merits, Reparations and Costs, Inter-American Court of Human Rights Series C No 111 (31 August 2004), para 78; *Palamara-Iribarne v Chile*, Merits, Reparations and Costs, Inter-American Court of Human Right Series C No 135 (22 November 2005), para 72; *López-Álvarez v Honduras*, Merits, Reparations and Costs, Inter-American Court of Human Right Series C No 141 (1 February 2006), para 164.

¹⁷ Clarifications to the Case, para 9.

¹⁸ *Lingens v Austria* (1986) 8 EHRR 4078; *Times Newspaper v United Kingdom* App no 3002/03, 23676/03 (ECtHR, 10 March 2009); *Barfod v Denmark* (1989) 13 EHRR 493.

¹⁹ UNHRC, ‘General comment No 34’ on ‘Article 19 (Freedom of Opinion and Expression)’ (2011) UN Doc CCPR/C/GC/34; *Velichkin v Belarus* Communication No 1022/2001, UN Doc CCPR/C/85/D/1022/2001 (2005) (HRC).

a. The SMS Charter is ‘prescribed by law’.

i. *The SMS Charter is not formulated with sufficient precision.*

A norm cannot be regarded as ‘law’ unless it is formulated sufficient precision to enable the citizen to regulate conduct to a reasonable degree.²⁰ For instance, the Constitutional Court of Columbia invalidated a law requiring radio broadcasters to affirm the essential values of Columbian nationality and follow “universal standards of good taste and decorum” as *vague and imprecise*.²¹ These requirements were vague, not in the sense that they required a person to confirm his conduct to an imprecise comprehensible standard, but rather in the sense that no conduct was specified at all.²²

Similarly, SMS Charter obligates media organizations to undertake vague obligations such as “protecting Malani culture from the negative influences of globalizations”,²³ “to comply with ethical and religious values of Malani culture”,²⁴ “to maintain the social integrity of Malani traditions”²⁵, and not engaging in “provocative speech”²⁶. These notions are highly

²⁰ *Sunday Times v United Kingdom* (1979-80) 2 EHRR 245, para 51; *Kolender v Lawson* 461 US 352, 357 (1983); *Connally v General Construction Company* 269 US 385, 391 (1926); *Kokkinakis v Greece* (1993)17 EHRR 397; *In Re Ontario Film and Video Appreciation Society v Ontario Board of Censors* (1983) 31 OR (2d) 582 (Ontario High Court); *Fedlek v Slovakia* (2000) 30 EHRR CD 291, para 56; *Silver and others v United Kingdom* (1983) 5 EHRR 347; *Malone v United Kingdom* (1984) 7 EHRR 14; *Leonardus Johannes Maria de Groot v The Netherlands* Communication No 578/1994, UN Doc CCPR/C/54/D/578/1994 (1995); *Hashman and Harrup v United Kingdom* (1999) 30 EHRR 241, para 35; Anna-Lena Svennson McCarthy, *The International Law of Human Rights and States of Exception: With Special Reference to the Travaux Preparatoires and the Case-law of the International Monitoring Organs* (Martinus Nijhoff 1998) 84.

²¹ Organization of American States, ‘National Jurisprudence on Freedom of Expression and Access to Information’, (2013) OEA/Ser.L/V/II.147CIDH/RELE/INF.10/13, para 78, citing *Republic of Colombia Constitutional Court Judgment C-010/00* (19 January 2000).

²² *Coates v City Council of Cincinnati* 402 US 385, 391 (1926).

²³ The Case, para 15.

²⁴ The Case, para 15.

²⁵ The Case, para 15.

²⁶ The Case, para 15.

indeterminate and are subject to *ex post facto* definition by the entities regulating online videos, posts, and blogs in Lydina.²⁷ Therefore, no restrictions can be reasonably deduced from the SMS Charter as no conduct is specified at all. Hence, the SMS Charter being too vague and imprecise is not ‘prescribed by law’.

For a norm to be ‘*prescribed by law*’, there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded under ICCPR.²⁸ It must indicate the scope of discretion of the executive authorities.²⁹ Further, the law must provide adequate and effective remedies such as impartial judicial control against illegal or abusive imposition of limitation on human rights.³⁰

ii. The SMS Charter does not provide sufficient safeguards against abuse.

In the present matter, the SMS Charter does not indicate the scope of discretion accorded to the authorities. This is evidenced by arbitrary application of the provisions of the SMS Charter to Deri Kutik’s speech³¹ and its non-application to the ‘Pardulist’ uploading the memes of Saduja.³² Further, the Lydinan courts are permitted to give special deference to claims brought by the Grand Parder under the SMS Charter. Therefore, there is absence of

²⁷ Organization of American States, ‘National Jurisprudence on Freedom of Expression and Access to Information’, (2013) OEA/Ser.L/V/II.147CIDH/RELE/INF.10/13, para 78, citing *Republic of Colombia Constitutional Court Judgment C-010/00* (19 January 2000).

²⁸ *Malone v United Kingdom* (1984) 7 EHRR 14, para 67; ECOSOC, ‘The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights’ (1984) UN Doc E/CN.4/1985/4, para 25.

²⁹ *Silver and others v United Kingdom* (1983) 5 EHRR 347.

³⁰ ECOSOC, ‘The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights’, (1984) UN Doc E/CN.4/1985/4, para 18; *Malone v United Kingdom* (1984) 7 EHRR 14, Concurring Opinion of Judge Pettiti.

³¹ The Case, para 21-22.

³² The Case, para 4.

impartial judicial control against arbitrary exercise of power.³³ Hence, the SMS Charter not having sufficient safeguards against abuse is not ‘prescribed by law’.

b. The restrictions in the SMS Charter were not pursuant to a legitimate aim.

i. *The SMS Charter is not for securing the rights of others.*

Speeches which contribute to any form of public debate capable of bringing about further progress in human affairs are protected by freedom of expression and cannot be restricted for protecting the ‘rights and reputations of others’.³⁴ For instance, in *Giniewski v France*, the ECtHR accepted that freedom of expression may be extended to protect criticism of the role of the Catholic Church in relation to the Jews on the basis of the need to investigate historical truth and did not find that such criticism infringed the right to religious freedom. This has been reiterated in *Aydin Tatlav v Turkey* where the same Court considered that a publication criticizing Islam is protected under Article 10 of the ECHR.³⁵

In the present matter, there was an on-going debate between the New Parduists and Parduists on the interpretation of verse 3:130 of the Zofftor.³⁶ The video of Derik Kutik on DigiTube contributed to on-going public debate in Lydina. Hence, the provisions of the SMS Charter requiring ‘*compliance with religious and ethical values of Malani culture*’,³⁷ ‘*maintaining social integrity of Malani traditions*’³⁸ and ‘*protecting Malani traditions from the negative*

³³ The Case, para 21.

³⁴ *Otto-Preminger-Institut v Austria* (1994) 19 EHRR 34; UNHRC, ‘General comment No 34’ on ‘Article 19 (Freedom of Opinion and Expression)’ (2011) UN Doc CCPR/C/GC/34, para 28; *Leonid Svetik v Belarus* Communication No 927/2000, UN Doc CCPR/C/81/D/927/2000 (2004) (HRC).

³⁵ *Aydin Tatlav v Turkey* App no 50692/99 (ECtHR, 2 May 2006).

³⁶ The Case, para 14.

³⁷ The Case, para 15.

³⁸ The Case, para 15.

influences of globalization’ that prohibited such speech violated the freedoms enshrined in Article 18 and 19 of the ICCPR.

ii. *The SMS Charter is not for protecting ‘public morals’ of Lydina.*

The concept of ‘public morals’ derives from many social, philosophical and religious traditions.³⁹ Consequently, limitations on the freedoms of a person based on public morals derived exclusively from a single tradition are invalid,⁴⁰

The SMS Charter is a regional Charter to promote ‘Malani culture’.⁴¹ Parduism, the majority religion in Lydina has a strong influence on the cultural practices of Malanis including their diet, music, dress and social values.⁴² Therefore, the religious and social traditions in the SMS Charter are drawn exclusively from the Parduist tradition. Hence, the SMS Charter is not for protection of public morals, and accordingly, does not further a legitimate aim recognized by the ICCPR.

iii. *The SMS Charter is not for protecting ‘public order’.*

The expression ‘public order’ can be defined as the sum of rules which ensure the smooth functioning of the society.⁴³ In *Brandenburg v Ohio*, it was held that the guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force

³⁹ UNHRC, ‘General comment No 22’ on ‘Freedom of Religion’ (1993) UN Doc HR1/GEN/1/Rev.1, para 8; ‘General comment No 34’ on ‘Article 19 (Freedom of Opinion and Expression)’ (2011) UN Doc CCPR/C/GC/34, para 32.

⁴⁰ *ibid.*

⁴¹ The Case, para 15.

⁴² The Case, para 5.

⁴³ ECOSOC, ‘The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights’ (1984) UN Doc E/CN.4/1985/4, para 22-24; *Wackenheim v France* Communication No 854/1999, UN Doc CCPR/C/75/D/854/1999 (2002) (HRC), para 74; *Gauthier v Canada* Communication No 633/1995, UN Doc CCPR/C/65/D/633/1995 (1999) (HRC), para 13.5; *Dissanayake v Sri Lanka* Communication No 1373/2005, UN Doc CCPR/C/93/D/1373/2005 (HRC).

or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite such action.⁴⁴ However, no such limitations or guiding criterion is provided by the SMS Charter.

The provisions of the SMS Charter require media to ‘*comply with ethical and social values of Malani culture*’,⁴⁵ ‘*maintain the social integrity of Malani culture*’,⁴⁶ and ‘*prevent hate speech*’,⁴⁷ irrespective of whether they lead to imminent lawless action or not. Therefore, the SMS Charter must not be construed to be pursuant to the aim of protecting ‘public order’, but rather protecting populist religious beliefs.

c. The restrictions in the SMS Charter are not necessary in a democratic society.

For a norm to be ‘*necessary in a democratic society*’, it must correspond to a pressing social need.⁴⁸ In deciding whether an interference with the freedom of expression and to manifest one’s religion meets a pressing social need, it is imperative to consider the audience of such speech.⁴⁹

Where the audience comprises of adult consumers, courts have been inclined towards invalidating interferences with free communication of ideas and information.⁵⁰ For instance, in *Jersild v Denmark*,⁵¹ the proceeding against the journalists could not be justified because

⁴⁴ *Bradenburg v Ohio* 395 US 444 (1969).

⁴⁵ The Case, para 15.

⁴⁶ The Case, para 15.

⁴⁷ The Case, para 15.

⁴⁸ *Sunday Times v United Kingdom (No 2)* (1992) 14 EHRR 229, para 62.

⁴⁹ *Handyside v United Kingdom* (1976) 1 EHRR 737.

⁵⁰ *Open Door and Dublin Well Woman v Ireland* (1993) 15 EHRR 244; *Scherer v Switzerland* (1994) 18 EHRR 276; *X and Y v Switzerland* App no 16564/90 (ECtHR, 8 April 1991).

⁵¹ *Jersild v Denmark* (1995) 19 EHRR 1.

the news item was part of a serious new programme on racial discrimination for a well-informed audience. Further, the degree of access that a ‘medium’ gives to the consumers who may be unwilling to accept the message, and the opportunity of avoiding the same would also assist in determining the necessity of the interference.⁵²

In the present matter, the video uploaded by Deri Kutik was a genuine programme on the origins of Zofftor. It relied on scientific discoveries to advance a plausible claim regarding the Zofftor.⁵³ The legitimacy of such interpretative speech is highlighted by the support it drew from the New Parduists.⁵⁴ Further, those unwilling to accept the message could have easily avoided accessing the video on DigiTube. Therefore, the provisions of the SMS Charter requiring media to ‘*refrain from insulting God, revealed religions, religious symbols, Holy scriptures and holy symbols*’⁵⁵, ‘*compliance with religious and ethical values of Malani culture*’,⁵⁶ and ‘*prohibiting provocative speech*’ constituted unnecessary interferences with the communication of ideas between willing producers and adult consumers.

⁵² *Otto-Preminger-Institut v Austria* (1994) 19 EHRR 34; *Jersild v Denmark* (1995) 19 EHRR 1; *Sable Communications of California, Inc v FCC* 492 US 115 (1989).

⁵³ The Case, para 9.

⁵⁴ The Case, para 14.

⁵⁵ The Case, para 15.

⁵⁶ The Case, para 15.

II. THE HOLDINGS OF THE LYDINAN COURTS ARE INCONSISTENT WITH THE UDHR.

[A] Deri Kutik and DigiTube cannot be held liable under the SMS Charter.

1. The SMS Charter does not provide for the obligation of private persons.

The responsibility for failure to meet international obligations under a treaty lies with the State,⁵⁷ even where the breach of the treaty is due to the actions of a private person.⁵⁸ While an international treaty may create rights for private persons enforceable directly by them,⁵⁹ it cannot directly create obligations for them.⁶⁰ Treaties may only indirectly regulate private persons, where the basis for holding them liable is through incorporation in domestic legislation.⁶¹ Even in the USA, where treaties are recognized as a source of domestic law,⁶² treaties become self-executing against citizens only where the language of the treaty directly obligates private parties to comply with it.⁶³

⁵⁷ ILC, 'Draft articles on Responsibility of States for Internationally Wrongful Acts' (2001) UN Doc A/56/10 art 1; JG Starke, *Introduction to International Law* (10th edn, Butterworths 1989) 81-83.

⁵⁸ Case C-265/95 *Commission v France* [1997] ECR I-6959; Case C-494/01 *Commission v Ireland* [2005] ECR I-3331; Case C-112/00 *Schmidberger* [2003] ECR I-5659; *Velasquez-Rodriguez Case* Inter-American Court of Human Rights Series C No 4 (29 July 1988), para 172; Evert Albert Alkema, 'The Third-Party Applicability or "Drittwirkung" of the European Convention on Human Rights' in Franz Matscher and Herbert Petzold (eds), *Protecting Human Rights: The European Dimension* (Carl Heymans Verlag KG 1988) 33, 37-38; Vasquez, 'Direct v Indirect Obligations of Corporations under International Law' (2005) 43 *Columbia Journal on Transnational Law* 927.

⁵⁹ Case 26/62 *Van Gend and Loos* [1963] ECR 1; Joined Cases C-6 and 9/90 *Francovich and Others* [1991] ECR I-5357; Case 43/75 *Defrenne* (no 2) [1976] ECR 455, para 31; Case C-281/98 *Angonese v Cassa di Risparmio di Bolzano* [2000] ECR I-4139.

⁶⁰ *Presbyterian Church of Sudan v Talisman Energy Inc.* 244 F Supp 2d 289 (SDNY 2003).

⁶¹ Case 33/76 *Rewe-Zentralfinanz and Rewe-Zentral* [1976] ECR 1989, para 5; Case C-268/06 *Impact* [2008] ECR I-2483; Case C-445/06 *Danske Slagterier* ECR I-2119; Joined Cases C-317-320/08, *Alassini and Others* [2010] ECR 2213, paras 47-49.

⁶² U.S. CONST. art VI, s 1.

⁶³ *Foster v Nielson* 27 US 253, 314 (1829); *Olympic Airways v Husain* 540 US 644, 646, 655-57 (2004); *Medellin v Dretke* 544 US 660, 693-4 (2005), Dissenting Opinion of Justice Breyer; *Medellin v Texas* 552 US 491, 508 (2008); *Sanchez-Llamas v Oregon* 548 US 311, 354 (2011); *Corus Staal BV v Department of Commerce* 395 F. 3d. 1343; Carlos Manuel Vazquez, 'The Four Doctrines of Self-Executing Treaties' (1995) 89 *AJIL* 695.

The SMS Charter is an international treaty and therefore, non-compliance only entails the State's liability. Further, it cannot be considered self-executing as the language of the treaty places an obligation on the State to 'ensure regulation of media within its jurisdiction' and not on the media itself.⁶⁴ The domestic legislation passed in pursuance of the SMS Charter the Content Integrity Act only regulates ISPs and has accordingly, not been applied to DigiTube and Deri Kutik.⁶⁵ Hence, the Court erred in holding DigiTube and Deri Kutik liable on the basis of the provisions of the SMS Charter.

2. DigiTube cannot be considered as media under the jurisdiction of Lydina.

The SMS Charter obligates States to regulate media 'under their jurisdiction'.⁶⁶ A foreign defendant may be sued in a State's jurisdiction only if a strong connection is established.⁶⁷ This means that in case of *internationally accessible* media such as on the internet, there must be high interactivity with the users in a forum State.⁶⁸ Further, the effect of the action that gives rise to liability must be intentionally and maliciously aimed at the forum State.⁶⁹ In this regard, mere reference to citizens of a State must be differentiated from a manifest intent of targeting users in a particular State.⁷⁰

⁶⁴ The Case, para 15.

⁶⁵ The Case, para 16-17.

⁶⁶ *ibid.*

⁶⁷ *McGee v International Life Insurance Company* 355 US 220, 222 (1957); *Shaffer v Heitner* 433 US 186, 216 (1977); *Kulko v Superior Court* 436 US 84, 91 (1978).

⁶⁸ *Zippo Manufacturing Company v Zippo Dot Com, Inc.* 952 F Supp 1119 (W.D. Pa. 1996); *Cybersell, Inc. v Cybersell, Inc.* 130 F.3d 414 (9th Cir. 1997).

⁶⁹ *Calder v Jones* 465 US 783 (1983); *Pavlovich v DVD Copy Control Association* 58 P 3d (2002).

⁷⁰ *Core-Vent Corp v Nobel Industries AB* 11 F. 3d 1482 (9th Cir. 1993); *Barrett v Catacombs Press* 44 F Supp 2d 717 (E.D. Pa. 1999); *Bailey v Turbine Design, Inc.* 86 F Supp 2d 790 (W.D. Tenn., E. Div 2000); *Revell v Lidov* 317 F 3d 467(5th Cir.); *Young v New Haven Advocate* 318 F 3d 86 (2002).

In the present matter, Centiplex Corporation, the owner of DigiTube is not a company incorporated within Lydina.⁷¹ Therefore, jurisdiction over it cannot be exercised in the absence of content intentionally and maliciously aimed at Lydina. The video fails to meet this threshold as its content refers to the superiority of Saduja over Parduism.⁷² The religious breakdown of Lydina does not justify an assertion that the effect of the video was particular to the State as such a breakdown of population was not exclusive to Lydina.⁷³ Therefore, Lydina lacks jurisdiction over DigiTube in the present matter.

3. The video did not violate Article 1(b) of the SMS Charter.

- a. The ‘religious and ethical values of Malani culture and society’ is not exclusive of the expression of Sadujist beliefs.

Article 1(b) obligates States to ensure that media complies with ‘religious and ethical values of Malani culture and society’.⁷⁴ The common ethical values of an ethnic group comprise all its diverse belief systems, including those based on external influences such as immigrant culture.⁷⁵ In fact, the aim of protecting the morality of society must not be derived exclusively from one tradition.⁷⁶ For instance, in *Hassan and Eylem Zengin v Turkey*, the

⁷¹ Clarifications to the Case, para 7.

⁷² The Case, para 8-9.

⁷³ The Case, para 5.

⁷⁴ The Case, para 15.

⁷⁵ James Kigongo, ‘The Relevance of African Ethics to the Contemporary African Society’, in A.T. Dalfovo and Others (eds), *Ethics, Human Rights and Development in Africa* (The Council for Research in Values and Philosophy 2002).

⁷⁶ UNHRC, ‘General comment No 18’ on ‘Non-Discrimination’ (1989) UN Doc CCPR/C/21/Rev.1/Add.4, para 8; Zdenka Machnyikova, ‘Religious Rights’ in Marc Weller (ed), *Universal Minority Rights: A Commentary on the Jurisprudence of International Courts and Treaty Bodies* (OUP 2007) 194; *Lautsi v Italy* (2009) 50 EHRR 1051, para 68.

ECtHR observed that the State must consider a faith not practiced by the majority as part of the *religion and culture of its society*, because of the significant number of its followers.⁷⁷

In the context of Lydinan society, Saduja has close ties with Malani culture and society since 20% of the Lydinan population comprises of followers of Saduja,⁷⁸ a significant population of Sadujists are ethnic Malanis;⁷⁹ and Saduja has been a part of the Lydinan society for over 300 years.⁸⁰ Further, the religious values of Parduism cannot be considered to be protected within the scope of the ‘religious and ethical values of Malani culture and society’, especially in the absence of an express mention of Parduism as the State religion within the Lydinan Constitution.⁸¹ In fact, the influence of Parduism on the culture of the signatory countries of the SMS Charter has been on secular aspects of their societies such as dress and social values.⁸² The protection under Article 1(b) must also be understood in this context and accordingly, the speech could not be considered in violation of this provision.

b. The interpretation of the Court favours Parduism and violates the principle of non-discrimination.

Laws must be interpreted in a manner consistent with international human rights obligations of the State.⁸³ Such obligations include non-discrimination on the basis of ethnic origin.⁸⁴

⁷⁷ *Hasan and Eylem Zengin v Turkey* App no 1448/04 (ECtHR, 9 October 2007), para 70.

⁷⁸ The Case, para 2.

⁷⁹ The Case, para 7.

⁸⁰ *ibid.*

⁸¹ The Case, para 6.

⁸² The Case, para 5.

⁸³ ECOSOC, ‘Commission on Human Rights Summary Record of the Hundred and Sixty-Second Meeting’, UN Doc E/CN.4/SR.162, para 46; *Toonen v Australia* (1994) 5 Selected Decisions of the Human Rights Committee 133, para 8.6.

Further, the regulation of the right to freedom of religion must involve a neutral role of the State without the power to assess the legitimacy of the religious belief or the manner of its expression, even where the State recognizes an official religion.⁸⁵ In line with this interpretation, the EctHr in *Mannousakis and Others v Greece*, rejected the State's contention that promotion of a particular religious denomination was justified on grounds of its greater influence in the national conscience of the country.⁸⁶

In the present matter, the Lydinan Courts, in accepting that criticism of the religious tenets of Parduism is contrary to the 'religious and ethical values of Malani culture and society' have by necessary implication upheld two principles: *first*, that such religious and ethical values derive from Parduism to the exclusion of Saduja and *second*, that the phrase 'complies with' must be understood to mean that opinions contrary to Parduism cannot be expressed. Such an interpretation contradicts the principle of non-discrimination and is therefore, erroneous.

4. The video did not violate Article 2(a) of the SMS Charter.

Article 2(a) obligates States to prevent 'the incitement of hatred based on race, religion, ethnicity and gender.'⁸⁷ However, such restrictions on freedom of expression are permissible only where speech amounts to incitement to lawless action.⁸⁸ As per the *imminent lawless action* test, the high threshold to restrict freedom of expression is met only where there is

⁸⁴ Declaration on the Elimination of All Forms of Intolerance of Discrimination Based on Religion or Belief UNGA Res 36/55 (25 November 1981) UN Doc A/RES/36/55 art 3, art 4.1.

⁸⁵ *Hassan and Chauch v Bulgaria* (2000) 24 EHRR 55, para 78; *Refah Partisi (Welfare Party) and others v Turkey* (2003) 37 EHRR 1, para 91; UNHRC, 'General comment No 22' on 'Freedom of Religion' (1993) UN Doc HR1/GEN/1/Rev.1, para 9; *Joseph Burstyn Inc. v Wilson* 343 US 495, 505 (1952).

⁸⁶ *Mannousakis v Greece* (1996) 23 EHRR 387, para 39.

⁸⁷ The Case, para 15.

⁸⁸ American Convention of Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 art 13.5; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 art 20(2).

clear and objective proof that the speaker intended to commit a crime, and that he had the real and effective possibility of achieving this objective.⁸⁹ Reference must be made to the context of the speech to examine whether the words reflected a clear intention of inciting violence, and whether the speaker was influential enough to actually achieve this objective.⁹⁰ Accordingly, the mere use of aggressive words or the abstract and intellectualized justification of the necessity of violence is not sufficient to meet this threshold.⁹¹

In the present matter, the statements assert that Parduists must be converted to Saduja 'by any means.'⁹² Since the speaker has stressed on reasoning and morality rather than blind faith as the basis of belief in Saduja,⁹³ it is clear that the speaker cannot regard violence as the basis of conversion. This is supported by the fact that he followed this speech with a historical analysis to disprove passages of the Parduist religious text.⁹⁴ Further, there was no express mention of violence, and the incitement of hatred, if any, was abstract at best. In any case, there is no proof that the speaker was capable of inciting such violence, especially in light of the Sadujist history of non-violence in response to the memes that ridiculed their religious leader.⁹⁵ This is evidenced by the fact that the Sadujists engaged in violence only in

⁸⁹ *Brandenburg v Ohio* 395 US 444 (1969) at 447; Organization of American States, 'Annual Report of the Inter-American Commission on Human Rights 2009', (2009) OEA/Ser.L/V/88, para 59.

⁹⁰ *Karataş v Turkey* App no 23168/94 (ECtHR, 8 July 1999), Joint Concurring Opinion of Palm, Tulkens, Fischbash, Casadevall and Greve.

⁹¹ *ibid*, para 52; *Okçuoğlu v Turkey* App no 24246/94 (ECtHR, 8 July 1999), para 48; *Sürek v Turkey (no 4)* App no 24762/94 (ECtHR, 8 July 1999), Concurring Opinion of Judge Bonello; *Noto v United States* 367 US 290, 297-298 (1961).

⁹² The Case, para 8.

⁹³ *ibid*.

⁹⁴ The Case, para 9.

⁹⁵ The Case, para 4.

retaliation after Parduists attacked and most of the injured were Sadujists.⁹⁶ Therefore, the speech does not amount to incitement to lawless action under the *imminent lawless action* test.

5. The video did not violate Article 2(b) of the SMS Charter.

Article 2(b) obligates States to prohibit provocation.⁹⁷ Speech is considered provocation where it deliberately hurts religious feelings and triggers violent protest.⁹⁸

a. The video does not reflect an intention to hurt religious feelings.

Speech amounts to provocation if it is an offensive attack on a matter regarded as sacred to a religion and members legitimately believe themselves to be the object of unwarranted attacks.⁹⁹ For instance, in *Giniewski v France*, the ECtHR observed that criticism of the Pope could not be considered an insult to Christianity as a whole because the belief in the sacred functions of the Pope was not a feature common to all strands of Christianity.¹⁰⁰ Further, criticism of religious doctrines based on historical analysis was considered to be protected under freedom of expression.¹⁰¹

In the present matter, the speech was considered ‘intentionally provocative’ because of Deri Kutik’s statements about the divinity of all humans and the historical analysis done by him regarding 3:130 of the Zofftor.¹⁰² However, such a reasoning-based criticism of religious

⁹⁶ The Case, para 11.

⁹⁷ The Case, para 15.

⁹⁸ *ibid.*

⁹⁹ *Otto-Preminger-Institut v Austria* (1994) 19 EHRR 34, para 49; *IA v Turkey* (2007) 45 EHRR 30; *Murphy v Ireland* (2004) 38 EHRR 13, para 67.

¹⁰⁰ *Giniewski v France* (2007) 45 EHRR 23, para 49.

¹⁰¹ *ibid.*, para 50.

¹⁰² The Case, para 13.

doctrines is protected under freedom of expression. Further, New Parduists agreed with Deri Kutik's analysis of the Zofftor.¹⁰³ Therefore, such an analysis cannot be considered to insult an aspect sacred to Parduism and no intention to cause religious hurt is reflected in the speech.

b. The video cannot be considered to trigger violent protests.

To be considered 'provocation' under Article 2(b), the speech must trigger violent protests.¹⁰⁴ However, the standard applicable for limiting the freedom of expression is that there must be a direct and proximate link between the speech and the violence.¹⁰⁵ This means that the words used must be inherently dangerous and must contain an unequivocal call for violence¹⁰⁶

In this case, the speech did not mention the use of violence and cannot be regarded as the cause of the riots that ensued. Religious riots were common in Lydina and there could be a number of other factors contributing to them.¹⁰⁷ Further, the Grand Parder's *perdu* regarding the alleged blasphemous nature of the speech was also made before the riots ended and could be regarded as a contributory cause.¹⁰⁸ Finally, the violence was not directed purely at religious buildings.¹⁰⁹ Therefore, a direct link between the riots and the speech cannot be established.

¹⁰³ The Case, para 14.

¹⁰⁴ The Case, para 15.

¹⁰⁵ *Oberschlick v Austria* App no 15974/90, (ECtHR, 23 May 1991); *Sürek v Turkey (no 4)* App no 24762/94 (ECtHR, 8 July 1999), Joint Partly Dissenting Opinion of Judges Talkens, Casadevall and Greve.

¹⁰⁶ *S Rangarajan v PJ Ram* (1989) 2 SCR 204, 226 (India); *S v Nathie* [1964] (3) SA 588 (AD) (South Africa).

¹⁰⁷ The Case, para 4.

¹⁰⁸ The Case, para 12-13.

¹⁰⁹ The Case, para 12.

[B] The holdings of the Court violated provisions of the UDHR.

1. The holdings violated the right to a fair and independent tribunal under Article 10, UDHR.

a. The tribunal appeared to be influenced by the Executive in its deliberations.

As per Article 10, everyone is entitled to an independent and impartial tribunal for the determination of their rights and obligations.¹¹⁰ Accordingly, the judicial tribunal must be free from the influence of the Executive organ of the Government in its deliberations.¹¹¹ In fact, the mere appearance of such an influence is sufficient to create a legitimate doubt about the independence and impartiality of the tribunal.¹¹² For instance, in *Beaumartin v France*, the ECtHR observed that this right was violated where the tribunal accepted as binding the advice of a member of the Executive on the meaning of a treaty.¹¹³ Public statements made by the Executive before the conclusion of the hearing also violate this right.¹¹⁴

In the present matter, the President's statement before the hearing stated that she was concerned that the video violated Article 2 of the SMS Charter, thus affecting the appearance of an impartial tribunal.¹¹⁵ The President also stated that she "trusted the Grand Parder to

¹¹⁰ The Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III) art 10; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 art 14(1); European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September, 1953) 213 UNTS 221 art 6 ; American Convention of Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 art 8; African Charter on Human and People's Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217 art 7.

¹¹¹ *Sovtransatvi Holdings v Ukraine* (2002) 58 EHRR 44, para 82.

¹¹² *Piersack v Belgium* App no 8692/79 (1983) 5 EHRR 169, para 30; *Campbell and Fell v United Kingdom* (1984) 7 EHRR 165, para 78; *Sramek v Austria* (1985) 7 EHRR 351.

¹¹³ *Beaumartin v France* (1994) 19 EHRR 485, para 38.

¹¹⁴ *Alenet de Ribemont v France* (1995) 20 EHRR 557, para 36; *Butkevicius v Lithuania* App no 48297/99 (ECtHR, 28 November 2000), para 53.

¹¹⁵ The Case, para 19.

take the appropriate steps” following which the latter filed the suit.¹¹⁶ This creates the appearance that the Grand Parder was acting on behalf of the Executive, especially in light of the fact that the Government paid a portion of his salaries,¹¹⁷ and the influence of his opinion on the Lydinan Courts.¹¹⁸ In this context, the deference given by the Court to his claim regarding Article 1 creates an appearance of non-independence.¹¹⁹ Therefore, the holdings are in violation of Article 10 of the UDHR.

b. The special deference given to the Grand Parder’s testimony violates the guarantee of equality of arms.

This right to an impartial tribunal guarantees the equality of arms in an adversarial system.¹²⁰ This right entails that each party must get an opportunity to present its case in a manner that does not place it at a net disadvantage compared to the other party.¹²¹ Further, each party must have the right to effectively challenge the evidence of the counterparty.¹²² Finally, the burden of persuasion of a fact must rest on the party relying on it -the plaintiff in case of proof of liability in civil cases.¹²³

¹¹⁶ The Case, para 19.

¹¹⁷ The Case, para 13.

¹¹⁸ Clarifications to the Case, para 4.

¹¹⁹ The Case, para 21.

¹²⁰ *Nideröst-Huber v Switzerland* (1998) 25 EHRR 709, para 23.

¹²¹ *ibid*; *Kress v France* App no 39594/98 (ECtHR, 7 June 2001), para 72.

¹²² *Kamaniski v Austria* App no 9783/82 (1989) 13 EHRR 36, para 102; *Ferreira Alves v Portugal*, App no 25053/05 (ECtHR, 21 June 2007), para 37.

¹²³ *Alaska Department of Environmental Conservation v EPA* 540 US 461 (2004); *Schaffer ex rel. Schaffer v Weast* 546 US 49 (2005).

In the present case, by giving special deference to the opinion of the Grand Parder regarding violation of Article 1 of SMS Charter,¹²⁴ the Court has given greater weightage to the testimony of the plaintiff, thereby effectively shifted the burden of persuasion to the defendants and negating the guarantee of equality of arms.

2. The holdings restricted freedom of religion under Article 18, UDHR.

As per Article 18, everyone has the freedom to thought, conscience and religion.¹²⁵ Such a right must be available equally and without discrimination to members of all religions, even when a State recognizes a religion as the State religion.¹²⁶ As per the *Arrowsmith* test,¹²⁷ the right to freedom of religion protects all expressions of religious belief that are closely linked to an individual's religion, including the right to express religious beliefs and to manifest one's religion in the form of teaching.¹²⁸ This must include the right to proselytize.¹²⁹ In any case, the Lydinan reservation to the ICCPR has only excluded proselytism where it leads to

¹²⁴ The Case, para13.

¹²⁵ The Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III) art 18; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 art 18; European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September, 1953) 213 UNTS 221 art 9; American Convention of Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 art 12; African Charter on Human and People's Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217 art 8.

¹²⁶ UNHRC, 'General comment No 22' on 'Freedom of Religion' (1993) UN Doc HR1/GEN/1/Rev.1; International Covenant on Civil and Political Rights, (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 art 2(1); European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September, 1953) 213 UNTS 221 art 14.

¹²⁷ *Arrowsmith v United Kingdom* (1978) 3 EHRR 218, para 19.

¹²⁸ Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief UNGA RES 36/55 (25 November 1981) UN Doc A/RES/36/55 art 1, art 6(e); *R v Big M Drug Mart Limited* [1985] 1 SCR 295 (Canada); *Agga v Greece* App no 50766/69, 52912/99 (ECtHR, 17 October 2002), para 52; *Cha'are Shalom Ve. Tsedec v France* App no 27417/95 (ECtHR, 11 July 2000), para 73.

¹²⁹ *Kokkinakis v Greece* (1993)17 EHRR 397, Partly Dissenting Opinion of Judge Martens, para 17.

division among religions.¹³⁰ Proselytism can therefore, be restricted only where it is improper or based on the promise of social advantages or coercion.¹³¹

In Deri Kutik's speech, he emphasised on reasoning and morality as the basis of superiority of Saduja over Parduism.¹³² By extension, the phrase 'by any means' must necessarily be construed as referring to *persuasive reasoning* rather than coercion.¹³³ The speech therefore, amounted to proper proselytism and the holdings of the Court restrict the freedom of religion.

3. The holdings restricted freedom of expression under Article 19, UDHR.

- a. The protection given to speech under the right to freedom of expression extends to controversial opinions.

The right to freedom of expression includes the right to seek, receive and impart information and ideas through any media.¹³⁴ The freedom of expression extends to opinions that offend, shock or disturb.¹³⁵ The bar for limitations on free speech is high,¹³⁶ and belief systems and

¹³⁰ The Case, para 18.

¹³¹ *Kokkinakis v Greece* (1993)17 EHRR 397, para 48-49; *Larrisis and others v Greece* (1999) 27 EHRR 329, para 45.

¹³² The Case, para 8.

¹³³ *Kokkinakis v Greece* (1993)17 EHRR 397.

¹³⁴ The Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III) art 19; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 art 19; European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September, 1953) 213 UNTS 221 art 10; American Convention of Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 art 9; African Charter on Human and People's Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217 *López-Álvarez v Honduras*, Merits, Reparations and Costs, Inter-American Court of Human Right Series C No 141 (1 February 2006) art 9; para 163; *Claude-Reyes et al. v Chile*. Merits, Reparations and Costs, Inter-American Court of Human Rights Series C No 151 (19 September 2006), para 75; *Kimel v Argentina*, Merits, Reparations and Costs, Inter-American Court of Human Rights Series C No 177 (3 May 2008), para 53.

¹³⁵ *Arslan v Turkey* App no 23462/92 (ECtHR, 8 July 1999), para 66; *Chauvy and others v France* (2005) 41 EHRR 29, para 69; Organization of American States, 'Annual Report of the Inter-American Commission on Human Rights 2009', (2009) OEA/Ser.L/V88. Doc 9, Chapter V.

¹³⁶ *Shchetko v Belarus* Communication No 1009/2001, UN Doc CCPR/C/87D/1009/2001 (2006) (HRC), para 7.3.

religions cannot be considered exempt from external and internal criticism.¹³⁷ Further, engaging in a debate regarding historical truth is an essential part of the right to freedom of expression.¹³⁸ The threshold of truth requires merely that value judgements are made in good faith regarding the veracity of the information.¹³⁹ Historical debates are also essential to the right to receive information as competing ideas in the *marketplace of truth* would result in the best perspectives.¹⁴⁰

Deri Kutik's speech observed that facts mentioned in verses of the Zofftor never actually occurred,¹⁴¹ based on findings in a reputable academic journal.¹⁴² This was denied by Parduists based on contradictory evidence.¹⁴³ The speech is therefore, a part of a historical debate, fundamental to the right impart and seek information.

b. The principle of intermediary liability “chills” freedom of expression.

Chilling effect refers to the deterrence effect that may result from a State action because of the consequence that flows from an expressive act under that law.¹⁴⁴ The validity of such a restrictive action is determined by whether the consequence of the action is to restrict speech

¹³⁷ UNGA, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (2008) UN Doc A/HRC/7/14; *Otto-Preminger-Institut v Austria* (1994) 19 EHRR 34, para 47.

¹³⁸ *Chauvy and others v France* (2005) 41 EHRR 29, para 69; *Giniewski v France* (2007) 45 EHRR 23, para 51.

¹³⁹ *Lingens v Austria* (1986) 8 EHRR 4078, para 46.

¹⁴⁰ *Abrams v United States* 250 US 616 (1919).

¹⁴¹ The Case, para 8.

¹⁴² Clarifications to the Case, para 16.

¹⁴³ *ibid.*

¹⁴⁴ Frederick Schauer, 'Fear, Risk and the First Amendment: Unraveling the Chilling Effect', (1978) 58 Boston University Law Review 685, 692.

that is protected by freedom of expression.¹⁴⁵ Holding an intermediary liable for speech made by a third party has a repressive effect on the right to receive information as the intermediary is compelled to employ self-censorship to avoid controversial opinions.¹⁴⁶ In such a case, potential for abuse of power by private censors is also a relevant consideration.¹⁴⁷ Such a chilling effect is also incompatible with the positive obligation on the government to ensure the necessary infrastructure for free speech.¹⁴⁸ Therefore, holding DigiTube liable has a chilling effect on freedom of expression, especially in light of the broad language of the SMS Charter which would encourage strict self-censorship due to the lack of clarity in the law.

4. The restrictions are not permitted under Article 29 (2), UDHR.

As per Article 29(2), restriction on rights and freedoms are permissible if they are prescribed by law, pursuing a legitimate aim and not in excess of what is necessary to achieve that aim.¹⁴⁹

a. Legality

The condition of legality requires that the limitation be established expressly and clearly in the formal and material sense.¹⁵⁰ Accordingly, ‘law’ must be incorporated in domestic law for

¹⁴⁵ *Buckley v Valeo* 424 US 1, 68 (1976); *Miller v California* 413 US 15 (1973).

¹⁴⁶ *Farmers’ Educational and Cooperative Union, North Dakota v WDAY Inc.* 360 US 525 (1959); *Smith v California* 361 US 147, 150-51 (1959); *Manual Enters., Inc. v Day* 370 US 478, 493 (1962); *Denver Area Educational Telecommunication Consortium Inc. v FCC* 518 US 727, 754 (1996); *Ashcroft v ACLU* 542 US 656, 670-671 (2002); *Cantwell v Connecticut* 310 US 296, 307 (1940).

¹⁴⁷ *Turner Broadcast Inc v FCC* 512 US 622, 656-657 (1994).

¹⁴⁸ Jack M Balkin, ‘The Future of Free Expression in a Digital Age’ (2009) 36 *Pepperdine Law Review* 427, 432.

¹⁴⁹ The Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III) art 29(2); Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (CUP 2010) 288.

the pursuit of the common good.¹⁵¹ Further, it must have sufficient precision to allow the individual to regulate his conduct,¹⁵² and not give excessive discretionary powers to the authorities interpreting it.¹⁵³

In the present matter, the accused have been held liable on the basis of an international treaty that lacks the legal basis to hold private persons liable.¹⁵⁴ Therefore, the restriction is not provided by law.

b. Legitimacy

i. *Public Order*

‘Public order’ in a democratic society must permit the widest possible circulation of ideas and opinions as well as the widest access to information.¹⁵⁵ A restriction of controversial speech where the threat of violence is unintentional, is contrary to the State’s positive obligation to

¹⁵⁰ Organization of American States, ‘Inter-American Legal Framework Regarding the Right to Freedom of Expression, Office of the Special Rapporteur on Freedom of Expression’, (2010) OEA/Ser.L. V/ II CIDH/RELE/INF; *Herrera-Ulloa v Costa Rica*, Preliminary Objections, Merits, Reparations and Costs, Inter-American Court of Human Rights Series C No 107 (2 July 2004), para 120; *Palamara-Iribarne v Chile*, Merits, Reparations and Costs, Inter-American Court of Human Right Series C No 135 (22 November 2005), para 46.

¹⁵¹ *Bathold v Germany* (1985) 7 EHRR 383, para 48; *The Word " Laws " in Article 30 of the American Convention on Human Rights*, Advisory Opinion OC-6/86, Inter-American Court of Human Rights Series A No 6 (9 May 1986).

¹⁵² *Sunday Times v United Kingdom* (1979-80) 2 EHRR 245, para 49; *Kokkinakis v Greece* (1993)17 EHRR 397, para 40; *Lambert v California* 350 US 225, 229-230 (1957); Anna-Lena Svennson McCarthy, *The International Law of Human Rights and States of Exception: With Special Reference to the Travaux Preparatoires and the Case-law of the International Monitoring Organs* (Martinus Nijhoff 1998) 93.

¹⁵³ ECOSOC, ‘The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights’ (1984) UN Doc E/CN.4/1985/4, para 16, 18.

¹⁵⁴ See above Issue I(A)(1).

¹⁵⁵ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 19 of the American Convention on Human Rights)*, Advisory Opinion OC-5/85, Inter-American Court of Human Rights Series A No 5 (13 November 1985), para 69.

protect speech.¹⁵⁶ In the present matter, the speech does not reflect an intention to incite violence,¹⁵⁷ and cannot be restricted on grounds of public order.

ii. Protection of the rights of others

In assessing the ‘rights of others’ under Article 29(2), the precedence of rights protected by human rights treaties over other rights must be taken into account.¹⁵⁸ Further, the right to freedom of religion does not protect one from the denial by others of one’s religious beliefs and the promotion of diverse religious doctrines.¹⁵⁹ Furthermore, the guarantee of the accuracy cannot be used to justify a restriction on rights under the UDHR, as the right to receive information includes the right to receive different opinions.¹⁶⁰ Therefore, in the present matter, the restriction cannot be justified on these grounds.

c. The restriction is not ‘necessary in a democratic society.’

A restriction on rights and freedoms must not go beyond what is strictly required to achieve the legitimate aim.¹⁶¹ In the context of restrictions on freedom of expression, States have a

¹⁵⁶ *S Rangarajan v P J Ram* (1989) 2 SCR 204 (India); *Ozgun Gundem v Turkey* (2001) 31 EHRR 49, para 46.

¹⁵⁷ See above Issue I(A)(4).

¹⁵⁸ ECOSOC, ‘The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights’ (1984) UN Doc E/CN.4/1985/4, para 35-37.

¹⁵⁹ *Otto-Preminger-Institut v Austria* (1994) 19 EHRR 34, para 47.

¹⁶⁰ *Smith and Grady v United Kingdom* App no 33985/96, 33986/96 (ECtHR, 27 September 1997), para 74; *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 19 of the American Convention on Human Rights)*, Advisory Opinion OC-5/85, Inter-American Court of Human Rights Series A No 5 (13 November 1985).

¹⁶¹ *Chintaman Rao v State of Madhya Pradesh* 1950 SCR 759, 763 (India); *AG v Times Newspaper* (1974) AC 273, 294 (UK); *East and West Steamship Company v Pakistan* PLD 1958 SC 41 (Pakistan); *Constitutional Rights Project and Others v Nigeria* (2000) AHRLR 227 (ACHPR 1999), para 68; *Ollson v Sweden* (1989) 11 EHRR 259, para 67; *Funke v France* 16 EHRR 297, para 55; *Amnesty International v Zambia* Communication No 212/98 (ACtHR, 5 May 1999), para 54; *Arslan v Turkey* App no 23462/92 (ECtHR, 8 July 1999) para 66; *Informationsverein Lentia and others* (1993) 17 EHRR 93, para 43; *DeMoraes v Angola* Communication No 1128/2002, UN Doc CCPR/C/83/D/1128/2002 (2005) (HRC), para 6.8; *R v Oakes* [1986] 1 SCR 103, 138-139 (Canada).

limited margin of appreciation.¹⁶² Where restrictions are content-based or regulate the content of speech rather than the time, manner etc.,¹⁶³ they can be justified only on grounds of compelling state interest.¹⁶⁴ The mere fact that speech is controversial does not justify such a compelling interest.¹⁶⁵ Further, the effect of the limitation must not be to restrict the right completely.¹⁶⁶

Deri Kutik's speech merely criticized the majority religion.¹⁶⁷ The controversial nature of the speech does not justify a compelling State interest. Therefore, such a measure cannot be considered necessary in a democratic society.

¹⁶² *Wingrove v the United Kingdom* (1997) 24 EHRR 1, para 53; *Nilsen and Johnsen v Norway* (2000) 30 EHRR 878.

¹⁶³ *Ward v Rock Against Racism* 491 US 781, 791 (1989).

¹⁶⁴ *Turner Broad Sys Inc v FCC* 512 US 622 (1992).

¹⁶⁵ *Dudgeon v United Kingdom* (1981) 4 EHRR 149, para 53; Rafael Busto Gisbert, 'The Right to Freedom of Expression in a Democratic Society', in Roca and Santalayo (eds.), *Europe of Rights: A Compendium on the European Convention of Human Rights* 377 (Martinus Nijhoff 2012); *Serif v Greece* (1999) 31 EHRR 561, para 53; *Lee v Republic of Korea* Communication No 1119/2002, UN Doc CCPR/C/84/D/1119/2002 (2005) (HRC), para 7.2.

¹⁶⁶ ECOSOC, 'The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights' (1984) UN Doc E/CN.4/1985/4, para 2; Kyriakos N Kyriazopoulos, 'Proselytization in Greece: Criminal Offense vs. Religious Persuasion and Equality', (2004 - 2005) 20(1) *Journal of Law and Religion* 149.

¹⁶⁷ The Case, para 8-9.

PRAYER

In the light of arguments advanced and authorities cited, the Applicants most humbly and respectfully request this court to adjudge and declare:

1. That the SMS Charter is valid under the ICCPR;
2. That the Applicants cannot be held liable under the SMS Charter;
3. That the Lydinan Supreme Court erred in making the Applicants liable for violating Articles 1(b), 2(a) and 2(b) of the SMS Charter;
4. That the civil suit initiated by the Grand Parder fails to accord the right to fair trial, guaranteed under Article 10, UDHR to the Applicants;
5. That the civil proceedings in the courts of Lydina violated the Applicants' right to freedom of thought, belief and conscience under Article 18, UDHR;
6. That the civil proceedings in the courts of Lydina are unjustified and violate the Applicants' right to freedom of speech and expression under Article 19, UDHR.

On behalf of Deri Kutik and DigiTube

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Agents for the Applicants