

2014/2015

DERI KUTIK & DIGITUBE

(APPLICANTS)

v

REPUBLIC OF LYDINA

(RESPONDENT)

MEMORIAL FOR RESPONDENT

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LIST OF ABBREVIATIONS

&	And
2d	Second Series
3d	Third Series
AC	Appeal Cases
ACLU	American Civil Liberties Union
AJIL	American Journal of International Law
AIR	All India Reporter
App	Application
Art	Article
Cal	California
Cir	Circuit
Cl	Clause
Conn	Connecticut
Const	Constitution
Ct	Court
CUP	Cambridge University Press
Doc	Document
DR	Decisions and Reports
ECmHR	European Commission of Human Rights
ECOSOC	United Nations Economic and Social Council
ECtHR	European Court of Human Rights

ed/ eds	Editor(s)
Edn	Edition
EHRH	European Human Rights Reports
et al	Et alia
EU	European Union
F	Federal Reporter
Fed Appx	Federal Appendix
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ILC	International Law Commission
ISP	Internet Service Provider
Minn Ct App	Minnesota, Court of Appeals
ND Cal	Northern District of California
No/ no	Number
OECD	Organization for Economic Co-operation and Development
OUP	Oxford University Press
Para	Paragraph
QB	Queen's Bench
s/ S	Section
SCC	Supreme Court Cases
SCI	Supreme Court of India
SCR	Supreme Court Reports
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
UNHRC/ HRC	United Nations Human Rights Committee
UNTS	United Nations Treaty Series
US	United States
USSC	United States Supreme Court
v	versus
VCLT	Vienna Convention on the Law of Treaties
Vol	Volume

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STATEMENT OF RELEVANT FACTS

Socio- Political Scenario

The Republic of Lydina [‘Lydina’] currently has a deep religious divide in its population. Parduism and Saduja are the two major religions constituting 75% and 20% of the population respectively. They are frequently involved in violence against each other, and this has led to many riots and disruptions in the country. Parduism has been the majority religion in Lydina for centuries and has developed a strong cultural bond for Lydinan Malanis. However, a small but significant percentage of Sadujists are ethnic Malanis. After the advent of the social media, the religious violence has increased markedly between the adherents of two religions. This is evidenced by 67% of Lydinan households having internet access and 70% of the population having access to smart technology.

Social Media Speech Charter

Because of the increased use of social media and to prevent religion-based violence within the country, the Republic of Lydina has signed a regional charter in 2008 called the Social Media Speech (SMS) Charter. The Charter requires signatory countries to establish rules to promote Malani culture while also encouraging the development of modern technology. Pursuant to the SMS Charter, Lydina has enacted the Content Integrity Act in 2009. Lydina is also a party to the International Covenant on Civil and Political Rights [‘ICCPR’] since 2000. It is pertinent to note that Lydina has made a limited reservation to Articles 18-20 of the ICCPR to the effect 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, a young Sadujist man, named Deri Kutik, uploaded a video on the video sharing website DigiTube.com. This website is owned by an Internet services company Centiplex Corporation. During his uploaded sermon, Deri Kutik asserted that Saduja is superior to Parduism because it does not stress on blind belief like Parduism. Further, he claimed that the teachings in Zofftor, Holy Scripture of the Parduists were false and untrue.

The DigiTube video went viral and was circulated all over Lydina. Consequently, there was rioting between the Parduists and the Sadujists. Over 100 people were injured in the riots which ended one week after the publication of the DigiTube video. The Grand Parder, the highest religious leader of Parduism in Lydina issued a pronouncement on January 20, 2014 that the DigiTube video was blasphemous and intentionally provocative.

Response of the Lydinan Government

The President, via a press statement, expressed her concerns that the DigiTube video violated Article 2 of the SMS Charter. On April 21 2014, the Grand Parder sued Deri Kutik and DigiTube in the domestic courts of Lydina under the SMS Charter. The Lydinan Court held that the DigiTube video violated Article 1(b), 1(d), 2(a) and 2(b) of the SMS Charter. Further, it rejected the counter claims that the SMS Charter was invalid under the ICCPR. Both rulings were appealed to the Supreme Court of Lydina ['Court']. The Court dismissed all the appeals. The Universal Freedom of Expression Court finds that it has jurisdiction as Lydina is a signatory to it.

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.

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 reservation made by Lydina to Articles 18-20 of the ICCPR that “*proselytism and other acts that may lead to division between religions*” covers the SMS Charter and the same is valid under the ICCPR. For a reservation to be valid under the ICCPR, it has to be compatible with the object and purpose of the treaty. The Lydinan reservation satisfies this requirement as it is specific and does not completely abrogate the rights accorded under Articles 18-20 under the ICCPR.

Further, the provisions of the SMS Charter are valid restrictions imposed on the rights under Article 18(3) and 19(3) of the ICCPR as they are ‘prescribed by law’ and are necessary for the protection of the rights of Malanis and to maintain public order in Lydina. The provisions of the SMS Charter are ‘prescribed by law’ as they are recognized as ‘law’ at the national level, formulated with sufficient precision so as to enable the persons subject to it to regulate their conduct and have sufficient safeguards against abuse. Lastly, they are necessary to protect the rights of Malanis and maintain public order in Lydina in light of the history of religious riots in Lydina.

II. THE HOLDINGS OF THE COURT ARE CONSISTENT WITH THE UDHR.

The holdings of the Court have not violated the rights of freedom of thought, conscience and religion, and the freedom of opinion and expression espoused in the UDHR. *Per contra*, Deri Kutik and DigiTube have violated the SMS Charter. Deri Kutik uploaded a video on

DigiTube calling for conversion of all Parduists to Saduja, on account of their inferiority. Further, the veracity of the Parduist scripture Zofftor was questioned.

The Court held that Deri Kutik and DigiTube have violated Articles 1(b), 2(a) and 2(b) of the SMS Charter as the content of the video did not comply with the religious and ethical values of Malani culture and society, incited hatred based on religion, and was provocative. There is a violation of Article 1(b) as there is a violation of the Parduist beliefs, which are central to Malani culture. There is a violation of Article 2(a) as there is an incitement of hatred as evidenced by the content and context of the speech. Lastly, there is a violation of Article 2(b) as the speech was provocative as espoused a violent response inspired by Malani solidarity.

Further, the judgment is in consonance with the provisions of the UDHR. There is no violation of the right to a fair hearing under Article 10, UDHR as the Lydinan court system is independent and the procedural requirement of fairness has been met. The holding is consistent with the right to freedom of thought, conscience and religion under Article 18, UDHR as the video amounts to improper proselytism and advocates religious hatred. The judgment has a legitimate secular purpose and there is no violation of the standard of non-discrimination. The judgment is correct and does not violate Article 19, UDHR in as much as the video constitutes a true threat. In any case, it is likely to cause imminent lawless action, in the light of religious volatility in the region. Additionally, the judgment does not cause a “chilling effect” due to lack of palpable injury. Lastly, the three-part test to judge the validity of restrictions under Article 29 (2) is met in this case as first, the restriction is prescribed by law, secondly, it pursues a legitimate aim of protecting the rights of Parduists and public order of Lydina, and finally, the restriction is necessary in a democratic society.

ARGUMENTS

I. THE SMS CHARTER IS VALID UNDER THE ICCPR.

The SMS Charter is valid on account of Lydina's reservation to the ICCPR [A]. Alternatively, the SMS Charter is compatible with the provisions of the ICCPR [B].

[A] The SMS Charter is valid on account of Lydina's reservation to the ICCPR.

The matter of reservations under the ICCPR is governed by the principles of international law¹ codified in the VCLT.² The VCLT stipulates that where a reservation is not prohibited by the treaty, State Parties may make a reservation provided it is compatible with its object and purpose.³ Lydina's reservation is compatible with the object and purpose of the ICCPR as it is specific [1] and it is not a blanket restriction [2].

1. The Lydinan reservation to the ICCPR is specific and hence, valid.

The object and purpose of the ICCPR is to create legally binding standards for human rights which are binding on States ratifying the Convention.⁴ Reservations of a general character

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; Vienna Convention on Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 art 19(3).

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.

create great uncertainty as to the extent of legal obligations undertaken by a state under the ICCPR.⁵

Therefore, for a reservation to be valid under the ICCPR, it must be specific and transparent, to ensure certainty as to the extent of obligations undertaken by a State.⁶ A reservation is considered to be specific and transparent if it refers to particular provisions of the ICCPR and indicate its scope in precise terms.⁷

The Lydinan reservation specifically refers to Articles 18-20 of the ICCPR and is limited to the scope of its exact wordings, '*Proselytism and other acts that may lead to division between religions are not protected by the Covenant*'.⁸ Therefore, it is specific and compatible with the object and purpose of the ICCPR.

2. The Lydinan reservation merely restricts certain aspects of the right to freedom of religion and freedom of expression.

A reservation merely restricting certain aspects of a right without taking away the right as a whole is valid.⁹ For instance, in *Restriction to the Death Penalty*,¹⁰ the IACtHR had to consider the legality of the reservation by Guatemala to Article 4(4) of the IACHR, a

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.

⁷ *ibid*; *Temeltasch v Switzerland* (1983) DR 31 (ECmHR).

⁸ Clarifications to the Case, cl 14.

⁹ Advisory Opinion OC 3-83, Inter-American Court of Human Rights Series A No 3 (8 September 1983), para 61.

¹⁰ *ibid*.

provision that excludes death penalty for political crimes.¹¹ The IACtHR held that a blanket reservation to the human right would be incompatible with the object and purpose of the Convention. However, restrictions curbing only certain aspects of the right to life such as the one made by Guatemala was valid under the Convention.¹²

Similarly, the Lydian reservation merely restricts certain aspects of the right to religion and freedom of expression relating to ‘*proselytism and other acts leading to division between religions*’. Hence, the reservation is consistent with the object and purpose of the ICCPR.

[B] Alternatively, the SMS Charter is compatible with the provisions of the ICCPR.

Admittedly, the ICCPR recognizes the right to freedom of religion of a person to include the attempt to persuade others to adopt new religious beliefs or affiliation.¹³ *In addition*, Article 19 of the ICCPR requires State Parties to guarantee the freedom of expression to individuals in matters of religious discourse¹⁴ through any medium of communication.¹⁵

However, these rights are not absolute in nature and can be subject to limitations under Articles 18(3) and 19(3).

¹¹ *Restriction to the Death Penalty*, Advisory Opinion OC 3-83, Inter-American Court of Human Rights Series A No 3 (8 September 1983), para 61.

¹² William C Shabas, ‘Reservations to Human Right Treaties: Time for Innovation and Reform’ (1994) 32 Canadian Yearbook of International Law 39.

¹³ Malcolm D Evans, *Religious Liberty and International Law in Europe* (CUP 2008) 194; Sub-Commission on Prevention of Discrimination and Protection of Minorities, ‘Special Rapporteur, Arcot Krishnaswami, Study of Discrimination in the Matter of Religious Rights and Practices’ (1960) UN Doc E/CN.4/Sub.2/200/Rev.1; *Dianna Ortiz v Guatemala* Case No 10.526 (IACtHR, 16 October 1996).

¹⁴ *Malcolm Ross v Canada* Communication No 736/1997, UN Doc CCPR/C/70/D/736/1997 (2000) (HRC).

¹⁵ *Gauthier v Canada* Communication No 633/1995, UN Doc CCPR/C/65/D/633/1995 (1999) (HRC); UNHRC, ‘General comment No 34’ on ‘Article 19 (Freedom of Opinion and Expression)’ (2011) UN Doc CCPR/C/GC/34.

The restrictions imposed by the SMS Charter are valid since they are prescribed by law [1], pursuant to a legitimate aim [2] and are necessary in a democratic society [3].¹⁶

1. The provisions of the SMS Charter are ‘restrictions’ which are ‘prescribed by law’ within the meaning of ICCPR.

a. The SMS Charter has its basis in domestic law.

For a ‘restriction’ to be ‘prescribed by law’, it must be considered as “law” at the national level.¹⁷ For instance, in *Groppera Radio*,¹⁸ the ECtHR allowed the states to rely on domestically applicable rules of public international law to satisfy this criterion. The ECtHR rejected the contention of the Applicants that international law was binding only on State Parties to the instrument and held that the International Telecommunications Regulations gave sufficient indication that rules would be made applicable to the applicants in their individual capacity.¹⁹

Similarly, the SMS Charter imposed a primary duty on the media functioning in the Malani States to comply with the provisions of the SMS Charter. The Malani States only had a secondary obligation to ‘ensure’ compliance by the media under their jurisdiction with the provisions of the SMS Charter.²⁰ Further, the Content Integrity Act enacted by Lydina in

¹⁶ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 art 18, art 19; *Luisiana Rois v Republic of Venezuela* Inter American Court of Human Rights Series E No 061 (8 September 2004); *Albert Womah Mukong v Cameroon* Communication No 458/1991, UN Doc CCPR/C/51/D/458/1991 (1994) (HRC); Javier García Roca and Pablo Santolaya (eds), *Europe of Rights: A Compendium on the European Convention of Human Rights* (Martinus Nijhoff 2012) 358.

¹⁷ Anna-Lena Svensson-McCarthy, *The International Law of Human Rights and States of Exception: With Special Reference to the Travaux Préparatoires and the Case-Law of the International Monitoring Organs* (Martinus Nijhoff 1998) 75; *Silver and others v United Kingdom* (1983) 5 EHRR 347.

¹⁸ (1990) 12 EHRR 321; *Autronic AG v Switzerland* (1990) 12 EHRR 485.

¹⁹ *Groppera Radio AG v Switzerland* (1990) 12 EHRR 321, para 65.

²⁰ The Case, para 15.

2009 only extended the duties under the SMS Charter to internet service providers operating in Lydina.²¹ Hence, the SMS Charter has its ‘basis’ in domestic law.

b. The SMS Charter is formulated with sufficient precision.

A norm is ‘prescribed by law’ if it is formulated with sufficient precision so as to enable citizens to reasonably foresee the consequences which a given action may entail.²² However, the consequences need not be foreseeable with absolute certainty as it may bring excessive rigidity in the law.²³ For this reason, “many laws are invariably couched in terms which, to a greater or lesser extent, are vague and whose application is a question of practice”.²⁴

In *Kokkinakis v Greece*,²⁵ and *Mueller v Switzerland*,²⁶ the ECtHR accepted that proselytism and obscenity laws fall within this category. Therefore, notions such as ‘obscenity’ and ‘proselytism’ were regarded as ‘prescribed by law’,²⁷ in order to avoid rigidity and keep pace with the changing circumstances.²⁸ Similarly, in *Wingrove v United Kingdom*,²⁹ it was held that blasphemy laws cannot by their very nature lend themselves to precise legal definition. However, the consequences of the operation of these blasphemy laws were held to be reasonably foreseeable.

²¹ The Case, para 17.

²² *The Sunday Times v United Kingdom* (1979-80) 2 EHRR 245, para 49.

²³ *ibid.*

²⁴ *The Sunday Times v United Kingdom* (1979-80) 2 EHRR 245, para 49.

²⁵ (1993)17 EHRR 397.

²⁶ (1988) 13 EHRR 212.

²⁷ Anna-Lena Svensson-McCarthy, *The International Law of Human Rights and States of Exception: With Special Reference to the Travaux Préparatoires and the Case-Law of the International Monitoring Organs* (Martinus Nijhoff 1998) 83.

²⁸ *Markt intern Verlag GmbH and Klaus Beermann v Germany* (1989) 12 EHRR 161; *Groppera Radio AG v Switzerland* (1990) 12 EHRR 321.

²⁹ *Wingrove v United Kingdom* (1997) 24 EHRR 1.

Thus, the provisions of the SMS Charter such as “*speech or conduct that deliberately hurts religious feelings or values of Malani Culture*”,³⁰ “*complying with religious and ethical values of Malani culture*”³¹ which are similarly worded to the statutes in the aforementioned cases, by their very nature cannot lend themselves to precise legal definition because of the constant developments in the media and internet communications. However, since the consequences of the SMS Charter are reasonably foreseeable in light of religious conflict between Parduists and Sadujists in Lydina, they fulfil the foreseeability requirement.

c. The SMS Charter has sufficient safeguards against abuse.

Linked to the foreseeability requirement is the requirement that a “*law which confers a discretion must indicate the scope of the discretion*”³² The expression ‘*prescribed by law*’ does not mean that the safeguards must be enshrined in the very text that authorises the imposition of restrictions.³³ The rule only implies that the interference by authorities should be subject to “effective control”.³⁴

The SMS Charter was subject to the effective control of Lydinan domestic courts.³⁵ In addition, an appeal to the Lydinan Supreme Court was also granted to control the discretion exercised by authorities pursuant to the SMS Charter.³⁶ Thus, there were sufficient safeguards against abuses of discretion conferred by the SMS Charter.

³⁰ The Case, para 15, SMS Charter art 2(b).

³¹ The Case, para 15, SMS Charter art 1(b).

³² *Silver and others v United Kingdom* (1983) 5 EHRR 347.

³³ *ibid.*

³⁴ *Silver and others v United Kingdom* (1983) 5 EHRR 347; *Klass and others v Germany* (1978) 2 EHRR 214.

³⁵ The Case, para 20.

³⁶ The Case, para 22.

2. *The restrictions imposed in the SMS Charter were pursuant to the legitimate aims of the ICCPR.*

a. The provisions of the SMS Charter are for protecting the fundamental rights of others.

The rights and freedoms of others may act as a limitation upon Article 18 and 19 of the ICCPR.³⁷ For instance, in *Otto Preminger Institut v Austria*, the ECtHR upheld a law which was intended to suppress behaviour directed against religious values of the Austrian society as a legitimate measure for “the protection of rights of others”.³⁸ Similarly, the Court in *Wingrove v United Kingdom*, upheld the English law of blasphemy intended to suppress behaviour directed against ‘objects of religious veneration among believing Christians’ as a legitimate measure for “the protection of rights of others”.³⁹

Accordingly, the provisions of the SMS Charter restraining the media under the jurisdiction from offending the ‘*ethical and religious values of the Malani culture*’⁴⁰ and “*insulting God, revealed religions, religious symbols, Holy Scriptures, and holy figures*”⁴¹ are for the “protection of the rights of others” and are thus pursuant to ‘legitimate aims’.

³⁷ 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, cl 35; *Malcolm Ross v Canada* Communication No 736/1997, UN Doc CCPR/C/70/D/736/1997 (2000) (HRC).

³⁸ (1995) 19 EHRR 34, para 48.

³⁹ (1997) 24 EHRR 1, para 48.

⁴⁰ The Case, para 15, SMS Charter art 1(b).

⁴¹ The Case, para 15, SMS Charter art 1(d).

b. The provisions of the SMS Charter are for preserving ‘public order’ in Lydina.

The expression *public order* as used in the ICCPR is defined as the sum of rules which ensure the functioning of the society or the set of fundamental principles on which society is founded.⁴²

In *Chaplinsky v New Hamisphere*, the USSC held that insulting or ‘fighting’ words which by their very utterance inflict injury or tend to incite an immediate breach of the peace can be validly restricted to maintain public order.⁴³ Similarly, in *Ramji Lal Modi v State of Uttar Pradesh*,⁴⁴ the SCI upheld a law that penalized deliberate hurting of the religious feelings of any class of persons was in the interests of public order.

Lydina has a history of religious violence and riots involving hate speeches on the social media networks and video sharing sites.⁴⁵ Thus, the provisions of the SMS Charter restraining media from ‘*insulting god, revealed religions, religious symbols, holy scriptures and holy figures*’,⁴⁶ ‘*hate speech*’,⁴⁷ and ‘*provocative speech*’⁴⁸ are necessary to maintain public order as such speech tends to incite immediate breach of peace.

⁴² 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, cl 22; *Manuel 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.

⁴³ 315 US 568 (1942).

⁴⁴ AIR 1957 SC 620 (India).

⁴⁵ The Case, para 2.

⁴⁶ The Case, para 15, SMS Charter art 1(d).

⁴⁷ The Case, para 15, SMS Charter art 2(a).

⁴⁸ The Case, para 15, SMS Charter art 2(b).

3. The restrictions imposed by the SMS Charter are necessary in a democratic society.

a. The restrictions in the SMS Charter are pursuant to a pressing social need.

i. *The restrictions in the SMS Charter protected the rights of others.*

Post publication civil sanctions for matters regarded as sacred by a religious community have been held to be necessary for the protecting the rights of others.⁴⁹ For instance, in *IA v Turkey*,⁵⁰ the author made statements implying a certain element of humiliation and discredit *vis-à-vis* religion, the Prophet and belief in God according to Islam. To dissuade such statements in future, pecuniary sanctions were held to be *necessary* to provide protection against offensive attacks on matters regarded as sacred by Muslims.

Similarly, the provisions of the SMS Charter imposing civil sanctions on the media failing to refrain from ‘*insulting god, revealed religions, religious symbols, holy scriptures and holy figures*’,⁵¹ ‘*hate speech*’,⁵² ‘*protecting Malani culture against hostility and harmful propaganda*’⁵³ and ‘*provocative speech*’⁵⁴ are necessary to protect matters regarded as sacred by Malanis in Lydina in light of the tenuous religious relations between Parduists and Sadujists.

⁴⁹ *IA v Turkey* (2007) 45 EHRR 30.

⁵⁰ *ibid.*

⁵¹ The Case, para 15, SMS Charter art 1(d).

⁵² The Case, para 15, SMS Charter art 2(a).

⁵³ The Case, para 15, SMS Charter art 1(e).

⁵⁴ The Case, para 15, SMS Charter art 2(b).

ii. *The SMS Charter was necessary to maintain 'public order'.*

'Public interest' must be taken into account to determine the pressing social need to interfere with free speech.⁵⁵ For instance, in *Beauharnais v Illinois*,⁵⁶ the Court took into account the fact that, from 1837 to 1951, Illinois had been the scene of exacerbated tension between races often flaring into violence and destruction, and accordingly, it noted that the State had a *pressing social need* to curb false and malicious defamation of racial and religious groups made in public places. Therefore, it upheld the Illinois law making it illegal to publish any racist speech leading to breach of peace.⁵⁷

In the present matter, the two major religious populations, Parduists constituting 75% of the population and the Sadujists constituting 20% of the population of Lydina are involved in frequent violence against each other.⁵⁸ Social media is an important contributing cause in the religious violence between two religions in Lydina.⁵⁹ Hence, Lydina has compelling reasons to curb defamation of racial and religious groups in the media under its jurisdiction for functioning of the Lydinan society. Consequently, the restriction imposed on speech '*insulting god, revealed religions, religious symbols, Holy scriptures and holy figures*',⁶⁰ '*hate speech*',⁶¹ '*protecting Malani culture against hostility and harmful propaganda*'⁶² and '*provocative speech*'⁶³ is necessary for maintaining 'public order' in Lydina.

⁵⁵ *The Sunday Times v United Kingdom* (1979-80) 2 EHRR 245, para 67.

⁵⁶ 343 US 250 (1952).

⁵⁷ *Virginia v Black* 538 US 343 (2003); *Ramji Lal Modi v State of Uttar Pradesh* AIR 1957 SC 620 (India).

⁵⁸ The Case, para 2.

⁵⁹ The Case, para 3.

⁶⁰ The Case, para 15, SMS Charter art 1(d).

⁶¹ The Case, para 15, SMS Charter art 2(a).

- b. The restrictions in the SMS Charter are proportionate to the legitimate aims being pursued.

The two common factors in evaluating whether the limiting measures are proportional are the negative impact of the limiting measure upon enjoyment of the right and the ameliorating effects of the limiting measure.⁶⁴

Article 20(2) of the ICCPR requires State parties to enact laws to prohibit hate speech.⁶⁵ In *Faurisson v France*,⁶⁶ the author was convicted under Gayssot Act that criminalized speech pertaining to certain crimes defined in the London Charter of 1945. The HRC upheld the Gayssot Act as a *proportionate measure* having a rational connection with the protection of the Jewish community and noted that it was intended to prohibit anti-Semitic feelings in light of the historical background of Holocaust.

The SMS Charter was a regional charter to prevent religion based violence because of the increased use of the social media.⁶⁷ Therefore, the SMS Charter refraining media from ‘*insulting god, revealed religions, religious symbols, holy scriptures and holy figures*’,⁶⁸ ‘*hate speech*’,⁶⁹ and ‘*provocative speech*’⁷⁰ and seeking ‘*compliance with ethical and*

⁶² The Case, para 15, SMS Charter art 1(e).

⁶³ The Case, para 15, SMS Charter art 2(b).

⁶⁴ *Burgess v Australia* Communication No 1012/2001, UN Doc CCPR/C/85/D/1012/2001 (2005) (HRC).

⁶⁵ UNHRC, ‘General comment No 34’ on ‘Article 19 (Freedom of Opinion and Expression)’ (2011) UN Doc CCPR/C/GC/34. para 51; *Malcolm Ross v Canada* Communication No 736/1997, UN Doc CCPR/C/70/D/736/1997 (2000) (HRC).

⁶⁶ Communication No 550/1993, UN Doc CCPR/C/58/D/550/1993 (1996) (HRC).

⁶⁷ The Case, para 15.

⁶⁸ The Case, para 15, SMS Charter art 1(d).

⁶⁹ The Case, para 15, SMS Charter art 2(a).

*religious values of Malani culture*⁷¹ is a *proportionate measure* for preserving the public order in Lydina in light of history of riots between Parduists and the Sadujists.

⁷⁰ The Case, para 15, SMS Charter art 2(b).

⁷¹ The Case, para 15, SMS Charter art 1(b).

II. THE HOLDINGS OF THE COURT ARE CONSISTENT WITH THE UDHR.

The Lydian Courts have correctly held Deri Kutik and DigiTube liable under provisions of the SMS Charter [A]. Such a holding is consistent with the State's obligations under the UDHR [B].

[A] Deri Kutik and DigiTube violated the SMS Charter.

Deri Kutik and DigiTube violated the SMS Charter as the content of the video uploaded by Kutik on DigiTube did not comply with the religious and ethical values of Malani culture and society [1]. Further, the speech incited hatred based on religion [2], and was provocative [3].

1. There is a violation of Article 1(b), SMS Charter.

There is violation of Parduist beliefs which are an essential component of Malani culture and society. A democratic society with plurality of religions necessitates the State to restrict the freedom of speech and expression in order to reconcile the interests of the various groups, and ensure mutual respect for conflicting beliefs.⁷²

In case of conflicting value standards, the State is afforded a wide discretion.⁷³ It is acceptable for State authorities to not recognize minority views which directly conflict with democratic values;⁷⁴ a principle applicable to the democracy of Lydina.⁷⁵ As such, the

⁷² *Kokkinakis v Greece* (1993) 17 EHRR 397, para 31; *Dudgeon v United Kingdom* (1981) 4 EHRR 149; 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.

⁷³ *Otto-Preminger-Institut v Austria* (1995) 19 EHRR 34; *Toonen v Australia* (1994) 5 Selected Decisions of the Human Rights Committee 133; *Hertzberg et al v Finland* Communication No 61/1979, UN Doc CCPR/C/15/D/61/1979 (1982) (HRC), para 10.2; Eyal Benvenisti, 'Margin of Appreciation, Consensus, and Universal Standards' (1999) 31 *International Law and Politics* 843; Yukkata Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2002); David Harris, Michael O'Boyle and Colin Warbick, *Law of the European Convention on Human Rights* (Butterworths 1995) 12-15.

⁷⁴ Samantha Knights, *Freedom of Religion, Minorities and the Law* (OUP 2007) 151.

internal coherency of religious and ethical values of a culture is maintained through the exclusion of deviating ideologies.⁷⁶

Parduism is *integral* to the Malani culture as it has been the majority religion in Lydina for centuries and has developed a strong cultural bond for Lydinan Malanis,⁷⁷ whereas, Sadujists trace their roots to sub-Saharan Africa.⁷⁸ Further, the Parduist belief in One God is reflected in the official ideology in the Constitution.⁷⁹ Therefore, as the video asserts that Saduja is superior to Parduism, calls for conversion of all Parduists – by any means – to Saduja, and questions the divine origins of the Zofftor,⁸⁰ it insults the foundational beliefs of Parduism. Hence, there is a violation of the religious and ethical values of Malani culture.

2. There is a violation of Article 2(a), SMS Charter.

Article 2(a) prevents incitement of hatred based on religion.⁸¹ States are under the obligation to enact laws prohibiting such manifestation of religious beliefs that may amount to advocacy of religious hatred causing incitement leading to discrimination, hostility or violence.⁸² Hatred is considered to be a state of mind characterised as “intense and irrational emotions of

⁷⁵ Clarifications to the Case, cl 2.

⁷⁶ Frans W.A. Brom, ‘Developing Public Morality: Between Practical Agreement and Intersubjective Reflective Equilibrium’ in W Van der Berg & T van Willigenburg (eds) *Reflective Equilibrium Dordrecht* (Kluwer Academic Publishers 1998) 191-202.

⁷⁷ The Case, para 6.

⁷⁸ The Case, para 7.

⁷⁹ The Case, para 6.

⁸⁰ The Case, para 8-10.

⁸¹ The Case, para 15.

⁸² International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 art 20 (2); UNHRC, ‘General comment No 22’ on ‘Freedom of Religion’ (1993) UN Doc HR1/GEN/1/Rev.1, para 7.

opprobrium, enmity and destruction towards the target group”.⁸³ The hate speech should be a genuine threat to tolerance.⁸⁴

Furthermore, the imminence and probability of the harm occurring forms another consideration for hate speech.⁸⁵ The prohibition on advocacy of religious hatred is justified when it constitutes incitement to lawless violence.⁸⁶

In the present case, the statements such as Saduja being superior to Parduism and “all Parduists are inferior and should be converted – by any means – to believe in Saduja”, clearly amount to condemnation of Parduism with the intent to insult the religion. The same is evidenced from the *perdu* issued by the Grand Parder, the highest religious leader of Parduism in Lydina.⁸⁷ Moreover, the intention, imminence and probability of the harm caused by the contents of the video in question are evidenced from the subsequent widespread rioting throughout Lydina that eventually led to large scale destruction of property. This included numerous homes and businesses, a local Centiplex facility and a major Parduist historical place of worship.⁸⁸

⁸³ Article 19, ‘Camden Principles on Freedom of Expression and Equality’ (April 2009) <<http://www.article19.org/data/files/pdfs/standards/the-camden-principles-on-freedom-of-expression-and-equality.pdf> > Principle 12.1; *R v Keegstra* [1990] 3 SCR 697 (Canada), para 1.

⁸⁴ *Norwood v UK* (2005) 40 EHRR 11.

⁸⁵ *Erbakan v Turkey* App no 59405/00 (ECtHR, 6 July 2006) para 68.

⁸⁶ 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 (ICCPR) art 20(2).

⁸⁷ The Case, para 13.

⁸⁸ The Case, para 11-12.

3. *The video violated Article 2(b) of the SMS Charter as the statements amounted to provocation.*

Under Article 2(b) any speech or conduct that deliberately hurts religious feelings or values of Malani culture and triggers violent protest inspired by Malani solidarity amounts to provocation.⁸⁹

Any speech which is an offensive attack on a religious matter regarded as sacred, and caused believers to legitimately believe themselves as the object of unwarranted and offensive attacks, amounts to provocation.⁹⁰ In examining the impact of speech or conduct that amounts to provocation, the political sensitivity of the region, and the context of the speech or conduct is considered;⁹¹ in the instant case these are characterised by deep religious unrest.

The standard applicable for limiting the freedom of speech and expression requires that the provocation to commit the crimes is direct and proximately linked.⁹² The proximate nexus between the speech and anticipated danger is evident from the inseparable concurrence of the speech with the violence, as the speech was the precursor of violence.⁹³ Kutik's speech, interpreted in its context,⁹⁴ of volatile public sentiment and violation of Malani culture, was

⁸⁹ The Case, para 15.

⁹⁰ *IA v Turkey* (2007) 45 EHRR 30, para 30; *Giniewski v France* (2007) 45 EHRR 23.

⁹¹ *Leroy v France* App no 36109/03 (ECtHR, 2 October 2008).

⁹² *Oberschlick v Austria* App no 15974/90, (ECtHR, 23 May 1991); Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) [2010] OJ L.95/1, art 3(4), 6.

⁹³ *Rangarajan v Ram* (1989) 2 SCC 574 (India).

⁹⁴ *Zana v Turkey* (1997) 27 EHRR 667.

the direct cause for the rioting and violence; the government is bound to prevent such evils.⁹⁵ Hence, Kutik's speech amounts to provocation.

[B] The holdings of the Court do not violate the provisions of the UDHR.

The Respondent submits that there is no violation of the right to a fair hearing under Article 10, UDHR [1]. The holding is consistent with the right to freedom of thought, conscience and religion under Article 18 [2] and right to freedom of opinion and expression under Article 19 [3]. *In any event*, the restriction is valid under Article 29 (2), UDHR [4].

1. There is no violation of Article 10, UDHR.

a. The Court is an independent and impartial tribunal

With respect to the right to a fair hearing in determination of rights and obligations,⁹⁶ the guarantee of “*independence*” of a tribunal is considered.⁹⁷ In this context, the term “*independence*” refers to that vis-à-vis the Executive,⁹⁸ the Parliament,⁹⁹ and the parties.¹⁰⁰ In stark contrast to *Beaumartin v France*, where the interpretation of the Minister of Foreign

⁹⁵ *Schenk v United States* 249 US 47 (1919).

⁹⁶ 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 (ICCPR) 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.

⁹⁷ *Kleyn and others v Netherlands* (2004) 38 EHRR 14; *Sacilor-Lormines v France* (2012) 54 EHRR 34, para 62; *Oleksandr Volkov v Ukraine* App no 21722/11 (ECtHR, 9 January 2013) para 107.

⁹⁸ *Sovtransatvi Holdings v Ukraine* (2002) 58 EHRR 44, para 80; *Mosteanu and others v Romania* App no 33176/96 (ECtHR, 26 February 2003) para 42.

⁹⁹ *Beaumartin v France* (1994) 19 EHRR 485, para 38.

¹⁰⁰ *Sramek v Austria* (1985) 7 EHRR 351, para 42.

Affairs was *binding* on courts in all circumstances, the Lydinan government's press release, in the instant case, merely portrayed the President's concern about the violence.¹⁰¹ It was made prior to institution of proceedings by the Grand Parder.¹⁰² Thus, it must not be construed as violating the judicial independence of the Lydinan courts.

Judicial independence necessitates that individual judges be free from undue influence.¹⁰³ It permits judges, in exercise of judicial discretion to take into consideration, the opinions of specialists whose knowledge is desirable and essential in settling the disputes.¹⁰⁴ The Lydinan courts are influenced by the Grand Parder's opinions, though not in a formal way.¹⁰⁵ The Grand Parder's claims have been given special deference,¹⁰⁶ by reason of his knowledge and expertise on religious issues, which are central to the present dispute.

b. The procedural requirement of fairness has been fulfilled.

The requirement of fairness in cases concerning civil rights is less onerous than in those involving criminal charges.¹⁰⁷ In an adversarial system, the right to equality of arms means *maintaining a "fair balance" between the parties*¹⁰⁸ whereby each party should have a

¹⁰¹ The Case, para 19.

¹⁰² The Case, para 19.

¹⁰³ *Parlov-Tkalčić v Croatia* App no 24810/06 (ECtHR, 22 December 2009) para 86; *Agrokompleks v Ukraine* App no 23465/03 (ECtHR, 6 October 2011) para 137; *Langborger v Sweden* (1990) 12 EHRR 416, para 32; *Kleyn and others v Netherlands* (2004) 38 EHRR 14, para 190.

¹⁰⁴ *Pabla Ky v Finland* (2006) 42 EHRR 34, para 32; *Ettl and others v Austria* (1988) 10 EHRR 255, para 38-40; *Debled v Belgium* (1995) 19 EHRR 506, para 36.

¹⁰⁵ Clarifications to the Case, cl 4.

¹⁰⁶ The Case, para 13.

¹⁰⁷ *Guigue and SGEN-CFDT v France* App no 59821/00 (ECtHR, 6 January 2004); *Dombo Beheer BV v the Netherlands* (1993) 18 EHRR 213, para 32; *Levages Prestations Services v France* (1997) 24 EHRR 351, para 46; *König v Germany* App no 6232/73 (ECtHR, 28 June 1978) para 96.

¹⁰⁸ *Nideröst-Huber v Switzerland* (1998) 25 EHRR 709, para 23.

reasonable opportunity to present his case and evidence under conditions that do not place him at a substantial disadvantage *vis-à-vis* the other party.¹⁰⁹ A difference of treatment in hearing of the parties' witnesses, which does not influence the outcome of proceedings, is compatible with equality of arms.¹¹⁰ The special deference to the claim of the Grand Pardon,¹¹¹ does not place the Applicants at a disadvantage as it did not influence the outcome of the proceeding.

2. There is no restriction on Article 18, UDHR.

a. The video amounts to 'improper proselytism'.

Although, everyone has the right to freedom of thought, conscience and religion and freedom to manifest his religion or belief in teaching,¹¹² and proselytism is recognized as a right to express a religious belief,¹¹³ it must respect the rights of others without attempting to coerce or manipulate the person into consenting,¹¹⁴ through techniques like violence and promise of

¹⁰⁹ *Dombo Beheer BV v the Netherlands* (1993) 18 EHRR 213, para 33; *Feldbrugge v the Netherlands* (1986) 8 EHRR 425, para 44; *Kress v France* App no 39594/98 (ECtHR, 7 June 2001) para 72.

¹¹⁰ *Ankerl v Switzerland* (2001) 32 EHRR 1, para 38.

¹¹¹ The Case, para 21.

¹¹² The Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR), art 18; 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 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; *Arrowsmith v United Kingdom* (1978) 3 EHRR 218, para 19.

¹¹³ Malcolm D Evans, *Religious Liberty and International Law in Europe* (CUP 2008) 194; Sub-Commission on Prevention of Discrimination and Protection of Minorities, 'Special Rapporteur, Arcot Krishnaswami, Study of Discrimination in the Matter of Religious Rights and Practices' (1960) UN Doc E/CN.4/Sub.2/200/Rev.1; *Dianna Ortiz v Guatemala* Case No 10.526 (IACtHR, 16 October 1996).

¹¹⁴ *Kokkinakis v Greece* (1993)17 EHRR 397.

advantages.¹¹⁵ It is to be incompatible with respect to the freedom of thought, conscience and religion of others.¹¹⁶

The use of the expression “*by any means*” reflects a suggestion to utilize coercive means for conversion,¹¹⁷ especially when interpreted in light the religious violence in Lydina.¹¹⁸ Therefore, the conversion is not based on reason or free-will.

b. The video amounts to advocacy of religious hatred.

Manifestation of religion or belief which advocates religious hatred constituting violence is prohibited.¹¹⁹ In exercising the freedom to manifest religion, an individual needs to take his specific situation into account.¹²⁰ Kutik advocates religious hatred as the questions raised on the veracity of the Zofftor, based on an academic journal hurt the fundamental beliefs of the Parduists.¹²¹ Further, Kutik failed to take the prevailing circumstances into account,¹²² leading to large-scale violence.¹²³

c. The holdings of the Lydina Court have a legitimate secular purpose.

¹¹⁵ *Kokkinakis v Greece* (1993)17 EHRR 397; *R v Windle* [1952] 2 QB 826 (UK).

¹¹⁶ *Kokkinakis v Greece* (1993)17 EHRR 397, para 48; *Larrisis and others v Greece* (1999) 27 EHRR 329.

¹¹⁷ The Case, para 8.

¹¹⁸ The Case, para 3-4.

¹¹⁹ 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); Zdenka Machnyikova, ‘Religious Rights’ in Marc Weller (ed), *Universal Minority Rights: A Commentary on the Jurisprudence of International Courts and Treaty Bodies* (OUP 2007) 189.

¹²⁰ *Kalac v Turkey* (1997) 27 EHRR 552, para 27; *Hasan and Chaush v Bulgaria* (2002) 34 EHRR 55, para 60.

¹²¹ Clarifications to the Case, cl 16.

¹²² The Case, para 3-4.

¹²³ The Case, para 11.

Any religious law must have a legitimate secular purpose, neither advancing nor inhibiting any religion, and must not result in an excessive entanglement of state and religion.¹²⁴ In *casu*, the judgment is religion-neutral as it is based on the violation of the SMS Charter.¹²⁵ It does not seek to advance or inhibit any religion, but curb the violence.¹²⁶

d. There is no violation of the standard of non-discrimination.

Admittedly, it is a State's duty to ensure that there is no discrimination on the basis of ethnic origin in religious matters.¹²⁷ However, there is no absolute prohibition on discrimination as States enjoy discretion in assessing whether differences in otherwise similar situations justify similar treatment.¹²⁸ The measures taken in consequence of exercise of discretion need to conform to the UDHR.¹²⁹ Although the neutral role of the State is necessary,¹³⁰ the aims and effects of the measures need to be taken into consideration.¹³¹

¹²⁴ *Lemon v Kurtzman* 403 US 602 (1971).

¹²⁵ The Case, para 21.

¹²⁶ The Case, para 19-21.

¹²⁷ 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; European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September, 1953) 213 UNTS 221, art 14; The Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III) art 1; A McColgan, *Discrimination Law: Text, Cases and Materials* (Hart Publishing 2005).

¹²⁸ *DH v Czech Republic* App no 57325/00 (ECtHR, 13 November 2007).

¹²⁹ 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.

¹³⁰ *Hasan and Chaush v Bulgaria*, (2002) 34 EHRR 55, para 78; *Refah Partisi (the Welfare Party) and others v Turkey* (2003) 37 EHRR 1.

¹³¹ *Belgium Linguistic Case (No 2)* (1968) 1 EHRR 252; *R (Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37 (UK).

The aims and effects of the holdings of the Court are in compliance with the religious and ethical values of Malani culture and society.¹³² Further, since the assessment of conflicting norms of cultures lies with States, there is no violation of the standard of non-discrimination.

3. There is no restriction on Article 19, UDHR.

Crude speech inciting immediate breach of peace,¹³³ does not contribute to the *marketplace of ideas*;¹³⁴ thus, is not protected under Article 19.¹³⁵ The freedom of expression under Article 19 does not protect speech which constitutes “true threats” or is likely to cause “imminent lawless action”.¹³⁶

a. The video constitutes a true threat.

The appropriate test for cases involving inciting communications made through non-traditional mediums, such as the internet and social networking websites, is true threats doctrine.¹³⁷ The imminent lawless action test which was established in the 1969 *Brandenburg v Ohio*¹³⁸ decision is inapplicable for communications made on social networking websites as

¹³² The Case, para 15.

¹³³ *Muller v Switzerland* (1988) 13 EHRR 212; Lawrence Byard Solum, ‘Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech’ (1989) 83 Northwestern University Law Review 54.

¹³⁴ *Miller v California* 413 US 15 (1973).

¹³⁵ *Chaplinsky v New Hampshire* 315 US 568 (1942); *Drieman and others v Norway* App no 33678/96 (ECtHR, 4 May 2000); Elena Kagan, ‘Private Speech, Public Purpose: The Role of Government Motive in First Amendment Doctrine’ (1996) 63 University of Chicago Law Review 413.

¹³⁶ *United States v Fullmer* 584 F 3d 132, 154 (3rd Cir 2009); *State v DeLoreto* 827 A 2d 671, 682 (Conn. 2003); *United States v Parr* 545 F 3d 491, 499 (7th Cir 2008); *United States v Pinkston* 338 Fed Appx 801, 802 (11th Cir 2009).

¹³⁷ *Reno v ACLU* 521 US 844 (1997); *United States v Alkhabaz* 104 F 3d 1492 (6th Cir 1997); *Planned Parenthood v American Coalition of Life Activists* 290 F 3d 1058 (9th Cir 2001); Jennifer Brenner, ‘True Threats: A more Appropriate Standard for analyzing First Amendment Protection and Free Speech when violence is perpetrated over the Internet’ (2002) 78 Notre Dame Law Review 753.

¹³⁸ *Bradenburg v Ohio* 395 US 444 (1969).

it did not envisage such means of non-traditional communication.¹³⁹ A statement is considered as a true threat when its maker can foresee that the audience would interpret it as a serious expression of a harmful intention.¹⁴⁰ It must be judged according to its effect on a reasonable person.¹⁴¹ Further, the circumstances in which the statements were made must be taken into consideration.¹⁴²

An online video portal was used to make provocative statements which incited religious hatred. It was reasonably foreseeable that the audience, in a social fabric marred by religious violence, would act in a violent and instinctive manner.¹⁴³

b. In any case, the video satisfies the ‘imminent lawless action’ test.

Speech may be punished, where it is directed to inciting imminent lawless action,¹⁴⁴ and is likely to incite such action.¹⁴⁵ It is a question of proximity and degree of danger posed by such speech.¹⁴⁶

i. *The video was directed to incite imminent lawless action.*

¹³⁹ *Reno v ACLU* 521 US 844 (1997), 849.

¹⁴⁰ *Planned Parenthood v American Coalition of Life Activists* 290 F 3d 1058 (9th Cir 2001).

¹⁴¹ *Planned Parenthood v American Coalition of Life Activists* 290 F 3d 1058 (9th Cir 2001); *Ramesh v Union of India* (1988) 1 SCC 668 (India).

¹⁴² *Watts v US* 394 US 705 (1969); *Schenk v United States* 249 US 47 (1919); *State of Bihar v Shailabala Devi* AIR 1952 SC 329 (India).

¹⁴³ The Case, para 4, 11.

¹⁴⁴ *Kennedy v Mendoza-Martinez* 372 US 144 (1962), 159.

¹⁴⁵ *Bradenburg v Ohio* 395 US 444 (1969).

¹⁴⁶ *Schenck v United States* 249 US 47, 52 (1919); *Ergdodu and Ince v Turkey* (2002) 34 EHRR 50.

The senders' intention to incite lawless action is reflected in the use of offensive and provocative language.¹⁴⁷ In case of serious disturbances, incitement has been held to be imminent and predictable when the speech is inseparably connected to the violence.¹⁴⁸

There is a history of religious tension in Lydina,¹⁴⁹ and the medium of the internet is accessible to most people due to the expansion of social media and the infinite size of the audience.¹⁵⁰ The use of the concerned words portrays the element of incitement of hatred among the religions.¹⁵¹ Lastly, Kutik's statements about the divinity of humans and his historical analysis of 3:130 violated the Parduist creed.¹⁵²

ii. The video was likely to incite imminent lawless action.

States can ban the use of fighting words, which by their very utterance are likely to incite violence or an immediate breach of peace.¹⁵³ Thus, the use of inflammatory words, "all

¹⁴⁷ *Bradenburg v Ohio* 395 US 444 (1969); *Hess v Indiana* 414 US 105 (1973); *Surek v Turkey* App no 26682/95 (ECtHR, 8 July 1999); UNHRC, 'Contribution of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (2001) UN Doc A CONF189/PC2/24; Martin Redish, 'Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger' (1982) 70(5) *California Law Review* 1159, 1172; Jennifer Brenner, 'True Threats: A more Appropriate Standard for analyzing First Amendment Protection and Free Speech when violence is perpetrated over the Internet' (2002) 78 *Notre Dame Law Review* 753, 759.

¹⁴⁸ *Rankin v McPherson* 483 US 378 (1987); *Surek v Turkey* App no 26682/95 (ECtHR, 8 July 1999); *Rangarajan v Ram* (1989) 2 SCC 574 (India); David Crump, 'Camouflaged Incitement: Freedom of Speech, Communicative Torts, and the Borderland of the Brandenburg Test' (1994) 29 *Georgia Law Review* 59.

¹⁴⁹ The Case, para 4.

¹⁵⁰ *ibid.*

¹⁵¹ The Case, para 8.

¹⁵² The Case, para 13.

¹⁵³ *Chaplinsky v New Hampshire* 315 US 568 (1942); Hannah Steinblatt, 'E-Incitement: A Framework for Regulating the Incitement of Criminal Flash Mobs' (2011) 22 *Fordham Intellectual Property Media & Entertainment Law Journal* 753.

Parduists are *inferior* and should be converted – *by any means* – to believe in Saduja”¹⁵⁴ falls within the unprotected category of fighting words.

The context of the video, in a religiously fragile zone,¹⁵⁵ which is relevant to be considered¹⁵⁶, increases the likelihood of the resultant violence. Inciting communication under circumstances wherein the recipients’ emotions are susceptible to violence is interpreted by the receiver to indulge in violence.¹⁵⁷

The probable danger posed by the circulation of the provocative video is corroborated by the actual occurrence of riots and attacks.¹⁵⁸ Hence, when viewed in the totality of circumstances, the imminence of lawless action as a consequence of the video is undeniable.

c. There is no chilling effect.

The existence of a chilling effect,¹⁵⁹ requires a distinct and palpable injury,¹⁶⁰ and not merely an illusory one.¹⁶¹ Chilling effect cannot arise from the mere presence of a governmental measure causing no specific harm,¹⁶² or the possibility of abuse.¹⁶³ Even if chilling effect is

¹⁵⁴ The Case, para 8.

¹⁵⁵ The Case, para 3-4.

¹⁵⁶ *Watts v United States* 394 US 705 (1969); *Bradenburg v Ohio* 395 US 444 (1969); *Glen v Hongisto* 438 F Supp 10, 18 (ND Cal 1977); *In re Welfare of MAH & JLW* 572 NW 2d 752, 759 (Minn Ct App 1997); *Surek v Turkey* App no 26682/95 (ECtHR, 8 July 1999); *Bethel School District v Fraser* 478 US 675 (1986).

¹⁵⁷ *Hogefeld v Germany* App no 35402/97 (ECtHR, 20 January 2000).

¹⁵⁸ The Case, para 11-12.

¹⁵⁹ US CONST. Amend. I.

¹⁶⁰ *O’Shea v Littleton* 414 US 488 (1974); *Johnson v Stuart* 702 F 2d 193 (9th Cir 1983); *Meese v Keene* 481 US 465 (1987).

¹⁶¹ *Los Angeles v Lyons* 461 US 95 (1983); *Johnson v Stuart* 702 F 2d 193 (9th Cir 1983).

¹⁶² *Melvin R Laird v Arlo Tatum* 408 US 1 (1972).

¹⁶³ *Davis v Ichord* 442 F 2d 1207 (1970).

caused, it is justified by the overriding public interest.¹⁶⁴ In *casu*, no evidence of real injury is available. Consequently, mere apprehension that people in Lydina would indulge in self-censorship cannot amount to chilling effect.¹⁶⁵

4. The restriction is permissible under Article 29 (2), UDHR.

The rights under Articles 18 and 19, UDHR are not absolute,¹⁶⁶ and may be subject to restrictions.¹⁶⁷ The three-fold test,¹⁶⁸ to judge the validity of restrictions under Article 29 (2) is met in this case.

a. Legality

i. The SMS Charter places an indirect duty on private actors.

International conventions include the duty to protect rights-holders from interference by private actors.¹⁶⁹ Private actors and business enterprises also have a responsibility to respect human rights, similar to that of States.¹⁷⁰ A State's duty to protect the rights stipulated in an

¹⁶⁴ *Goodwin v United Kingdom* (2002) 35 EHRR 447.

¹⁶⁵ *Melvin R Laird v Arlo Tatum* 408 US 1 (1972); *Meese v Keene* 481 US 465 (1987).

¹⁶⁶ *Worm v Austria* (1997) 25 EHRR 454.

¹⁶⁷ The Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III) art 29; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 10(2); American Convention of Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 art 13(2); Constitution of India 1950, art 19(2); *Chaplinsky v New Hampshire* 315 US 568 (1942); *Dinesh Trivedi v Union of India* (1997) 4 SCC 306 (India); *State of West Bengal v Subodh Gopal Bose* AIR 1954 SC 92 (India).

¹⁶⁸ *The Sunday Times v United Kingdom* (1979-80) 2 EHRR 245; *Albert Womah Mukong v Cameroon* Communication No 458/1991, UN Doc CCPR/C/51/D/458/1991 (1994) (HRC); *Herrera-Ulloa v Costa Rica* Inter-American Court of Human Rights Series C No 107 (2 July 2004).

¹⁶⁹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 art 2; Convention on the Elimination of All Forms of Discrimination against Women 1979 (adopted 18 December 1979, entered into force 3 September 1981) art 2; American Convention of Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 art 1.

¹⁷⁰ UNHRC, 'General comment No 34' on 'Article 19 (Freedom of Opinion and Expression)' (2011) UN Doc CCPR/C/GC/34.

international agreement requires the imposition of obligations on private parties.¹⁷¹ Private persons cannot violate human rights prescribed in treaties.¹⁷²

Lydina signed the SMS Charter as a consequence of the increasing social media usage with a view to prevent religious violence within the country.¹⁷³ Unlike traditional print and digital media, social media content is not ‘edited’ before publication and essentially comprises of the individuals who post on it. Therefore, the SMS Charter places an indirect obligation on both social media as well as those using the same to perpetrate a message.

ii. *The SMS Charter is considered as “law” in Lydina.*

Private actors can be made liable under international law¹⁷⁴ and international rules may be judicially enforced by municipal courts.¹⁷⁵ When an international agreement imposes legal obligations on States for determining the *rights and duties* of private citizens, it is considered to be applicable in the municipal sphere.¹⁷⁶ Accordingly, human rights treaties are considered

¹⁷¹ *Herrera Rubio et al. v Colombia* Communication No 161/1983, UN Doc CCPR/C/OP/2 (1990) (HRC).

¹⁷² American Convention of Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 art 1(1); Oliver De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (CUP 2010) 381; UNHRC, ‘General comment No 31’ on ‘Nature of General Legal Obligation Imposed on State Parties to the Covenant’ (2004) UN Doc CCPR/C/21/Rev.1/Add/ 13, para 8; EA Alkema, ‘The Third Party Applicability or “Drittwirkung” of the European Convention on Human Rights’ in F. Matscher, H. Petzold, and G. J. Wiarda (eds), *Protecting Human Rights: the European Dimension* (Carl Heymans Verlag 1988) 35; A Clapham, *Human Rights in the Private Sphere* (Oxford: Clarendon Press 1993); A Drzemczewski, ‘The European Human Rights Convention and the Relations between Private Parties’ (1979) 2 *Netherlands International Law Review* 168; A R Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford: Hart Publishing 2004); *Young, James and Webster v United Kingdom* (1981) 4 EHRR 38; *X and Y v the Netherlands* (1985) 8 EHRR 35; *Velasquez-Rodriguez v Honduras*, Merits, Inter-American Court of Human Rights Series C No 4 (29 July 1988).

¹⁷³ The Case, para 15.

¹⁷⁴ *Autronic AG v Switzerland* (1990) 12 EHRR 485; *Groppera Radio AG v Switzerland* (1990) 12 EHRR 321.

¹⁷⁵ *Medellin v Texas* 552 US 491, 505 (2008); *Cook v United States* 288 US 102, 119 (1933).

¹⁷⁶ Anna-Lena Svensson-McCarthy, *The International Law of Human Rights and States of Exception: With Special Reference to the Travaux Préparatoires and the Case-Law of the International Monitoring Organs* (Martinus Nijhoff 1998) 75; *Foster v Neilson* 27 US 253, 311 (1829); *United States v Percheman* 32 US 51 (1833); *Edye v Robertson* 112 US 580 (1884); *Sei Fujii v California* 38 Cal (2d) 718 (1952).

as ‘law’ such as the European Convention of Human Rights.¹⁷⁷ Therefore, in the absence of a contrary rule of municipal law and on indications of public policy for prevention of religious violence,¹⁷⁸ the SMS Charter amounts to ‘law’.

iii. *The obligations of Centiplex Corporation and DigiTube are concurrent.*

Pursuant to the SMS Charter, Lydina enacted the Content Integrity Act to regulate the conduct of ISPs.¹⁷⁹ ISPs are access providers, who control the infrastructure needed to access the internet and make this infrastructure available to individual subscribers in return for payment.¹⁸⁰ ISPs may also provide related services such as internet building and content hosting.¹⁸¹ DigiTube is an online host owned by the ISP, Centiplex Corporation.¹⁸² Therefore, as the duties of hosting ISPs and hosts are similar, DigiTube has concurrent liability under the Charter as it qualifies as ‘media’.

iv. *Intermediaries may be made liable for broadcasting “illegal conduct”.*

¹⁷⁷ *Blathwayt v Baron Cawley* [1976] AC 397 (UK); *Matthew v Trinidad and Tobago State* [2004] UKPC 33 (UK); Malcolm N Shaw, *International Law* (6th edn, CUP 2008) 154.

¹⁷⁸ The Case, para 14-15.

¹⁷⁹ The Case, para 16-17.

¹⁸⁰ Centre for Democracy and Technology, *Shielding the Messenger: Protecting Platforms for Expression and Innovation* (2012) < <https://www.cdt.org/files/pdfs/CDT-Intermediary-Liability-2012.pdf> > accessed 20 September 2014.

¹⁸¹ Digital Millennium Copyright Act, 17 USC s 512 (2000) (US); *Rossi v Motion Picture Association of America* 391 F 3d 1000, 1002 (9th Cir); *Online Policy Group v Diebold, Inc.* 337 F Supp. 2d 1195, 1204-05 (ND Cal 2004); Vakul Sharma, *Information Technology Law and Practice* (Universal Law Publishing 2005) 186; Mark F Grady and Francesco Parisi, *The Law of Economics of Cyber Security* (1st edn, 2006) 226; Jyoti Vishwanath & C Palakonda, ‘Legal Scenario Relating to the Role and Responsibility of Internet Service Providers in India: An Assessment’ 37-38 *Banaras Law Journal* 102.

¹⁸² The Case, para 8; Clarifications to the Case, cl 7.

An intermediary is liable if it does not filter, remove or block user content which is deemed illegal.¹⁸³ Both, intermediaries that transmit or host third-party content, as well as content authors may be held liable for broadcasting illegal conduct.¹⁸⁴

b. Legitimacy

Restrictions may be placed on rights in pursuance of legitimate aims,¹⁸⁵ and states have wide discretion to determine the legitimate aim of their laws.¹⁸⁶

i. *Protection of the rights of others*

Restrictions may be imposed upon the rights of persons to protect the rights of others.¹⁸⁷ The speech ought to be assessed with their content and context.¹⁸⁸ In light of the religious

¹⁸³ UNHRC, 'General comment No 34' on 'Article 19, the International Covenant on Civil and Political Rights' (2011) UN Doc CCPR/C/GC/34; Electronic Commerce Directive (Hatred against Persons on Religious Grounds or Grounds of Sexual Orientation) Regulations 2010 (UK); Law 5651 on the Prevention of Crime Committed in the Information Technology Domain 2009 (Turkey).

¹⁸⁴ Computer Crimes Act B.E.2550 (2007) s 14, s 15 (Thailand); Sawatree Suksri, Siriphon Kusonsinwut, and Orapin Yingyongpathana, 'Situational Report on Control and Censorship of Online Media through the Use of Laws and the Imposition of Thai-State Policies', (2010) iLaw Project <http://www.boell.de/downloads/ilaw_report_EN.pdf>; Measures for Managing Internet Information Services, Article 20 [in Chinese], issued by the State Council on September 25, 2000, effective October 1, 2000 (China). Unofficial English translation available at http://www.chinaculture.org/gb/en_aboutchina/2003-09/24/content_23369.htm; OECD, The Role of Internet Intermediaries in advancing Public Policy Objectives, Workshop Summary, 2010 < <http://www.oecd.org/sti/ieconomy/45997042.pdf> > accessed 15 September 2014.

¹⁸⁵ The Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III) art 29 ; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 18(3), art 19(3)(b); American Convention of Human Rights (adopted 22 November 1969, entered into force 18 July 1978) art 12(3), art 13(2); UNHRC, 'General comment No 34' on 'Article 19 (Freedom of Opinion and Expression)' (2011) UN Doc CCPR/C/GC/34; *Dahlab v Switzerland* App no 42393/98 (ECtHR, 15 February 2001); *Larrisis and others v Greece* (1999) 27 EHRR 329; *Kalac v Turkey* (1997) 27 EHRR 552; *Interights and Others v Mauritania* (2004) AHRLR 87 (ACtHPR).

¹⁸⁶ *Handyside v UK* (1976) 1 EHRR 737; *Gorzelik and others v Poland* (2005) 40 EHRR 4, para 67; *Cumpănă and Mazăre v Romania* (2005) 41 EHRR 200; *Colombani and others v France* App no 51279/99 (ECtHR, 25 June 2002); *Chauvy and others v France* (2005) 41 EHRR 29; *Refah Partisi (the Welfare Party) and others v Turkey* (2003) 37 EHRR 1.

instability of the region,¹⁸⁹ the video was provocative, inciting and insulting towards Parduism and Malani culture.¹⁹⁰

ii. *Public Order*

Governments can impose restrictions that result in disturbance of public order and safety.¹⁹¹ Public order includes rules which ensure the functioning of society or the set the society's foundational principles.¹⁹² Public order is a valid legitimate aim in unstable conditions, where speech is capable of fuelling violence;¹⁹³ such as the religious violence in Lydina.¹⁹⁴

c. Proportionality

To be necessary in a democratic society, the restriction must serve a pressing social need,¹⁹⁵ and be proportional to the legitimate aim.¹⁹⁶ State authorities enjoy discretion in determining

¹⁸⁷ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (art 19 (3); European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September, 1953) 213 UNTS 221 art 10 (2); *Otto-Preminger-Institut v Austria* (1995) 19 EHRR 34; *Open Door and Dublin Well Woman v Ireland* (1993) 15 EHRR 244; UNHRC, 'General comment No 34' on 'Article 19 of the International Covenant on Civil and Political Rights' UN Doc CCPR/C/GC/34, para 28; 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, cl. 8; Parliamentary Assembly of the Council of Europe, 1998, 'Resolution 1165' art 14.

¹⁸⁸ *Zana v Turkey* (1997) 27 EHRR 667; *Ceylan v Turkey* App no 23556/94 (ECtHR, 8 July 1999).

¹⁸⁹ The Case, para 3-4.

¹⁹⁰ The Case, para 11-13.

¹⁹¹ 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, cl I(A)(22)-(24); Nihal Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* (1st edn, CUP 2002) 198.

¹⁹² 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, cl I(B)(iii)(22).

¹⁹³ *Surek v Turkey* App no 26682/95 (ECtHR, 8 July 1999).

¹⁹⁴ The Case, para 11, 15.

¹⁹⁵ *Olsson v Sweden* (1989) 11 EHRR 259.

threats to public interest and developing an adequate response to balance competing interests and human rights.¹⁹⁷ The test to judge proportionality is one of balancing of interests as opposed to a strict necessity test.¹⁹⁸ In *casu*, the violence consequent to the video constitutes ‘pressing social need’.¹⁹⁹ The judgment develops an adequate response by holding the Applicants liable.²⁰⁰

¹⁹⁶ *Handyside v United Kingdom* (1976) 1 EHRR 737; *Goodwin v United Kingdom* (2002) 35 EHRR 447; *The Observer and The Guardian v United Kingdom* (1992) 14 EHRR 153; *The Sunday Times v United Kingdom* (1979-80) 2 EHRR 245; 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, UN Doc E/CN.4/1985/4, cl I(A)(10)(b),(c) and (d).

¹⁹⁷ *Handyside v United Kingdom* (1976) 1 EHRR 737; *Leander v Sweden* (1987) 9 EHRR 433; *Zana v Turkey* (1997) 27 EHRR 667; *Lingens v Austria* App no 9815/82 (ECtHR, 8 July 1986), para 41; *Oberschlick v Austria* App no 15974/90 (ECtHR, 23 May 1991); *Brannigan & McBride v United Kingdom* (1993) 1 EHRR 1; *Evans v United Kingdom* (2006) 43 EHRR 21; *SH and others v Austria* App no 57813/00 (ECtHR, 1 April 2010); Eyal Benvenisti, ‘Margin of Appreciation, Consensus, and Universal Standards’ (1999) 31 *International Law and Politics* 843.

¹⁹⁸ *McLeod v United Kingdom* (1999) 27 EHRR 493; *Barenblatt v United States* 360 US 109 (1959), 126; *Hatton and others v United Kingdom* App no 36022/97 (ECtHR, 8 July 2003); *Rojas García v Colombia* Communication No 687/1996, UN Doc CCPR/C/71/D/687/1996 (2001) (HRC); *Open Door and Dublin Well Woman v Ireland* (1993) 15 EHRR 244; *Smith v United Kingdom* App no 33985/96, 33986/96 (ECtHR, 27 September 1999) para 74; *Chapman v United Kingdom* App no 27238/95 (ECtHR, 18 January 2001).

¹⁹⁹ The Case, para 11.

²⁰⁰ The Case, para 22.

PRAYER

The Applicants most humbly and respectfully request this Court to adjudge and declare:

1. That the SMS Charter is not valid under the ICCPR;
2. That the actions of the Applicants violate Articles 1(b), 2(a) and 2(b) of the SMS Charter;
3. That the civil proceedings in the Lydinan Court system meet the institutional and procedural requirements of the right to fair trial, guaranteed under Article 10, UDHR to the Applicants;
4. That the initiation of civil proceedings in the courts of Lydina does not violate the Applicants' right to freedom of thought, belief and conscience under Article 18, UDHR;
5. That the civil proceedings in the courts of Lydina are valid and do not violate the Applicants' right to freedom of speech and expression under Article 19, UDHR;
6. That, alternatively, the restriction placed is justified and valid and under Article 29(2), UDHR as it is prescribed by law, is in pursuance of legitimate aims and is proportional.

On behalf of the Republic of Lydina

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Agents for the Respondent