709R

THE 2019-2020 PRICE MEDIA LAW MOOT COURT COMPETITION

A, B AND X

(APPLICANTS)

V

STATE OF SURYA

(RESPONDENT)

MEMORIAL FOR RESPONDENT

Word count: 4999

TABLE OF CONTENTS

LIST OF ABBREVIATIONS

ACHR	American Convention of Human Rights
ACHPR	African Charter on Human and Peoples' Rights
ACmHPR / ACommHPR	The African Commission on Human and Peoples' Rights
ACtHPR	African Court on Human and Peoples' Rights
CPA	Suryan Criminal Procedure Act
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
HRC	United Nations Human Rights Committee
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
PA	Suryan Penal Act
UK	United Kingdom
UN	United Nations
UNGA	United Nations General Assembly
UNHRC	United Nations Human Rights Council
US	United States

LIST OF AUTHORITIES

International Instruments

UN Documents

Cases from HRC

Cases from ECtHR

Cases from IACtHR

Cases from ACtHPR

Cases from Other Jurisdictions

Statutes and Constitutions

Books

Articles

Small Report, ‘Iranian Internet Infrastructure and Policy Report’ (January 2013) 11

Stefan Sottiaux, ‘Bad Tendencies’ in the ECtHR’s ‘Hate Speech’ Jurisprudence’ 7 European Constitutional Law Review (2011, No. 1) 38

United States Commission on International Religious Freedom (USCIRF) ‘Limitations on Minorities’ Religious Freedom in South Asia’ (November 2018).....24

Materials from the Internet

‘LinkedIn User Agreement’ (8 May 2018) < https://www.linkedin.com/legal/user-agreement> accessed 4 November 2019.....16

‘Terms of Service’ (23 October 2018) < https://www.quora.com/about/tos> accessed 4 November 2019.....16

‘What Names are Allowed on Facebook?’ (*Facebook*) <www.facebook.com/help/112146705538576> accessed 4 November 2019.....16

Alissa de Carbonnel, ‘Russia Demands Internet Users Show ID to Access Public Wifi’ (*Reuters,* 8 August 2014) < https://www.reuters.com/article/us-russia-internet/russia-demands-internet-users-show-id-to-access-public-wifi-idUSKBN0G81RV20140808> accessed 2 November 2019.....11

Article 19.org, ‘Iran: National Messenger Apps are the New Hallmark of Internet Nationalisation’ (*Article19.Org,* 21 October 2018) < https://www.article19.org/resources/iran-national-messenger-apps-are-the-new-hallmark-of-internet-nationalisation/> accessed 4 November 2019.....11

STATEMENT OF RELEVANT FACTS

Surya and the Tarakans

1. Surya's population of 25 million people consist of 90% native ethnic Suryans and 8-10% economic migrants from neighbouring countries, including Chandra.

2. The majority of Suryans profess the 'Suryan' faith, the official religion of Surya which involves the worship of the sun.

3. An ethno-religious civil war engulfing Chandra for decades caused 10,000 Tarakans – who subscribed to *andha*, a minority belief in Chandra – to flee and seek asylum in Surya.

4. A notable practice of the *andha* philosophy is the symbolic wearing of blindfolds premised on the belief that sight is a source of temptation. Some devout believers wear blindfolds in public, during public meditation or during processions. Between 2015 and 2019, the rate of ethnic Suryans adopting the *andha* faith rose sharply from 0.2% to 2%.

Hiya!

5. Hiya! is a registered company in Surya that operates a free online messaging application used by 75% of Suryans. User registration requires only a valid mobile phone number (but not a real name). The Hiya! app has two basic functions: *first*, a private 'bilateral chat' that connects two users on a peer-to-peer basis; *second*, a public 'broadcast channel' where users can stream live or pre-recorded audio-visual content.

6. Users may subscribe to channels to view content broadcasted in real time, and may receive a 'ping' from the broadcaster whenever a broadcast is about to begin in a few minutes or already on-going. A broadcaster can send mass messages to subscribers via bilateral chat. Every broadcast channel comes with a unique 'link' that can be shared and viewed by any user including non-subscribers.

7. Hiya! developed an upload filter called ‘first Artificially Intelligent test of hatred!’ (fAIth!) which blocks broadcasts containing ‘hate speech’ as per its ‘Standards on Hate Speech’ (with an accuracy rate of 87% according to one university study).

Anti-andha movement

8. In January 2019, Suryan nationalist groups launched a campaign demanding the government to introduce laws to ban any blasphemy of the Suryan faith and prevent proselytism and conversion of Suryans into *andha*.

9. SuryaFirst, a prominent group in Suryan society, accused the Tarakans for “*corrupting their social fabric*” and urged for the prohibition of the wearing of blindfolds in public. SuryaFirst maintains a broadcast channel on Hiya! called ‘Seeing is Believing’ with over 100,000 subscribers in Surya.

10. On 20 January 2019, the Suryan government announced the holding of public consultations concerning a new law to regulate proselytism with the specific intent to protect the ‘forefathers of the original faith’. SuryaFirst launched a series of broadcast advocating for such law and calling for its subscribers’ support. Within a week, the link to an online petition with over 30,000 signatures was being circulated over Hiya!.

11. On 15 February 2019, Section 220 of the PA was amended to criminalise forced conversion from one faith to another (with a proviso that “*the voluntary returning to the forefathers’ original faith or one’s own original faith*” does not constitute as conversion).

The Sun Prince

12. On 16 February 2019, SuryaFirst broadcasted a video message by a masked individual identifying himself as the ‘Sun Prince’ stating *inter alia*: “…*The Divine Sun is under threat since many who see the light are now turning away to darkness. Today, the true Sons of*

Surya must rise against the unlawful actions of the sightless. We shall strip them of their blindfolds, and force them to see the light…".

13. A live video followed, featuring a group of masked individuals approaching a blindfolded male person on a street in the capital of Surya. They shouted at the person to remove the blindfold as it was 'against the law' and chanted 'seeing is believing'. The group leader tore off the person's blindfold without resistance.

14. The broadcast ended with the Sun Prince's statement: "*Immediately go shine a light on Suryans who have adopted the andha blindness. Seeing is believing*".

15. The broadcast was downloaded, saved and shared by Hiya! users. Within 24 hours, over 250,000 had viewed the video and the sharing continued for the next few days. The broadcast was not blocked by fAIth! as the algorithm had been trained to consider Section 220(3) of the PA which affirmed the special position of the Suryan faith.

The copycat videos

16. From 18 to 28 February 2019, over 100 videos of groups (masked and unmasked) assaulting blindfolded persons on the streets were shared on Hiya!. In one video, the group shone bright flashlights into the face of a blind young woman whilst chanting 'seeing is believing'.

17. Such videos were not featured on SuryaFirst's broadcast channel.

18. On 28 February 2019, SuryaFirst broadcasted a pre-recorded video message showing the Sun Prince thanking his "*faithful followers for taking the message of light to the dark streets of Surya*".

Criminal investigations

19. On 1 March 2019, two separate complaints were filed.

20. The first complaint was brought by S, the blindfolded male person in the original video broadcasted on SuryaFirst's channel on 16 February, under the newly amended Section 220 of the PA for 'forcible conversion'.

21. The second complaint was brought by T, a visually-impaired young woman in another video, under Section 300 of the PA for 'advocacy of hatred'.

22. In investigating both complaints, the Suryan prosecutor sought assistance from Hiya! by requesting all personal data pertaining to the 'broadcasters' of the SuryaFirst channel and the 'Sun Prince'. Hiya!'s legal team responded positively that it was willing to cooperate if a formal letter was sent.

23. Pursuant to a formal letter by the Suryan prosecutor, Hiya! released the mobile phone numbers of two broadcasters linked to the channel. Also, Hiya! blocked the SuryaFirst broadcast channel without notification.

24. Through a judicial warrant issued to the mobile phone service providers, the police identified A and B as the broadcasters of SuryaFirst's channel.

25. Upon being taken into custody, A and B exposed X as the Sun Prince during police interrogation alongside their lawyer.

Criminal convictions

26. On 1 May 2019, X was charged under Section 220, whilst A and B were charged under Section 300. The Suryan Criminal High Court delivered a verdict of conviction in both cases. X was handed a suspended sentence of two-year imprisonment, whilst A and B were each imposed a fine of USD 2,000.

27. A, B and X appealed against the verdicts before the Suryan Appellate Court on the basis that their convictions violated their constitutional right to privacy and freedom of

expression under Article 8 and 10 of the Suryan Constitution. The Appellate Court dismissed their appeals and upheld the convictions.

28. After their convictions, Hiya! permanently banned A, B and X on its app, and terminated the SuryaFirst broadcast channel.

29. Having exhausted all domestic remedies, A, B and X filed the present applications to the Universal Court of Human Rights for violations of Article 17 and 19 of the ICCPR.

STATEMENT OF JURISDICTION

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

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

QUESTIONS PRESENTED

I. Whether Surya's decision to obtain personal data from Hiya! and from certain other users violated X's rights under article 17 of the ICCPR?

II. Whether Surya's decision to obtain personal data regarding A and B from Hiya! violated their rights under article 17 of the ICCPR?

III. Whether Surya's prosecution and conviction of X violated his rights under article 19 of the ICCPR?

IV. Whether Surya's prosecution and conviction of A and B violated their rights under article 19 of the ICCPR?

SUMMARY OF ARGUMENTS

I. Surya's decision to obtain personal data regarding X from Hiya! and A and B did not violate Article 17 of the ICCPR as the two-stage test is not met. At the ***first stage***, Surya did not interfere with X's right to privacy as (i) Hiya! did not store nor disclose any personal data belonging to X; and (ii) A and B's disclosure of X's identity in the course of police interrogation is a standard means of evidence-gathering by law enforcement authorities which gives no rise to any reasonable expectation of privacy. At the ***second stage***, assuming *arguendo* that Surya interfered with X's right to privacy, such interference was lawful and non-arbitrary. ***First***, the disclosure of X's identity was provided by law because (i) the CPA was accessible; and (ii) the disclosure of X's identity without judicial authorisation was foreseeable in the course of criminal investigation. ***Second***, the disclosure of X's identity pursued two legitimate aims *i.e.* to protect public order, and respect for the rights of actual or potential victims. ***Third***, the disclosure of X's identity was reasonable in the circumstances: (i) the right to anonymity is not universal, qualified and at most, should only be reserved for the media and journalistic sources; and in any event, (ii) Surya adopted the least intrusive measure to investigate SuryaFirst *i.e.* identification of its broadcasters (instead of intercepting their correspondences).

II. Surya's decision to obtain personal data regarding A and B from Hiya! did not violate Article 17 of the ICCPR as the two-stage test is not met. At the ***first stage***, the mere disclosure of A and B's mobile phone numbers by Hiya! without any other piece of information that can constitute a means to identify A and B does not fall within the ambit of personal data protection. At the ***second stage***, assuming *arguendo* that Surya interfered with A and B's rights to privacy, such interference was lawful and non-arbitrary. ***First***, the disclosure of A and B's identities was provided by law in

accordance with the CPA. ***Second***, the disclosure of A and B's identities pursued two legitimate aims *i.e.* the protection of public order, and respect for the rights of actual and potential victims. ***Third***, the disclosure of A and B's identities was reasonable in the circumstances: (i) Surya complied with due process of law as judicial authorisation is not required as A and B's information had been disclosed voluntarily by Hiya!; and (ii) SuryaFirst's broadcast posed a serious threat to public order.

III. The prosecution and conviction of X did not violate his right to freedom of expression under Article 19 of the ICCPR. ***First***, the prosecution and conviction of X was provided by law as Section 220 of the PA was both accessible and sufficiently precise to enable Suryans to regulate their conduct in relation to religious propagation. ***Second***, the prosecution and conviction of X pursued two legitimate aims *i.e.* respect for the rights of others *not* to be coerced into adopting a religion, and protection of public order in the context of religious pluralism, tolerance and harmony. ***Third***, the prosecution and conviction of X was proportionate: (a) X attempted to forcibly convert *andha* adherents through the use of threats; (b) Section 220 of the PA is non-discriminatory and protects the minority *andha* believers; and (c) the suspended sentencing of X was fair in light of its novelty and the need to set a strong judicial precedent to instil religious tolerance in Suryan society.

IV. Surya's prosecution and conviction of A and B did not violate their rights to freedom of expression under Article 19 of the ICCPR. ***First***, the prosecution and conviction of A and B was provided by law because Section 300 of PA was accessible and in accordance to the prohibition of advocacy of hatred against minorities under Article 20(2) of the ICCPR. ***Second***, the prosecution and conviction of A and B pursued two legitimate aims *i.e.* protection of the rights of others, particularly ethnic minorities from hostility and discrimination, and for the protection of public order. ***Third***, the

prosecution and conviction of A and B was proportionate because (i) A and B advocated hatred on the SuryaFirst's Hiya! channel based on the six-element test of the *Rabat Plan of Action*; and (ii) the criminal sanctions on A and B were proportionate in light of their material contribution and lack of remorse towards the suffering of the *andha* believers.

ARGUMENTS

I. SURYA'S DECISION TO OBTAIN PERSONAL DATA FROM HIYA! AND FROM A AND B DID NOT VIOLATE X'S RIGHTS UNDER ARTICLE 17 OF THE ICCPR

1. The right to privacy is enshrined under Article 17 of the ICCPR.[1] Such right is also recognised in UNGA General resolutions[2] and regional human rights instruments in Europe,[3] America[4] and Asia.[5]

2. X seeks a declaration that Surya obtained information regarding X from Hiya! and other users in violation of Article 17.[6] However, such application fails to fulfil the requisite two-stage test:[7] [A] there was no interference with X's right to privacy; or alternatively, [B] such interference was lawful and non-arbitrary.

---

[1] International Covenant on Civil and Political Rights (ICCPR) (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 17(1)-(2).

[2] Universal Declaration of Human Rights (UDHR) (adopted 10 December 1948) UNGA Res 217A (III), art 12; The right to privacy in the digital age (adopted 18 December 2013) UNGA Res A/RES/68/167 [1].

[3] European Convention on Human Rights (ECHR) (adopted 4 November 1950, entered into force 3 September 1953), art 8; Charter of Fundamental Rights of the European Union (adopted 2 October 2000, entered into force 1 December 2009), art 7.

[4] American Convention on Human Rights (ACHR) (adopted 22 November 1969, entered into force 18 July 1978), art 11; American Declaration on the Rights and Duties of Persons (adopted April 1948, entered into force 2 May 1948), art V.

[5] Arab Charter on Human Rights (adopted 15 September 1994, entered in force 16 March 2008) art 16; ASEAN Human Rights Declaration (adopted 18 November 2012), art 21.

[6] Record, [36], [38].

[7] UN Human Rights Committee (HRC), 'General Comment No. 16 on Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation' (8 April 1988) [4]; Ivana Roagna, 'Protecting the Right to Respect for Private and Family Life under the European Convention on Human Rights' (2012) Council of Europe Human Rights Handbook, 10 - 11; Ursula Kilkelly, 'The Right to Respect for Private and Family Life: A Guide to the Implementation of Article 8 of the European Convention of Human Rights' (2001) Council of Europe Human Rights Handbook, No. 1, 8-9.

A. Surya Did Not Interfere with X's Right to Privacy

3. Most liberal democracies have only recently begun to recognise privacy as an independent right in the last two decades, including UK,[8] Canada,[9] New Zealand,[10] and Australia.[11] In contrast, privacy is a constitutionally-guaranteed right in Surya,[12] in step with its positive obligation under the ICCPR.[13]

4. In its purest form, the right to privacy denotes the right to live privately away from unwanted attention,[14] or put simply, the 'right to be left alone'.[15]

5. Today, privacy is a broad term[16] not susceptible to exhaustive definition.[17] In its broadest

[8] *Campbell* v *MGN Ltd* [2004] UKHL 22 (United Kingdom) [120]-[123].

[9] *Jones* v *Tsige* [2012] ONCA 32 (Canada) [24], [72].

[10] *C* v *Holland* [2012] NZHC 2155 (New Zealand) [67], [75].

[11] *ABC* v *Lenah* [2002] LRC 86 (Australia) [132].

[12] Record, [28].

[13] UNHRC, General Comment No. 31 on The Nature of the General Legal Obligation Imposed on State Parties to the Covenant (26 May 2004) CCPR/C/21/Rev.1/Add. 13 [8], [13].

[14] *Satakunnan Markkinapörssi Oy and Satamedia Oy* v *Finland* App no. 932/13 (ECtHR, 21 July 2015) [130]; *Smirnova* v *Russia* App nos. 46133/99 and 48183/99 (ECtHR, 24 October 2003) [95].

[15] *Justice K.S. Puttaswamy (Retd.) and Anor.* v *Union of India and Ors*, Writ Petition (Civil) No.494 of 2012 (India) [25], [307], [323]; *C* v *Holland* (n 10) [11]; Warren and Brandeis, 'The Right to Privacy' (1890) Vol.4, No. 5 *Harvard Law Review*, 193; Voss & Renard, 'Proposal For An International Taxonomy On The Various Forms of The "Right To Be Forgotten": A Study On The Convergence Of Norms', (2016) Vol.14, No.2 *Colorado Technology Law Journal*, 284.

[16] *S. And Marper* v *The United Kingdom* App nos. 30562/04 and 30566/04 (ECtHR, 4 December 2008) [66]; *Vukota-Bojić* v *Switzerland* App no. 61838/10 (ECtHR,18 October 2016) [52]; *Satakunnan Markkinapörssi Oy and Satamedia Oy* v *Finland* (n 14) [129]; *Peck* v *United Kingdom* App no. 44647/98 (ECtHR, 28 January 2003) [57]; *R v Spencer* 2014 SCC 43 (Canada) [35]; *Dagg* v *Canada (Minister of Finance)* (Canada) [1997] 2 SCR 403 [67].

[17] *Satakunnan Markkinapörssi Oy and Satamedia Oy* v *Finland* (n 14) [129]; *Bensaid* v *United Kingdom* App no. 44599/98 (ECtHR, 6 February 2001) [47]; *Antović and Mirković* v *Montenegro* App no. 70838/13 (ECtHR, 28 November 2017) [41]; *Vukota-Bojić* v *Switzerland* (n 16) [52]; Will Thomas DeVries, 'Protecting Privacy in the Digital Age' (2003) Vol.18, No.1 *Berkeley Technology Law Journal*, 284; Dennis F. Hernandez, 'Litigating the Right to Privacy: A Survey of Current Issues' (1996) 446 PLL/PAT, 425, 429.

sense, privacy encompasses three aspects:[18] personal (*i.e.* physical and psychological integrity[19]), territorial (*i.e.* living or public spaces[20]), and informational (*i.e.* self-determination over personal data[21]).

6. The crux of X's application is that the "*collusion*" between Surya and Hiya! "*led to the discovery of his identity*" as the Sun Prince.[22] Hence, the critical question is whether X's informational privacy[23] was interfered by (1) Hiya!'s disclosure of information on A and B; and (2) A and B's disclosure of X's identity.

1. <u>Hiya! did not disclose any personal data belonging to X</u>

7. Personal data protection is vital to a person's enjoyment of private life.[24] Unauthorised disclosure of personal data constitutes an invasion of privacy.[25] Personal data refers to "*any*

---

[18] *R* v *Spencer* (n 16) [35]; *R* v *Tessling* 2004 SCC 67 (Canada) [21]–[24]; *R* v *Dyment* [1988] 2 SCR 417 (Canada), 428, 429.

[19] *Satakunnan Markkinapörssi Oy and Satamedia Oy* v *Finland* (n 14) [130]; *X and Y* v *the Netherlands* App no. 8978/80 (ECtHR, 26 March 1985) [22]; *Von Hannover* v *Germany* App no. 59320/00 (ECtHR, 24 June 2004) [50]; *Mikulić* v *Croatia* App no. 53176/99 (ECtHR, 7 February 2002) [53]; *Pretty* v *the United Kingdom* App no. 2346/02 (ECtHR, 29 April 2002) [61].

[20] *Peck* v *United Kingdom* (n 16) [59], [62]; *P.G. and J.H.* v *the United Kingdom* App no. 44787/98 (ECtHR, 25 September 2001) [57]; *Von Hannover* v *Germany* (n 19) [68]; *Niemietz* v *Germany* App no. 13710/88 (ECtHR, 16 December 1992) [33]; *Fontevecchia y D'Amico* v *Argentina* (29 November 2011) IACtHR Series C No. 238 (Merits, Reparations and Costs) [91]; *Peiris* v *Sri Lanka* (26 October 2011) Communication No. 1862/2009, U.N. Doc. CCPR/C/103/D/1862/2009 [10].

[21] UNHRC, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (17 April 2013) UN Doc A/HRC/23/40 [22]; American Civil Liberties Union (ACLU), 'Informational Privacy in the Digital Age A Proposal to Update General Comment 16 (Right to Privacy) to the International Covenant on Civil and Political Rights' (February 2015), 11,33; *Satakunnan Markkinapörssi Oy and Satamedia Oy* v *Finland* (n 14) [137]; *Benedik* v *Slovenia* App no. 62357/14 (ECtHR, 24 April 2018) [103].

[22] Record, [24]-[25].

[23] *Benedik* v *Slovenia* (n 21) [103]; *R* v *Spencer* (n 16) [37].

[24] *Bohlen* v *Germany* App no. 53495/09 (ECtHR, 19 February 2015) [35]; *Guillot* v *France* App no. 22500/93, (ECtHR, 24 October 1993) [21]; *Burghartz* v *Switzerland* App no. 16213/90 (ECtHR, 22 February 1994) [24]; *Stjerna* v *Finland* App no. 18131/91 (ECtHR, 25 November 1994) [37]; *Henry Kismoun* v *France* App no. 32265/10 (ECtHR, 5 December 2003) [25]; *S. and Marper* v *the United Kingdom* (n 16) [103].

[25] *Leander* v *Sweden* App no. 9248/81 (ECtHR, 26 March 1987) [48]; *Satakunnan Markkinapörssi Oy and Satamedia Oy* v *Finland* (n 14) [133]; *Amann* v *Switzerland* App no. 27798/95 (ECtHR, 16 February 2000) [68];

information relating to an identified or identifiable individual".[26]

8. Upon the Suryan prosecutor's request, Hiya! released the two mobile numbers linked to SuryaFirst's broadcast channel.[27] Pursuant to a judicial warrant directing the mobile service providers to release the names linked to such numbers,[28] the police identified A and B as the broadcasters.[29]

9. At this juncture, X's identity has not yet been revealed, and none of his personal data was compromised. *First*, Hiya! did not release X's mobile phone number. *Second*, it is uncertain whether X is even a registered user on Hiya!. *Third*, in any event, Hiya! does not require real names[30] nor store any personal data.[31]

10. Hence, Hiya's disclosure of information on A and B does not concern X's privacy.

Kopp v *Switzerland* App no. 23224/94 (ECtHR, 25 March 1998) [53]; *Claude-Reyes et al.* v *Chile* (September 19, 2006) IACtHR Series C No. 151 [77]*; Gomes Lund et al.* v *Brazil (Guerrilha do Araguaia)* (November 24, 2010) IACtHR Series C No. 219 [197].

[26] Convention for the Protection of Individuals with regards to Automated Processing of Personal Data (Convention 108) (adopted in 28 January 1981, entered into force 1 October 1985), art 2(a)*;* Council Regulation (EC) 2016/279 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation, GDPR) [2016] OJ L119/1, art 4(1); Council Directive 2016/680 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, [2016] OJ L119/89, art 3(1); *Satakunnan Markkinapörssi Oy and Satamedia Oy* v *Finland* (n 14) [133]; *Amann* v *Switzerland* (n 25) [65]; *Benedik* v *Slovenia* (n 21) [102]; Personal Data Protection Act, 2012 (Singapore) s 2; Data Protection Act, 2018 (United Kingdom) s 3, 5.

[27] Record, [24].

[28] Clarifications, [60].

[29] Record, [25]; Clarifications, [29].

[30] Clarifications, [28].

[31] Clarifications, [30].

2. A and B's disclosure of X's identity did not interfere with X's right to privacy

11. After taken into custody by the police, A and B revealed X's identity as the Sun Prince during interrogations in the presence of their lawyer without any coercion.[32] Yet, such disclosure still does not encroach into X's sphere of privacy.

12. *First*, Article 17 is triggered where there exist a reasonable expectation of privacy.[33] Interrogation is a routine technique employed by law enforcement officers worldwide in criminal investigation,[34] unlike unauthorised illicit means of evidence-gathering such as covert surveillance[35] and interception of correspondences.[36] Further, the right to fair trial protects a person's right to remain silent and privilege against self-incrimination.[37]

---

[32] Record, [25].

[33] *Copland* v *the United Kingdom* App no. 62617/00 (ECtHR3 April 2007) [42]; *Halford* v *the United Kingdom* App no. 20605/9225 (ECtHR, June 1997) [45]; *Bărbulescu* v *Romania* [GC] App no. 61496/08 (ECtHR, 5 September 2017) [73]; *Uzun* v *Germany* App no. 35623/05, (ECtHR, 2 September 2010) [49]-[52]; *Benedik* v *Slovenia* (n 21) [115].

[34] Council Regulation (EC) 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data [2001] OJ L 8/1, art 6(2); GDPR (n 26), art 129; Council Directive 2016/680 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing council framework decision 2008/977/JHA [2016] L 119/89 (n 26) art 4; *Gafgen* v *Germany* [GC] App no. 22978/05 (ECtHR, 1 June 2010) [38]; *Salduz* v *Turkey* [GC] App no. 36391/02 (ECtHR, 27 November 2008) [54]; Investigatory Powers Act 2016, s 2(4)(b) (United Kingdom).

[35] HRC, 'CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation' (8 April 1988) [8]; *P.G. and J.H.* v *the United Kingdom* (n 20) [42], [56]; *Huvig* v *France* App no. 11105/84 (ECtHR, 24 April 1990) [34]; *Valenzuela Contreras* v *Spain* 58/1997/842/1048 (ECtHR, 30 July 1998) [46]; *Weber and Saravia* v *Germany* App no. 54934/00 (ECtHR, 29 June 2006) [95]; *Association for European Integration and Human Rights and Ekimdzhiev* v *Bulgaria* App no. 62540/00 (ECtHR, 28 June 2007) [76]; *Roman Zakharov* v *Russia* App no. 47143/06 (ECtHR, 4 December 2) [231]; *Rotaru* v *Romania* App no. 28341/95 (ECtHR, 4 May 2000) [43]-[44].

[36] General Comment No. 16 (n 7) [8]; *Copland* v *the United Kingdom* (n 33) [41]-[42]; *Halford* v *the United Kingdom* (n 33) [45]; *Malone* v *The United Kingdom* App no. 8691/79 (ECtHR, 2 August 1984*)* [84]; *Klass and Others* v *Germany* App no. 5029/71 (ECtHR, 6 September 1978) [40]; *Bărbulescu* v *Romania* (n 33) [119]-[120]; *Bykov* v *Russia* [GC] App no. 4378/02 (ECtHR, 10 March 2009) [78].

[37] ICCPR (n 1) art 14(1), 3(g); *Saidova* v *Tajikistan* (8 July 2004) Communication no. 964/2001, CCPR/C/81/D/964/2001 [3.1], [6.2]; *Khoroshenko* v *Russian Federation* (29 March 2011) Communication no. 1304/2004, CCPR/C/101/D/1304/2004 [5.5], [9.8]; *Bykov* v *Russia* (n 36) [92]; *O'Halloran and Francis* v *the United Kingdom* [GC] App nos. 15809/02 and 25624/02 (ECtHR, 29 June 2007) [53]; *Saunders* v *the United*

However, whilst A and B cannot be compelled to confess guilt, they are not prevented by law from incriminating X.

13. *Second*, a reasonable expectation of privacy between A, B, and X may arise *inter se* from their close relationship as SuryaFirst members.[38] If so, X's remedy lies in a civil action against A and B for breach of confidentiality in tort or contract[39] (*horizontal* level[40]). However, since X has not brought such claim, Surya's positive obligation to provide sufficient adjudicatory mechanism to settle their competing claims (*vertical* level[41]) is not in issue here.

14. Hence, X's application under Article 17 is manifestly ill-founded.[42]

B. Alternatively, Surya's Interference with X's Right to Privacy Was Lawful and Non-Arbitrary

15. Assuming *arguendo* that the disclosure of X's identity interfered with his right to privacy, such interference is lawful and non-arbitrary in accordance to the three-part test[43] adopted

Kingdom App no. 19187/91 (ECtHR, 17 December 1996) [68]-[69]; *Heaney and McGuinness* v *Ireland* App no. 34720/97 (ECtHR, 21 December 2000) [47]-[48].

[38] Clarifications, [41].

[39] *Peck* v *United Kingdom* (n 16) [40]; *Campbell* v *MGN Ltd* (n 8) [44]-[45]; *C* v *Holland* (n 10) [40]-[41].

[40] General Comment No. 31 (n 13) [8]; *K.U.* v *Finland* App no. 2872/02, (ECtHR, 2 December 2008) [48]-[49]; *Hämäläinen* v *Finland* App no. 37359/09 (ECtHR, 16 July 2014) [63]; *Airey* v *Ireland* App no. 6289/73 (ECtHR, 9 October 1979) [33]; *Fontevecchia y D'Amico* v *Argentina* (n 20) [49].

[41] General Comment No. 16 (n 7) [1]; *K.U.* v *Finland* (n 40) [48]-[49]; *Hämäläinen* v *Finland* (n 40) [63]; *Airey* v *Ireland* (n 40) [33]; *Fontevecchia y D'Amico* v *Argentina* (n 20) [49].

[42] *Boso* v *Italy* App no. 50490/99 (ECtHR, 5 September 2002) [3]; *Weber and Saravia* v *Germany* (n 35) [156].

[43] ICCPR (n 1) art 12(3), art 18(3), art 21 & art 22(2); General Comment No. 16 (n 7) [3]-[4]; General Comment No. 31 (n 13) [6].

by the HRC,[44] the ECtHR,[45] and IACtHR[46]: (1) provided by law; (2) in accordance with the aims of the ICCPR; and (3) reasonable in the particular circumstances.

1. The disclosure of X's identity was provided by law

16. The term 'unlawful' means that any "*interference authorised by States can only take place on the basis of law*".[47] Such law must be accessible to the public and foreseeable as to its effects.[48]

a) The CPA was accessible

17. A law is accessible when individuals are able to have adequate indication of the legal rules applicable to a specific case.[49]

[44] *Toonen* v *Australia* (5 November 1992) Communication No. 488/1992 U.N. Doc CCPR/C/50/D/488/1992 [8.3]; *Van Hulst* v *The Netherlands* (3 October 2005) Communication No. 903/1999 U.N. Doc. CCPR/C/82/D/903/1999 [7.3]; *G* v *Australia* (17 March 2017) Communication No. 2172/2012 U.N. Doc. CCPR/C/119/D/2172/2012 [4.5]; Special Rapporteur 2013 (n 21) [28]-[29]; *Raihman* v *Latvia* (30 November 2010) Communication No. 1621/2007, CCPR/C/100/D/1621/2007 [8.3]; *Canepa* v *Canada* (20 June 1997) Communication No. 558/1993, CCPR/C/59/D/558/1993 [11.4].

[45] *Satakunnan* v *Finland* (n 14) [141]; *Benedik* v *Slovenia* (n 21) [121]; *Magyar Helsinki Bizottság* v *Hungary* [GC] App no. 18030/11 (ECtHR, 8 November 2016) [182] – [187]; *Dubská and Krejzová* v *The Czech Republic* [GC] App nos. 28859/11 and 28473/12 (ECtHR, 15 November 2016) [111] – [113]; *Fernández Martinez* v *Spain* [GC] App no. 56030/07 (ECtHR, 12 June 2014) [123] – [124].

[46] *Fontevecchia y D'Amico* v *Argentina* (n 20) [43]*; Escher et al.* v *Brazil* IACtHR (Preliminary Objections, Merits, Reparations, and Costs) (6 July 2009) [51]; *Atala Riffo and Daughters* v *Chile* IACtHR (Merits, Reparations and Costs) (24 February 2012) [158]; *Santander Tristan Donoso* v *Panama* IACtHR Series C No.193 (Merits, Reparations, and Costs) (27 January 2009) [71], [136].

[47] General Comment No.16 (n 7) [3]; *Malone* v *The United Kingdom* (n 36) [66].

[48] *Delfi AS* v *Estonia* [GC] App no. 64569/09 (ECtHR, 16 June 2015) [120]; *VgT Vereingegen Tierfabriken* v *Switzerland* App no. 24699/94 (ECtHR, 28 June 2001) [52]; *Rotaru* v *Romania* (n 35) [52]; *Gawęda* v *Poland* App no. 26229/95 (ECtHR, 14 March 2002) [39]; *Maestri* v *Italy* App no. 39748/98 (ECtHR, 17 February 2004) [30]

[49] *Sunday Times* v *United Kingdom (no. 1)* App no. 6538/74 (ECtHR, 26 April 1979) [49]; *Groppeara Rodio AG and Others* v *Switzerland* App no. 10890/84 (ECtHR, 28 March 1990) [68]; *Silver and Others* v *The United Kingdom* App Nos. 5947/72, 6205/73, 7052/75, 7061/75, 7107/75 (ECtHR, 25 March 1983) [88]; *MM* v *United Kingdom* App no. 24029/07 (ECtHR, 13 November 2012) [193].

18. The procedures on evidence-gathering in Surya is prescribed in the CPA[50] which "*enables law enforcement authorities to obtain a judicial warrant to instruct data controllers to disclose user data*".[51]

b) The disclosure of X's identity was foreseeable

19. The law must be formulated with sufficient precision[52] to enable individuals to reasonably foresee the legal consequences which a given action may entail.[53] However, those consequences need not be foreseeable with absolute certainty, as the law cannot be excessively rigid and must be able to evolve with changing circumstances.[54]

20. As submitted, the police may avail to a myriad of evidence-gathering techniques.[55] Laws governing disclosure of personal data are contained in general statutes in some States,[56] or

[50] Clarifications, [3].

[51] Clarifications, [7].

[52] UN Economic and Social Council 'Siracusa Principles on the Limitation and Derogation of Provisions in the ICCPR' (1985) UN Doc E/CN 4/1984/4, principle 17; *Kokkinakis* v *Greece* App no. 14307/88 (ECtHR, 25 May 1993) [40]; *Wingrove* v *the United Kingdom* App no. 17419/90 (ECtHR, 25 November 1996) [40]; *Lindon, Otchakovsky-Laurens and July* v *France* App nos. 21279/02 and 36448/02 (ECtHR, 22 October 2007) [41]; *Editorial Board of Pravoye Delo and Shtekel* v *Ukraine* App no. 33014/05 (ECtHR, 5 August 2011) [52].

[53] *Sunday Times* v *United Kingdom (no. 1)* (n 49) [49]; *Couderc and Hachette Filipacchi Associés* v *France* App no. 40454/07 (ECtHR,10 November 2015) [31]; *Malone* v *the United Kingdom* (n 36) [67]*; Miller* v *Switzerland* App no. 10737/84 (ECtHR, 24 March 1988); *Liberty and Others* v *the United Kingdom* App no. 58243/00 (ECtHR, 1 July 2008) [59]; *Shimovolos* v *Russia* App no. 30194/09 (ECtHR, 21 June 2011) [68]; *Amann* v *Switzerland* (n 25) [56]; *Kopp* v *Switzerland* (n 25) [55]; *Iordachi and others* v *Moldova* App no. 25198/02 (ECtHR, 10 February 2009) [21]; *Rotaru* v *Romania* (n 35) [55].

[54] *Delfi AS* v *Estonia* (n 48) [121]; *Lindon, Otchakovsky-Laurens and July* v *France* (n 52) [41]; *Centro Europa 7 S.R.L.* v *Italy* [GC] App no. 38433/09 (ECtHR, 7 June 2012) [141].

[55] Arguments, [12].

[56] Resolution 0912 of the National Police 2008 (Columbia); Code of Criminal Procedure 2012, s 126(c)(1) (Netherlands); The Criminal Procedure Act 1981, s 82 (Norway).

in data protection regimes in other States.[57]

21. In Surya, the CPA provides sufficient safeguards against arbitrariness and abuse by indicating with clarity the manner in which user data may be accessed by the police.[58]

22. In any event, X's identity was revealed by A and B, and *not* extracted from any personal data stored in Hiya!. Evidently, a judicial warrant is not required for a police interrogation.

2. The disclosure of X's identity pursued a legitimate aim

23. Despite not explicitly providing for any restrictions, Article 17 is generally accepted to be subjected to the general restrictions under the ICCPR:[59] (a) respect of the rights or reputation of others; and (b) protection of national security, public order, public health or morals.[60]

24. Prevention, detection, and investigation of crime serves to protect public order, and the rights of actual or potential victims.[61] Hence, the disclosure of X's identity to investigate the complaints against SuryaFirst[62] pursued a legitimate aim.

---

[57] Personal Data Processing Act 2019, s 32 (Czech Republic); Personal Data Protection Act 2002, Art 5 (Bulgaria); Act on the Protection of Personal Data 1998, art 22(3)(a) (Portugal); Danish Data Protection Act 2018, art 8(1) (Denmark).

[58] UNHRC 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression' (22 May 2015) A/HRC/29/32 [20]; *S. and Marper* v *the United Kingdom* (n 16) [103]; *Copland* v *the United Kingdom* (n 33) [45]-[46]; *Halford* v *the United Kingdom* (n 33); *Bykov* v *Russia* (n 36) [80]; *Escher et al.* v *Brazil* (n 46) [131].

[59] HRC 'CCPR General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (29 March 2004) [6]; UNHRC 'Report of the Special Rapporteur on the right to privacy' (17 October 2018) UN Doc A/73/45712 [14]; Special Rapporteur 2013 (n 21) [28].

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

[61] *Peck* v *United Kingdom* (n 16) [64]-[67]; *P.G. and J.H.* v *the United Kingdom* (n 20) [49]; *Ben Faiza* v *France* App no. 31446/12 (ECtHR, 8 February 2008) [77]; *Uzun* v *Germany* (n 33) [76]-[77].

[62] Record, [19], [21], [23].

3. The disclosure of X's identity was reasonable in the circumstances

25. According to the ICCPR's *travaux préparatoires*, the term 'reasonableness' in Article 17 requires an interference to be proportionate to the legitimate end sought.[63]

26. Such balancing test should weigh between (a) X's right to anonymity; and (b) the availability of least intrusive measures.[64]

a) X's right to anonymity is qualified and not impaired

27. There is a close nexus between privacy and freedom of expression,[65] particularly in the digital era.[66] Informational privacy guarantees confidentiality in private correspondences between people, [67] and anonymity in online communications.[68]

28. However, there is no consistent State practice as to the right to anonymity:

[63] General Comment No. 16 (n 7) [3]-[4]; *Toonen* v *Australia* (n 44) [6.4] & [8.3]; *Van Hulst* v *The Netherlands* (n 44) [7.6]; *G* v *Australia* (n 44) [4.5] & [7.4].

[64] Special Rapporteur 2015 (n 58) [35].

[65] ICCPR (n 1) art 19(2).

[66] The right to privacy in the digital age (n 2) Preamble {v)-(viii), [4(a)]; Inter-American Commission on Human Rights (IACHR), 'Standards for a Free, Open and Inclusive Internet' (15 May 2017) [185].

[67] General Comment No. 16 (n 7) [8]; *Escher et al.*v *Brazil* (n 46) [114]; *Niemietz* v *Germany* (n 20) [28]-[29]; *Huvig* v *France* (n 35) [8], [25]; *R* v *Spencer* (n 16) [38].

[68] African Declaration on Internet Rights and Freedom (adopted 8 September 2014), art 8; African Commission on Human and Peoples' Rights (ACommHPR), 'Resolution on the Right to Freedom of Expression on the Internet in Africa' ACHPR/Res. 362(LIX) 2016 (4 November 2016); Standards for a Free, Open and Inclusive Internet (n 66) [185].

(a) At one end of the spectrum, the US,[69] Canada,[70] South Korea,[71] Argentina,[72] and Paraguay[73] deem such right constitutionally protected.

(b) At the opposite end, Brazil,[74] Venezuela,[75] Vietnam,[76] Iran,[77] Russia,[78] and China[79] restrict anonymous forms of communication, whilst usage of real name is mandatory for registration of Internet services in over 50 countries,

[69] U.S. Constitution, First Amendment; *McIntyre* v *Ohio Elections Commission* 514 U.S. 334 (1995), 342, 343; *Talley* v *California* 362 U.S. 60 (1960), 64; *Watchtower Bible & Tract Society of New York Inc.* v *Village of Stratton* 536 U.S. 150 (2002), 166,167; 'The Constitutional Right to Anonymity: Free Speech, Disclosure and the Devil' The Yale Law Journal (1961), Vol. 70, 1100.

[70] *R* v *Spencer* (n 16) [42]; Sean Fine, 'Canadians Have Right to Online Anonymity, Supreme Court Rules' 13 June 2014 <https://www.theglobeandmail.com/news/national/supreme-court-privacy/article19155295/> accessed 2 November 2019.

[71] Decision 2010 Hun-Ma 47 (consolidated) (28 August 2012) 252.

[72] Constitution of the Argentine Nation 1994, s 43.

[73] Paraguay's Constitution of 1992, art 36.

[74] Brazil's Constitution of 1988, art 5 (Brazil).

[75] Venezuela's Constitution of 1999, art 57.

[76] Human Rights Watch, 'Vietnam: new decree punishes press' (*Human Rights Watch*, 23 February 2011) < https://www.hrw.org/news/2011/02/23/vietnam-new-decree-punishes-press> accessed 2 November 2019; Free World Centre, 'Article 19, Comment on Decree No. 02 of 2011 on Administrative Responsibility for Press and Publication Activities of the Prime Minister of the Socialist Republic of Vietnam' (June 2011).

[77] Freedom House, 'Freedom on the Net 2013 – Iran' (3 October 2013); Small Report, 'Iranian Internet Infrastructure and Policy Report' (January 2013); Article 19.org, 'Iran: National Messenger Apps are the New Hallmark of Internet Nationalisation' (*Article19.Org*, 21 October 2018) < https://www.article19.org/resources/iran-national-messenger-apps-are-the-new-hallmark-of-internet-nationalisation/> accessed 4 November 2019.

[78] Federal Law No.276-ФЗ amending the Federal Law on Information, Information Technologies and the Protection of Information (29 July 2017) (Russia); Alissa de Carbonnel, 'Russia Demands Internet Users Show ID to Access Public Wifi' (*Reuters*, 8 August 2014) < https://www.reuters.com/article/us-russia-internet/russia-demands-internet-users-show-id-to-access-public-wifi-idUSKBN0G81RV20140808> accessed 2 November 2019.

[79] Internet User Account Name Management Regulations 2015, art 5 (China); Johan Lagerkvist, 'Principal-Agent Dilemma in China's Social Media Sector? The Party-State and Industry Real-Name Registration Waltz' (2012) Vol. 6, No. 19 *International Journal of Communication*, 2628-2646.

such as: South Africa,[80] and Colombia.[81]

(c) The middle ground approach reserves anonymity for the media and journalistic sources – as followed by Australia,[82] New Zealand,[83] Mexico,[84] Chile, [85] El Salvador, [86] Panama, [87] Peru, [88] Uruguay, [89] Venezuela, [90] Ecuador,[91] and Angola.[92]

29. The underlying object of anonymity is to prevent reprisal and repression.[93] However, X is not a journalist nor whistle-blower protected in the public interest.[94] In any event, the

[80] Regulation of Interception of Communications and Provision of Communication-Related Information Act 2002 (RICA), s 39(1) (South Africa); Electronic Communications and Transactions Act 2002, s 29(2) (South Africa).

[81] Decree 1630 of 2011, Colombian Ministry of ICT .

[82] Evidence Amendment (Journalists' Privilege) Act 2007, s 126A(1) (Australia).

[83] Evidence Act 2006, s 68 (New Zealand).

[84] National Code of Criminal Procedure 2014, art 244 (Mexico).

[85] Law No.19.733 (Chile).

[86] Criminal Procedure Code 2004, art 73(5) (El Salvador).

[87] Law 67, art 21 (Panama).

[88] Criminal Procedure Code 2004, art 170 (Peru).

[89] Law 16.099, art 6 (Uruguay).

[90] Law for Journalism 4.819, art 8 (Venezuela).

[91] Ecuador Constitution 2008, art 20.

[92] Press Law 7/06, art 20(1) (Angola).

[93] Special Rapporteur 2015 (n 58) [20]; *Delfi AS* v *Estonia* (n 48) [147]-148]; *Benedik* v *Slovenia* (N 21) [105].

[94] UNHRC 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression' (30 May 2017) A/HRC/35/32 [62]; *Goodwin* v *the United Kingdom* [GC] App no. 17488/90 (ECtHR, 27 March 1996) [39]; *Sanoma Uitgevers B.V.* v *the Netherlands* [GC] App no. 38224/03 (ECtHR, 14 September 2010) [71]-[71]; *Roemen and Schmit* v *Luxembourg* App no. 51772/99 (ECtHR, 25 February 2003) [47]; *Ernst and Others* v *Belgium* App no. 33400/96 (ECtHR, 15 July 2003) [94]; *Tillack* v *Belgium* App no. 20477/05 (ECtHR, 27 November 2007) [56]; *Voskuil* v *the Netherlands* App no. 64752/01 (ECtHR, 22 November 2007) [49]; *Financial Times Ltd and Others* v *the United Kingdom* App no. 821/03 (ECtHR, 15 December 2009) [56]; *Big Brother Watch* v *the United Kingdom* App nos. 58170/13, 62322/14 and 24960/15 (ECtHR, 13 September 2018) [492].

'unmasking' of X as the Sun Prince at trial in public attracted no unwanted attention.[95]

30. Ultimately, the need for the police to collect information for crime prevention outweighs a suspect's right to privacy.[96] To hold otherwise would allow criminals to abuse anonymity, to gain immunity, and act with impunity.[97]

b) Surya adopted the least intrusive measure to investigate SuryaFirst

31. The principle of proportionality dictates that the least intrusive measure must be adopted to achieve the legitimate aim pursued.[98]

32. Common examples of invasive law enforcement measures include:

(a) Wire-tapping *i.e.* planting of listening devices in apartment;[99]

(b) Opening and perusal of private correspondence;[100]

(c) Monitoring of telephone, Internet and email usage (metadata);[101]

---

[95] Clarifications, [64].

[96] *Magyar Helsinki Bizottsag* v *Hungary* (n 45) [25], [27]; *Satakunnan Markkinapörssi Oy and Satamedia Oy* v *Finland* (n 14) [98]-[99]; *Van Hulst* v *The Netherlands* (n 44) [7.6]-[7.10]; International Association of Chiefs of Police (IACP) 'Summit Report: A Law Enforcement Perspective on the Challenges of Gathering Electronic Evidence' (2015); The Constitution of the Republic of Hungary 1949, art 50; The Constitution of Finland 1999, art 10; *R v Fearon* 2014 SCC 77 (Canada) [45]; *R* v *Caslake* [1998] 1 SCR 51 (Canada) [17].

[97] Special Rapporteur 2015 (n 58) [13]; *Bubbins* v *the United Kingdom* App no. 50196/99 (ECtHR, 17 March 2005) [121].

[98] HRC, 'General Comment No. 34 Article 19: Freedoms of opinion and expression' (12 September 2011) CCPR/C/GC/34 [33]; Special Rapporteur 2015 (n 58) [16]-[17]; ACtHPR, *Lohe Issa Konate* v *The Republic of Burkina Faso* (5 December 2014) App no. 004/2013 [148]-[149]; *Sunday Times* v *United Kingdom (no. 1)* (n 49) [62]; *Perna* v *Italy* App no. 48898/99 (ECtHR, 6 May 2003) [38]; *Nikula* v *Finland* App no. 31611/962 (ECtHR,1 March 2002) [47]; *Uzun* v *Germany* (n 33) [78]-[80].

[99] *P.G. and J.H.* v *the United Kingdom* (n 20) [37]-[38]; *Bykov* v *Russia* (n 36) [79]-[81].

[100] *Narinen* v *Finland* App no. 45027/98 (ECtHR,1 June 2004) [34]-[37]; *Klass and Others* v *Germany* (n 36) [40].

[101] *Copland* v *the United Kingdom* (n 33) [48]; *Malone* v *the United Kingdom* (n 36) [84].

(d) Tracking of movement via real-time geolocation technology (*e.g.* GPS).[102]

33. In contrast, all that the Suryan authorities sought from Hiya! and A and B is the true identity of the Sun Prince – *the name of X*. They could have – *but did not* – demand further information on X's activities to gather evidence (*e.g.* accessing his correspondences with A and B or tracking X's movements during February 2019).

34. Further, SuryaFirst's broadcast channel was blocked by Hiya!'s own volition, and not at the behest of Surya.[103]

35. In sum, the Suryan authorities exercised restraint when investigating SuryaFirst. Their disclosure request was narrowly targeted at identifying suspects,[104] and not intercepting nor restricting content.[105] Hence, X's right of anonymity (if any) was not significantly impaired.

II. SURYA'S DECISION TO OBTAIN PERSONAL DATA REGARDING A AND B FROM HIYA! DID NOT VIOLATE THEIR RIGHTS UNDER ARTICLE 17 OF THE ICCPR

36. Surya's acquisition of information on A and B from Hiya! did not violate Article 17 because [A] there was no interference with A and B's right to privacy; or alternatively, [B] such

[102] *Ben Faiza* v *France* (n 61) [74]; *Uzun* v *Germany* (n 33) [78]-[80].

[103] Record, [24].

[104] Special Rapporteur 2015 (n 58) [60]; *Big Brother Watch* v *the United Kingdom* (n 94) [316].

[105] General Comment No. 34 (n 98) [34]; Manila Principles.Org 'Manila Principles on Intermediary Liability Best Practices Guidelines for Limiting Intermediary Liability for Content to Promote Freedom of Expression and Innovation' (24 March 2015) principle IV (b); *Holt* v *Hobbs* 135 S.Ct. 853 (2015) (United States) [8]-[13]; *McCutcheon* v *Federal Election Commission* 572 U.S. 185 2014 [35], [36]; *United States* v *Playboy Entertainment Group, Inc.* 529 U.S. 803 (2000) [811]-[827]; *Shelton* v *Tucker* 364 U.S. 479 (1960) 493; *United States* v *Robel* 389 U.S. 258 (1967), 264; *Virginia State Bd. of Pharmacy* v *Virginia Citizens Consumer Council* 425 U.S. 748 (1976), 771; *Central Hudson Gas & Electric Co.* v *PSC* 447 U.S. [557], [564]-[565], [569]-[571].

interference was lawful.

A. The Disclosure of A and B's Mobile Phone Numbers By Hiya! Did Not Interfere with Their Right to Privacy

37. As submitted, personal data falls within the ambit of informational privacy.[106] The critical question is whether A and B's mobile phone numbers disclosed by Hiya! qualifies as 'personal data'.

38. Personal data refers to any information which constitutes a means of identifying a person.[107] The common types of data capable of tracing sources of electronic communication include name and address of subscriber, telephone number, or IP address for Internet services.[108] However, a single piece of information alone is seldom self-identifying, as even common forenames (*e.g.* Bruce) can only pinpoint a person when coupled with other information (*e.g.* Gotham City, '*billionaire-by-day-vigilante-by-night*').[109] Typically, for electronic databases, a bundle of information is required to construct personal data, such as disclosure of subscriber information (name and home address) associated with a dynamic IP address.[110]

---

[106] Arguments, [5].

[107] *Bohlen* v *Germany* (n 24) [35]; *Guillot* v *France* (n 24) [21]; *Burghartz* v *Switzerland* (n 24) [24]; *Stjerna* v *Finland* (n 24) [37]; *Henry Kismoun* v *France* (n 24) [25].

[108] Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland Ltd* v *Minister for Communications, Marine and Natural Resource and Others and Kärntner Landesregierung and Others* (CJEU, 8 April 2014) [26], [29]; Joined Cases C-92/90 and C-93/90 *Volker und Markus Schecke GbR* v *Land Hessen and Hartmut Eifert* (CJEU, 17 June 2010) [71].

[109] *Bohlen* v *Germany* (n 24) [35].

[110] *Benedik* v *Slovenia* (n 21) [112]-[114].

39. Further, a distinction must be drawn between pseudonymised data and anonymised data.[111] Personal data *includes* information processed in such manner to no longer be attributed to the data subject without the use of additional information kept separately (pseudonymisation), but *excludes* information rendered anonymous so that the data subject is not or no longer identifiable (anonymization).[112]

40. If multiple pieces of information capable of identifying A and B had been stored but kept separate by Hiya, such 'encrypted data' still qualifies as 'personal data'[113] However, Hiya! only stores the mobile phone numbers of users without linkage to their real names[114] (unlike Facebook,[115] LinkedIn[116] and Quora[117]). Neither does Hiya! have the means to obtain their names from mobile phone service providers without judicial warrant.[118] Any procedural non-compliance with Suryan law (if at all) is negligible and falls below the 'de minimis' standard.[119] Hence, the disclosure of A and B's 'anonymised' mobile phone numbers does not infringe their right to privacy.

---

[111] Article 29 Working Party, 'Opinion 04/2014 on Anonymisation Techniques' (10 April 2014) 0829/14/EN, 21-22.

[112] GDPR (n 26) art 4(5).

[113] Article 29 Working Party (n 111), 5-7.

[114] Clarifications, [28].

[115] 'What Names are Allowed on Facebook?' <www.facebook.com/help/112146705538576> accessed 4 November 2019.

[116] 'LinkedIn User Agreement' 8 May 2018, < https://www.linkedin.com/legal/user-agreement> accessed 4 November 2019, s 8.1(c).

[117] 'Terms of Service' 23 October 2018, < https://www.quora.com/about/tos> accessed 4 November 2019, s 2(b).

[118] Case C-582/14 *Patrick Breyer* v *Germany* (ECLI:EU:C:2016:779, 19 October 2016) [45]-[48].

[119] *Korolev* v *Russia (No. 2)* App no. 25551/05 (ECtHR,1 April 2010) [41]-[43]; *Finger* v *Bulgaria* App no. 37346/05 (ECtHR,10 May 2011) [67]-[71]; *Ionescu* v *Romania* App no. 36659/04 (ECtHR,1 June 2010) [30]-[36]; *Vasilchenko* v *Russia* App no. 34784/02 (ECtHR, 23 September 2010) [49].

B. Alternatively, Surya's Interference with A and B's Right to Privacy Was Lawful and Non-Arbitrary

41. Assuming *arguendo* that the disclosure of A and B's identities interfered with their right to privacy, such interference fulfils the test of legality, necessity and proportionality under Article 17.[120]

1. The disclosure of A and B's identities was provided by law

42. As submitted, the Suryan authorities sought and acquired information relating to SuryaFirst's broadcasters on Hiya! in accordance with the CPA.[121]

2. The disclosure of A and B's identities pursued a legitimate aim

43. As submitted, the prevention, detection, and investigation of crime are aimed at protecting public order, and the rights of actual and potential victims.[122]

3. The disclosure of A and B's identities was reasonable in the circumstances

44. As submitted, the test of 'reasonableness' requires an interference to be proportionate to the legitimate end sought.[123]

45. The two factors of proportionality relating to the disclosure of X's identity similarly apply to A and B *mutatis mutandis*.[124] In addition, two other factors merit consideration: (i) due process; and (ii) threat to public order.

---

[120] Arguments, [15]

[121] Arguments, [16] – [22].

[122] Arguments, [23] – [24].

[123] Arguments, [25] – [26].

[124] Arguments, [27] – [35].

a) Surya complied with due process of law

46. Due process as a procedural safeguard against arbitrariness is essential to the principle of proportionality.[125]

47. Judicial authorisation is an important safeguard – perhaps even the "best practice" – but is neither mandatory nor sufficient by itself to ensure compliance with the right to privacy.[126] Judicial control may be vested in a supervisory body of last resort.[127] Ultimately, the actual operation of the system, checks and balances, and existence of actual abuse must be examined in totality.[128]

48. The measures taken by Surya is best understood through a chronology of events:

    (a) S and T filed complaints on the mob attacks;[129]

    (b) The Suryan prosecutor contacted Hiya! to "*seek assistance in the investigation*";[130]

    (c) Hiya!'s legal team responded that "*it was fully prepared to cooperate with the investigation and would share the personal data of specific users if a formal request to do so was sent*";[131]

[125] *Osman* v *the United Kingdom* 87/1997/871/1083 (ECtHR, 28 October 1998) [116]; *Bărbulescu* v *Romania* (n 33) [121].

[126] *Big Brother Watch* v *the United Kingdom* (n 94) [320]; *Klass and Others* v *Germany* (n 36) [56].

[127] *Klass and Others* v *Germany* (n 36) [55]; *Uzun* v *Germany* (n 33) [71]-[72].

[128] *Big Brother Watch* v *the United Kingdom* (n 94) [320]; *Uzun* v *Germany* (n 33) [73].

[129] Record, [20]-[23].

[130] Record, [24].

[131] Record, [24].

(d) The prosecutor sent a formal letter to Hiya! requesting "*all personal data pertaining to the* '*broadcasters*' *of the SuryaFirst broadcast channel, and the user identifying himself as the 'Sun Prince*'";[132]

(e) 24 hours later, Hiya!'s legal team released the mobile phone numbers of the two SuryaFirst broadcasters;[133]

(f) The Suryan police obtained a judicial warrant to direct the mobile phone service providers to release the names linked to such numbers (*i.e.* A and B).[134]

49. Initially, Hiya! volunteered to disclose the personal data of A and B on its own volition with legal advice. Regardless of Hiya!'s terms of use and privacy policy,[135] the Suryan authorities can reasonably rely on Hiya!'s own judgment of the permissibility of such disclosure.[136]

50. As there was little such cooperation and assurances from the mobile phone service providers, the police were obliged to apply for a judicial warrant to obtain the names of A and B pursuant to the CPA and due process.[137]

51. Further, it is not contended that the disclosure of A and B's identities was misused by the

[132] Record, [24].

[133] Record, [24].

[134] Clarifications, [60].

[135] Clarifications, [21]-[25].

[136] GDPR (n 26), art 9(2)(b); Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Members States 2002/584/JHA [2002] OJ L 190/1, art 3(1), art 4(7)(a); *Minister for Justice and Equality* v *LM* Case C-216/18 PPU [GC] (CJEU, 25 July 2018) [33], [78].

[137] GDPR (n 26), art 9 (2)(b); *Sanoma Uitgevers B.V.* v *the Netherlands* (n 94) [88]-[91], [98]; Council Framework Decision of 13 June 2002 (n 136), art 1(1), 2(2); Police and Criminal Evidence Act 1984, s 8(1)(a) (United Kingdom); Criminal Code 1985, s 117.04(3) (Canada).

authorities during the criminal proceedings or for other purposes.

52. Hence, the lack of judicial authorization at the initial stage of discovery does not render the disclosure incompatible with due process.

b) SuryaFirst's broadcast posed a threat to public order

53. Expeditious governmental intervention is necessary whenever Internet intermediaries are used as vehicles for hate speech and incitement of violence, especially in situations of conflict and tension.[138] As content on Hiya! are downloadable and shareable by users,[139] SuryaFirst's videos can be disseminated rapidly and widely, and persistently remain online.[140]

54. The complaints received by Surya evinced a disconcerting pattern of crime. S was one of many victims of 'forcible conversion' prohibited by the newly-passed Section 220 of the PA.[141] The second complaint by T, a blind Tarakan minority, made under Section 300 was even more serious due to her constant suffering in a "*hostile and demeaning*" environment.[142]

55. To stem the escalating tide of disorder,[143] Surya had little choice but to act swiftly against the source and possible 'mastermind', SuryaFirst. Hence, the disclosure of A and B's

[138] *Sürek* v *Turkey (No. 1)* [GC] App no. 26682/95 (ECtHR, 8 July 1999) [60], [62] & [63]; *Erdogdu & Ince* v *Turkey* App nos. 25067/94 and 25068/94 (ECtHR, 8 July 1999) [54].

[139] Record, [18]-[19].

[140] *Delfi* v *Estonia* (n 48) [110].

[141] Record, [21].

[142] Record, [22]-[23].

[143] *Oya Ataman* v *Turkey* App no. 74552/01 (ECtHR, 5 December 2006) [35]; *Makhmudov* v *Russia* App no. 35082/04 (ECtHR 26 July 2007) [63]-[65]; *Gün and Others* v *Turkey* App no. 8029/07 (ECtHR 18 June 2013) [69]; *Taranenko* v *Russia* App no. 19554/05 (ECtHR, 15 May 2014) [65].

identities was an effective yet restrained counter-measure.

III. SURYA'S PROSECUTION AND CONVICTION OF X DID NOT VIOLATE HIS RIGHTS UNDER ARTICLE 19 OF THE ICCPR

56. The right to freedom of expression is enshrined under Article 19 of the ICCPR and regional human rights instruments in Europe,[144] America,[145] Asia,[146] and Africa.[147] However, such right is not absolute, and carries with it special duties and responsibilities.[148]

57. Any restrictions to such right must fulfil the three-part test of legality, necessity, and proportionality as affirmed by the HRC, [149] ECtHR, [150] IACtHR, [151] and

[144] ECHR (n 3), art 8, 10; Special Rapporteur 2018 (n 59) [15].

[145] ACHR (n 4), art 13.

[146] Arab Charter on Human Rights (n 5), art 27; ASEAN Human Rights Declaration (n 5), art 22-23.

[147] African Charter on Human and Peoples Rights (adopted 27 June 1981, entered into force 21 October 1986), art 9(2).

[148] ICCPR (n 1), art 19(3); General comment No. 34 (n 98) [21]; *Tae-Hoon Park* v *Republic of Korea* (3 November 1998) Communication No 628/1995 U.N. Doc CCPR/C/57/D/628/1995 [10.3]; *Benhadj* v *Algeria* (20 July 2007) Communication No 1173/2003 U.N. Doc. CCPR/C/90/D/1173/2003 [8.10]; *Handyside* v *United Kingdom* App no. 5493/72 (ECtHR, 7 December 1976) [49]; *Perna* v *Italy* (n 98) [87]; *Hachette Filipacchi Associes* v *France* App no. 71111/01 (ECtHR, 12/11/2007) [40]; *Mouvement Ralien Suisse* v *Switzerland* App no. 16354/06 (ECtHR, 13 July 2012) [48]; *Animal Defenders International* v *United Kingdom* App No. 48876/08 (ECtHR, 22 April 2013) [100]; *Stephen Peter Gough* v *United Kingdom* App No. 49237/11 (ECtHR, 28 October 2014) [164].

[149] General Comment No. 34 (n 98) [22], [33]-[35]; *Womah Mukong* v *Cameroon* (10 August 1994) Communication No 458/1991 UN Doc CCPR/C/51/D/458/1991 [9.7]; *Sohn* v *Republic of Korea* (19 July 1995) Communication No 518/1992 UN Doc CCPR/C/54/D/518/1992 [10.4]; *Malcolm Ross* v *Canada* (18 October 2000) Communication No 736/1997 UN Doc CCPR/C/70/D/736/1997 [11.2]; *Velichkin* v *Belarus* (12 September 2011) Communication No. 1022/2001, U.N. Doc. A/61/40, Vol. II [7.3].

[150] *Handyside* v *United Kingdom* (n 148) [49]; *Sunday Times* v *United Kingdom (no. 1)* (n 49) [45]; *Ceylan* v *Turkey* App no. 23556/94 (ECtHR, 8 July 1999) [24]; *Murat Vural* v *Turkey* App no. 9540/07 (ECtHR, 21 January 2015) [59]; *Perinçek* v *Switzerland* App no. 27510/08 (ECtHR, 15 October 2015) [124]; *Delfi AS* v *Estonia* (n 48) [119]; *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt* v *Hungary* App no. 22947/13 (ECtHR, 2 February 2016) [46].

[151] *Carvajal Carvajal* v *Colombia* IACtHR Series C No. 352 (13 March 2018) [176]; *Gomes Lund* v *Brazil* IACtHR C No. 219 (4 November 2010) [197]; *Francisco Martorell* v *Chile* IACtHR OEA/Ser L/V/II.95 Doc 7 rev 234 (3 May 1996) [55]; *Herrera-Ulloa* v *Costa Rica* IACtHR Series C No. 107 (2 July 2004) [120]; IACHR 'Report of the Special Rapporteur for Freedom of Expression' (30 December 2009) OEA/Ser L/V/II Doc 51 [58]-[64].

ACtHPR/ACommHPR.[152]

58. The test is fulfilled as the prosecution and conviction of X was (a) provided by law;[153] (b) pursued a legitimate aim;[154] and (c) proportionate to achieve such aim.[155]

A. The Prosecution and Conviction of X was Provided by Law

59. A restriction is provided by law when such law is accessible to the public[156] and formulated with sufficient precision to enable individuals to regulate their conduct.[157]

1. Section 220 of PA was accessible

60. A law is accessible when individuals are able to have adequate indication of the legal rules applicable to a particular case.[158]

---

[152] *Lohé Issa Konaté* v *The Republic of Burkina Faso* (n 98) [125]; ACtHPR, *Abdoulaye Nikiema, Ernest Zongo, Blaise Ilboudo & Burkinabe Human and Peoples' Rights Movement* v *The Republic of Burkina Faso* App No. 013/2011 (28 March 2014); ACtHPR, *Interights* v *Mauritania* No. 242/2001 (2004) 87 [78]-[79]; African Commission on Human and Peoples' Rights (ACommHPR) 'Resolution on the Adoption of the Declaration of Principles of Freedom and Expression in Africa' (2002) ACHPR/Res 62 (XXXII) 02, Principle II; ACommHPR 'Zimbabwe Lawyers for Human Rights & Institute for Human Rights and Development in Africa and Zimbabwe' Comm no 294/04 (2004) AHRLR 268 [80].

[153] General Comment No. 34 (n 98) [24]-[27].

[154] General Comment No. 34 (n 98) [28]-[32].

[155] General Comment No. 34 (n 98) [33]-[35].

[156] *Muller* v *Switzerland* App no. 10737/82 (ECtHR, 24 May 1988) [29]; *Kokkinakis* v *Greece* (n 52) [40]; *Sunday Times* v *United Kingdom (no.1)* (n 49) [49]; *Wingrove* v *The United Kingdom* (n 52) [40]; *Lindon, Otchakovsky-Laurens and July* v *France* (n 52) [41]; *Editorial Board of Pravoye Delo and Shtekel* v *Ukraine* (n 52) [52]; Siracusa Principles on the Limitation and Derogation of Provisions in the ICCPR (n 52), Principle 17.

[157] General Comment No. 34 (n 98) [25]; UNHRC 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression' (20 April 2010) A/HRC/14/23 [78]; *Olafsson* v *Iceland* App no. 58493/13 (ECtHR, 16 March 2017) [36]; *Chauvy* v *France* App no. 64915/01 (ECtHR, 29 June 2004) [43]; *Lindon, Otchakovsky-Laurens and July* v *France* (n 52) [41]; *Kokkinakis* v *Greece* (n 52) [40]; *Usón Ramirez* v *Venezuela* IACtHR Series C No.207 (20 November 2009) [56]-[57]; *Kimel* v *Argentina* IACtHR Series C No. 177 (2 May 2008) [63].

[158] *Sunday Times* v *United Kingdom (no.1)* (n 49) [49]; *Groppeara Rodio AG and Others* v *Switzerland* (n 49) [68]; *Silver and Others* v *the United Kingdom* (n 49) [88]; *MM* v *United Kingdom* (n 49) [193].

61. The PA was amended to include Section 220 on 15 February 2019[159] after public consultations.[160] Hence, Suryans are not only aware of such law, but also had an opportunity to participate in its legislative drafting.

2. Section 220 of PA was sufficiently precise

62. The level of precision required of a law – which cannot provide for every eventuality – depends largely on its content, the field it is designed to cover, and the number and status of those adversely affected.[161] As substance prevails over form,[162] a law includes statutes,[163] administrative decrees,[164] and unwritten case-law.[165]

63. No matter how clearly drafted a new criminal legislation is, there will inevitably be an element of uncertainty[166] requiring judicial interpretation to elucidate obscure points and dispel doubts.[167] The fact that X may well be the first person convicted for 'forcible

[159] Record, [14].

[160] Record, [12].

[161] *Delfi AS* v *Estonia* (n 48) [122]; *Editorial Board of Pravoye Delo and Shtekel* v *Ukraine* (n 52) [52]; *Groppeara Radio AG and Others* v *Switzerland* (n 49) [68]; *Centro Europa 7 S.r.l. and Di Stefano* v *Italy* (n 54) [141]; *Mariya Alekhina and others* v *Russia* App no. 38004/12 (ECtHR, 17 July 2018) [255].

[162] *Kafkaris* v *Cyprus* [GC] App no. 21906/04 (ECtHR, 12 February 2008) [139]; *Leyla Şahin* v *Turkey* [GC] App no. 44774/98 (ECtHR, 10 November 2005) [88].

[163] *Sunday Times* v *United Kingdom (no. 1)* (n 49) [47]; *Barthold* v *Germany* App no. 8734/79 (Commission Decision, 25 March 1985) [45].

[164] *De Wilde, Ooms and Versyp* v *Belgium* App no. 21906/04 (ECtHR, 18 June 1971) [93]; *Barthold* v *Germany* App no. 8734/79 (Commission Decision, 25 March 1985) [46].

[165] *Sunday Times* v *United Kingdom (no. 1)* (n 49) [47]; *Kruslin* v *France* App no. 11801/85 (ECtHR, 24 April 1990) [29]; *Casado Coca* v *Spain* App no. 15450/89 (ECtHR, 24 February 1994) [43].

[166] *Savva Terentyev* v *Russia* App no. 10692/09 (ECtHR, 28 August 2018) [58]; *Dmitriyevskiy* v *Russia* App no. 42168/06 (ECtHR, 3 October 2017) [82].

[167] *Öztürk* v *Turkey* App no. 22479/93 (ECtHR, 28 September 1999) [55]; *Jorgic* v *Germany* App no. 74613/01 (ECtHR, 12 July 2007) [101]; *Savva Terentyev* v *Russia* (n 166) [56].

conversion' in Surya[168] does not render the law less precise, but is more relevant in the assessment of proportionality.[169]

64. In any event, there is nothing exceptional about Section 220. Similar anti-conversion laws flourish in South-Asia,[170] including India,[171] Nepal,[172] Bhutan, [173] Myanmar,[174] Pakistan (Sindh province)[175] and Sri Lanka (bill pending[176]).

65. In India, specific statutes have been enacted in 7 states: Orissa, [177] Madhya Pradesh, [178] Arunacal Pradesh, [179] Chhattisgarh, [180] Gujarat, [181] Himachal Pradesh, [182]

[168] Record, [26].

[169] *Savva Terentyev* v *Russia* (n 166) [58]; *Mariya Alekhina and others* v *Russia* (n 161) [258].

[170] United States Commission on International Religious Freedom (USCIRF) 'Limitations on Minorities' Religious Freedom in South Asia' (November 2018), 1-3; Reuben Ackerman, 'Forced Conversions around the Commonwealth: An Introductory Note' (July 2018), 21; Law Library of Congress, 'Laws Criminalising Apostasy in Certain Jurisdictions' (May 2014), 4-5.

[171] UNHRC 'Report of the Special Rapporteur on freedom of religion or belief, Addendum, Mission to India' (29 January 2009) A/HRC/10/8/Add.3 [47]-[52]; USCIRF 'Limitations on Minorities' Religious Freedom in South Asia' (n 170), 4-5; Meghan G. Fischer, 'Anti-Conversion Laws and the International Response' 6 Penn. St. J.L. & Int'l Aff. 1 (2018), 13-19.

[172] Nepal Constitution 2015, art 26(3); The Muluki Ain (General Code), Part 4, Chapter 19, Number 1. 512 (Nepal); Criminal (Code) Act, 2074 (2017) Section 9, Clause 158 (Nepal).

[173] The Constitution of the Kingdom of Bhutan 2008, art 2.2; Penal Code (Amendment) Act of Bhutan 2011, s 463A, 463B; Religious Organizations Act of Bhutan 2007, art 5(g); Meghan G. Fischer (n 171) 45-46.

[174] Religious Conversion Bill 2015, art 14-20 (Myanmar); Meghan G. Fischer (171) 43.

[175] USCIRF 'Limitations on Minorities' Religious Freedom in South Asia' (n 170), 5.

[176] *Ibid.*

[177] Orissa Freedom of Religion Act, Act 2 of 1967 (India).

[178] Madhya Pradesh Freedom of Religion Act, Act 27 of 1968 (India).

[179] Arunachal Pradesh Freedom of Religion Act, Act 4 of 1978 (India).

[180] Chhattisgarh Freedom of Religion (Amendment) Act, Act 18 of 2006 (India).

[181] Gujarat Freedom of Religion Act, Act 24 of 2003 (India).

[182] Himachal Pradesh Freedom of Religion Act, Act 31 of 2006 (India).

Jharkhand,[183] and Uttarakhand.[184] The term "*force*" in Section 220(2) which includes "*threat of divine displeasure and social excommunication*"[185] is *pari materia* with such statutes.[186] The Indian Supreme Court upheld their constitutionality reasoning that freedom of religion only protects the right to *propagate* i.e. "*transmit or spread one's religion by exposition of its tenets*" but *not* the right to *convert*.[187]

66. Hence, Section 220 is sufficiently precise for X to reasonably foresee the legal consequences that may entail[188] from his video broadcast on 16 February 2019,[189] especially being a member of SuryaFirst.[190]

B. The Prosecution and Conviction of X Pursued a Legitimate Aim

67. Freedom of expression can be restricted for the grounds specified in Article 19(3) of the ICCPR: (a) respect of the rights or reputation of others; or (b) protection of national security, public order, public health or morals.[191]

[183] Jharkhand Freedom of Religion Act, Act 17 of 2017 (India).

[184] Uttarakhand Freedom of Religion Act, Act 14 of 2018 (India).

[185] Record, [14].

[186] Orissa Freedom of Religion Act 1967 (n 177), s 2(b); Himachal Pradesh Freedom of Religion Act 2006 (n 182), s 2(b); Gujarat Freedom of Religion Act 2003 (n 181), s 2(c), 2(d); Arunachal Pradesh Freedom of Religion Act 1978 (n 179), s 2(d) (India); Jhardkhand Freedom of Religion Act 2018 (n 183), s 2(d).

[187] *Rev. Stanislaus* v *State of Madya Pradesh and Orissa*, AIR 1977 SC 908 (India).

[188] *Sunday Times* v *United Kingdom (no.1)* (n 49) [49]; *Couderc and Hachette Filipacchi Associés* v *France* (n 53) [31]; *Malone* v *the United Kingdom* (n 36) [67]*; Miller* v *Switzerland* (n 53) [29]; *Liberty and Others* v *the United Kingdom* (n 53) [59].

[189] Record, [16].

[190] Clarifications, [41].

[191] General Comment No. 34 (n 98) [22]; UNHRC 'Interim Report of the Special Rapporteur on freedom of religion or belief' (5 March 2019) A/40/58 [17].

1. X interfered with the freedom of religion of others

68. There are three main rights imbued in freedom of religion under Article 18 of the ICCPR:[192] (a) right to adopt and change one's own religion of his own choice;[193] (b) right *not* to be coerced into adopting a religion; [194] (c) right to manifest one's religion[195] which includes the *right to convert others by means of non-coercive persuasion*.[196]

69. Since the first and second rights touch on the inner dimension of a person's convictions (*forum internum*), they are non-derogable in nature.[197] The third right, intertwined with freedom of expression, [198] is the external manifestation of such convictions (*forum externum*), which may be restricted to prevent infringement of the *forum internum* rights of others.[199]

70. Hence, X's right to convert cannot prevail over the freedom of *andha* believers to *not* be

[192] UDHR (n 2) art 18; UNHRC 'Interim report of the Special Rapporteur on freedom of religion or belief' (13 August 2012) U.N. Doc. A/67/303 [16]; UNHRC 'Report of the Special Rapporteur on freedom of religion or belief' (28 February 2018) A/HRC/37/49 [30].

[193] ICCPR (n 1), art 18(1); HRC, 'General Comment No. 22 on Article 18 (Freedom of Thought, Conscience or Religion)' (30 July 1993) CCPR/C/21/Rev.1/Add.4 [3].

[194] ICCPR (n 1), art 18(2); General Comment No. 22 (n 193) [5].

[195] ICCPR (n 1), art 18(1) and (3); General Comment No. 22 (n 193) [4].

[196] UNHRC 'Interim report of the Special Rapporteur on freedom of religion or belief' (13 August 2012) U.N. Doc. A/67/303 [24], [26]-[28].

[197] General Comment No. 22 (n 193) [3]; Special Rapporteur 2019 (n 191) [6]; Special Rapporteur 2012 (n 196) [19], [22]; UNHRC, 'Report of the Special Rapporteur on freedom of religion or belief' (23 December 2015) UN Doc. A/HRC/31/18 [7], [17]-[19]; *Sinan Işık* v *Turkey* App no. 21924/05 (ECtHR, 2 February 2010) [41]-[42]; *Kokkinakis* v *Greece* (n 52) [31]; *Alexandridis* v *Greece* App no. 19516/06 (ECtHR, 21 February 2008) [38]; *Buscarini and Others* v *San Marino* [GC] App no. 24645/94 (ECtHR, 18 February 1999) [34].

[198] Special Rapporteur 2019 (n 191); Special Rapporteur 2015 (n 197) [6]-[8], [19]; Special Rapporteur 2012 (n 196) [27].

[199] Special Rapporteur 2019 (n 191) [6]; Special Rapporteur 2015 (n 197) [21], [25]; *Refah Partisi (Prosperity Party) and Others* v *Turkey* [GC] App nos. 41340/98, 41342/98, 41343/98 and 41344/98 (ECtHR, 23 February 2003) [92]-[95].

coerced into adopting such faith.[200] Indeed, Section 220 is precisely designed by Surya[201] to prevent abuse of such right through immoral and deceitful means.[202]

2. X disrupted public order

71. Freedom of expression may be restricted to protect public order.[203] States, being the ultimate guarantor of religious pluralism, have a duty of neutrality and impartiality to ensure that conflicting religious groups co-exist and tolerate each other peacefully,[204] and that the rights of minorities are not impaired.[205]

72. The Suryan faith is the official and dominant religion in Surya.[206] By 2019, a small pocket of 10,000 Tarakans resettled in Surya.[207] Between 2015 and 2019, the number of native Suryans adopting the Tarakan *andha* philosophy rose from 0.2% to 2%.[208] In January 2019,

[200] Record, [31].

[201] Record, [12], [14].

[202] *Kokkinakis* v *Greece* (n 52) [42], [44]; *Larissis and Others* v *Greece* App nos. 23372/94, 26377/94 and 26378/94 (ECtHR, 24 February 1998) [44].

[203] Special Rapporteur 2019 (n 191) [6], [31]-[32]; Special Rapporteur 2015 (n 197) [25]; *Perinçek* v *Switzerland* (n 150) [151]-[152]; *Otto Preminger-Institute* v *Austria* App no. 13470/87 (ECtHR, 20 September 1994) [46]; *E.S.* v *Austria* App no. 38450/12 (ECtHR, 25 October 2018) [41]; *Refah Partisi (Prosperity Party) and Others* v *Turkey* (n 199) [95]; *Usón Ramirez* v *Venezuela* (n 157) [92].

[204] *Sinan Işık* v *Turkey* (n 197) [45]; *Manoussakis and Others* v *Greece* App no. 18748/91 (ECtHR, 26 September 1996) [47]; *Metropolitan Church of Bessarabia and Others* v *Moldova* App no. 45701/99 (ECtHR, 13 December 2001) [123]; *Kokkinakis* v *Greece* (n 52) [33]; *S.A.S.* v *France* [GC] App no. 43835/11 (ECtHR, 1 July 2014) [123]-[128]; *Leyla Şahin* v *Turkey* (n 162) [107]-[108]; *Refah Partisi (Prosperity Party) and Others* v *Turkey* (n 199) [94].

[205] ICCPR (n 1), art 27; General Comment No. 22 (n 193) [9]; 18 Commitments on "Faith For Rights" [IV]; Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, UNGA Res 36/55 (adopted 25 November 1981), art 2(2); Special Rapporteur 2019 (n 191) [28]; *Belkacem* v *Belgium* App no. 34367/14 (ECtHR, 27 June 2007) [32]-[33]; *Rev. Stanislaus* v *State of Madya Pradesh and Orissa* (n 187)*;* European Roma Rights Centre, 'Minorities and Media Freedom under International Law' (7 December 1999) [3].

[206] Record, [1].

[207] Record, [2].

[208] Record, [11].

radical nationalists strongly condemned the *andha* faith and campaigned for anti-blasphemy laws.[209]

73. In light of growing tension between both communities, restrictions on religious expression are justified to protect their sensitivities, prevent escalation of the conflict, and ultimately, preserve religious harmony.[210]

C. The Prosecution and Conviction of X was Proportionate

74. Restrictions to freedom of expression must be proportionate to the legitimate aim pursued.[211] The prosecution and conviction of X under Section 220 was proportionate from three aspects: (a) criminality; (b) non-discrimination; and (c) sentencing.

1. X attempted to forcibly convert *andha* adherents

75. As noted by the ECtHR in *Kokkinakis*[212] and *Larissis*,[213] a distinction has to be drawn between innocent evangelism and improper proselytism, which involves the element of '*coercion*' (*e.g.* use of violence, offering material or social advantages, exerting improper pressure on people in distress, or brainwashing). Similarly, Section 220 defines 'force' expansively to cover non-physical types of coercion.[214]

---

[209] Record, [10].

[210] Special Rapporteur 2019 (n 191) [25], [31]; *Otto Preminger-Institute* v *Austria* (n 203) [56]; *Wingrove* v *the United Kingdom* (n 156) [58]; *E.S.* v *Austria* (n 203) [44], [57].

[211] *Sunday Times* v *United Kingdom (no. 1)* (n 49) [62]; *Ojala and Etukeno Oy* v *Finland* App no. 69939/10 (ECtHR, 14 January 2014) [43]; *Ruokanen* v *Finland* App no. 45130/06 (ECtHR, 6 April 2010) [38]; *Kasabova* v *Bulgaria* App no. 22385/03 (ECtHR, 19 April 2011) [54]; *Herrera-Ulloa* v *Costa Rica* (n 151) [122].

[212] *Kokkinakis* v *Greece* (n 52) [48].

[213] *Larissis and Others* v *Greece* (n 202) [45].

[214] Record, [14].

76. X's video message should not be construed in reference to the statements in isolation but rather in light of its overall thrust,[215] especially considering X's involvement in the production SuryaFirst's broadcast.[216]

77. *First*, X employed strong directive language[217] in his video message on 16 February 2019, such as "***force*** *them to see the light*" and "***immediately go*** *shine a light*".[218]

78. *Second*, the 'live' scene of the masked mob assaulting an innocent blindfolded bystander on the streets shown *between* his two statements[219] evinced an unspoken implicit threat to viewers that the same fate would befall those who do not stop practicing the *andha* faith, especially wearing blindfolds.[220]

79. *Third*, despite SuryaFirst not being directly responsible for the ensuing 'copycat' videos during 18-28 February, X released a statement on 28 February thanking his "*faithful followers*" for following his earlier message. [221]

80. *Fourth*, their victims, particularly S and T, felt humiliated, ostracised and distressed.[222]

---

[215] *Lewandowska-Malec* v *Poland* App no. 39660/07 (ECtHR, 18 September 2012) [62]; *Perinçek* v *Switzerland* (n 150) [233].

[216] Clarifications, [41].

[217] *Jersild* v *Denmark* [GC] App no. 15890/89 (ECtHR, 23 September 1994) [35]; *Oberschlick* v *Austria* App no. 20834/92 (ECtHR, 1 July 1997) [29].

[218] Record, [16]-[17].

[219] Record, [17].

[220] General Comment No. 34 (n 98) [36]; *Jong-Kyu Sohn* v *Republic of Korea* (n 149) [10.4]; *Guyane* v *Suriname* Arbitral Tribunal constituted pursuant to Article 287 and in accordance with Annex VII of the United Nations Convention on the Law of the Sea (The Hague, 17 September 2007) [432]-[433].

[221] Record, [19].

[222] Record, [21], [23].

2. Section 220 is non-discriminatory

81. Before the Suryan courts, X argued *inter alia* that the law "*specifically protected the Suryan faith*",[223] alluding to Section 220(3) stating that conversion excludes "*voluntarily returning to the forefather's original faith or to one's original faith*".[224] However, such defence falls flat, as a matter of construction and enforcement.

82. *First*, the literal text does not mention the Suryan faith, and the qualifying word "*voluntarily*" means that 're-conversion' by force is similarly prohibited. Further, from a contextual approach, anti-blasphemy laws must be distinguished from anti-conversion laws. The former aims to protect a *belief* from criticism and denigration,[225] whilst the latter to protect *believers* from hostility and discrimination (in conformity with the fundamental notion of human beings as rights-holders[226]). Wisely, the Suryan government rejected SuryaFirst's call for the former[227] and enacted the latter instead.[228]

83. *Second*, X was prosecuted for attempting to forcibly convert *andha* adherents to the Suryan faith.[229] The conviction was upheld on appeal.[230] Indeed, this reinforces an unequivocal

[223] Record, [29].

[224] Record, [14].

[225] Special Rapporteur 2019 (n 191) [29]; *Wingrove* v *the United Kingdom* (n 156) [47]; *Otto Preminger-Institute* v *Austria* (n 203) [47]-[48].

[226] General Comment No. 31 (n 13) [9]; Special Rapporteur 2019 (n 191) [31]; Special Rapporteur 2015 (n 197) [14]-[16].

[227] Record, [10].

[228] Record, [12], [14].

[229] Record, [26].

[230] Record, [33].

recognition from all three State organs of Surya – legislative, executive and judiciary[231] – that Section 220 grants no preferential treatment to 're-conversion' to the Suryan faith.[232]

84. Hence, the conviction of X conforms with the principle of non-discrimination.[233]

3. The suspended sentencing of X was fair

85. The nature and extent of a punishment must be proportionate to the offence.[234]

86. X received a suspended sentence of two years' imprisonment on condition of non-repetition during such period.[235] Such punishment strikes a fair balance between acknowledging the uncertainties arising from the newly amended Section 220 as a mitigating factor,[236] and setting a landmark precedent exhorting the Suryan society to be more tolerant of rejection of their religion by others and propagation of doctrines antithetical to their faith.[237]

IV. SURYA'S PROSECUTION AND CONVICTION OF A AND B DID NOT VIOLATE THEIR RIGHTS UNDER ARTICLE 19 OF THE ICCPR

87. The prosecution and conviction of A and B under Section 300 of PA fulfilled the three-part

[231] General Comment No. 31 (n 13) [4], [7].

[232] Special Rapporteur 2012 (n 196) [47]; Special Rapporteur 2009 (n 171) [48]; *Rev. Stanislaus* v *State of Madya Pradesh and Orissa* (n 187).

[233] ICCPR (n 1), art 26, 27.

[234] *Ceylan* v *Turkey* (n 150) [37]; *Tammer* v *Estonia* App no. 41205/98 (ECtHR, 6 February 2001) [69]; *Skalka* v *Poland* App no. 43425/98 (ECtHR, 27 May 2003) [38]; *Cumpana* v *Romania* App no. 33348/96 (ECtHR, 17 December 2004) [111]; *Couderc and Hachette Filipacchi Associés* v *France* (n 53) [44]; *Perna* v *Italy* (n 98) [46].

[235] Record, [26].

[236] Arguments, [62]- [63].

[237] *E.S.* v *Austria* (n 203) [42]; *Aydin Tatlav* v *Turkey* App no. 50692/99 (ECtHR, 2 May 2006); *Otto Preminger-Institut* v *Austria* (n 203) [47].

test of legality, necessity and proportionality.[238]

A. The Prosecution and Conviction of A and B Was Provided By Law

88. As submitted, a restriction to freedom of expression must be provided by law that is accessible to the public and foreseeable as to its consequences.[239]

89. Section 300, a 'hate speech' law, is increasingly prevalent worldwide,[240] even including liberal democracies like Canada,[241] Ireland,[242] UK,[243] Belgium,[244] Netherlands,[245] and Japan.[246]

90. Section 300 does not suffer from vagueness, overbreadth, nor risk of abuse.[247] The term "*hatred*" is reserved to "*the most severe and deeply felt form of opprobrium*".[248] The term "*advocacy*" which includes "*sharing of photographs, audio and video files, and hyperlinks*

[238] Arguments, [57].

[239] Arguments, [58]-[66].

[240] Office of the United Nations High Commissioner for Human Rights (OHCHR), 'Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence' (11 January 2013) UN Doc A/HRC/22/17/Add 4 [11]; Committee on the Elimination of Racial Discrimination (CERD), General Recommendation No. 35 (Combatting racist hate speech) (26 September 2013) CERD/C/GC/35 [13], [46]-[47]; Special Rapporteur 2019 (n 191) [33]; Special Rapporteur 2015 (n 197) [55]-[56].

[241] Canadian Criminal Code, s 319.

[242] Prohibition of Incitement to Hatred Act 1989, s 2 (Ireland).

[243] Public Order Act 1986, s 17, 18 (United Kingdom).

[244] Belgian Anti-Racism Law 1981, art 3 (Belgium).

[245] Penal Code of the Netherlands 2014 (amended), art 137c, 137d.

[246] Hate Speech Elimination Act 2016 (Japan).

[247] Rabat Plan of Action (n 240) [7], [11].

[248] Rabat Plan of Action (n 240) [18], [29]; Special Rapporteur 2019 (n 191) [34]; *R* v *Keegstra* [1990] 3 S.C.R. 697 (Canada) [786].

to content on the Internet"[249] is consistent with international recognition that hate speech can manifest in a myriad of forms in social media.[250]

91. SuryaFirst's channel on Hiya! has over 100,000 subscribers[251] and earns advertising revenue.[252] As broadcasters involved in the production of videos,[253] A and B are *quasi*-publishers who should be familiar with Suryan law and able to procure legal advice.[254] Hence, Section 300 was within their realm of foreseeability.

B. Surya's Prosecution and Conviction of A and B Pursued a Legitimate Aim.

92. Article 20(2) of the ICCPR requires States to prohibit "*any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence*".[255] Laws enacted pursuant to Article 20(2) are permissible restrictions to Article 19(3).[256]

93. 'Hate speech' laws are designed to protect vulnerable groups from deep-rooted

[249] Record, [22].

[250] General Recommendation No. 35 (n 240) [7]; *Belkacem* v *Belgium* (n 205) [33]; *Packingham* v *North Carolina* 582 U.S. p 10 (2017); Casey Newton, 'Hate Speech is spreading on Facebook in India again' <https://www.theverge.com/interface/2019/10/30/20938311/facebook-avaaz-india-report-hate-speech-megaphone-warning> accessed 31 November 2019.

[251] Record, [13].

[252] Record, [29].

[253] Record, [25]; Clarifications, [41].

[254] *Delfi* v *Estonia* (n 48) [126]-[129]; *Chauvy* v *France* (n 157) [43]-[45]; *RTBF* v *Belgium* App no. 50084/06 (ECtHR, 29 March 2011) [104]; *Cantoni* v *France* App no. 17862/91 (ECtHR, 15 November 1996) [35]; *Tolstoy Miloslavsky* v *the United Kingdom* App no. 18139/91 (ECtHR, 13 July 1995) [37], [41].

[255] *Gündüz* v *Turkey* App no. 35071/97 (ECtHR, 14 June 2004) [40],[41]; *Jersild* v *Denmark* (n 217) [30].

[256] General Comment No. 34 (n 98) [48]; Rabat Plan of Action (n 240) [14]; Special Rapporteur 2015 (n 197) [57].

discrimination[257] (*e.g.* immigrants[258] and ethnic minorities[259]). Hence, Section 300 is essential to protect public order[260] and the right to life of others.[261]

C. The Prosecution and Conviction of A and B Was Proportionate

94. The proportionality of prosecuting and convicting A and B turns on whether: (1) SuryaFirst's broadcast constitutes 'hate speech';[262] and (2) criminal sanction is justified.[263]

1. A and B advocated hatred on the SuryaFirst's Hiya! channel

95. The elements of 'hate speech' prohibited by Article 20(2) should follow the test in the *Rabat Plan of Action*[264] as recognised by the CERD,[265] UN Special Rapporteurs,[266] and

[257] Convention on the Rights of Persons with Disabilities (adopted 30 March 2007, entered into force 3 May 2008), art 8(1)(b); Special Rapporteur 2019 (n 191) [33]; *Savva Terentyev* v *Russia* (n 166) [76]; *Féret* v *Belgium* App no. 15615/07, (ECtHR, 16 July 2009) [69]-[73], [78]; *Vejdeland and Others* v *Sweden* App no. 1813/07 (ECtHR 9 February 2012) [54].

[258] *Soulas and Others* v *France* App no. 15948/03 (ECtHR, 10 July 2008) [36]-[41]; *Féret* v *Belgium* (n 257) [69]-[73], [78]; *Le Pen* v *France* App no. 18788/90 (ECtHR, 20 April 2010) [1]; *Norwood* v *the United Kingdom* App no. 23131/03 (ECtHR, 16 November 2004), 4.

[259] *Balsytė-Lideikienė* v *Lithuania* App no. 72596/01 (ECtHR, 4 November 2008) [78]; *Pavel Ivanov* v *Russia* App no. 35222/04 (ECtHR, 20 February 2007) [1].

[260] Rabat Plan of Action (n 240) [14]; Special Rapporteur 2015 (n 197) [25].

[261] Special Rapporteur 2013 (n 21) [25]; *Delfi* v *Estonia* (n 48) [48].

[262] *Perinçek* v *Switzerland* (n 150) [195].

[263] *Surek* v *Turkey* (n 138) [64]; *Stomakhin* v *Russia* App no. 52273/07 (ECtHR, 9 May 2018) [129]; *Cumpănă and Mazăre* v *Romania* App no. 33348/96 (ECtHR, 17 December 2004) [117]; *Claude Reyes* v *Chile* IACtHR Series C No. 151 (Merits, Reparations and Costs) (16 September 2006) [94]-[95]; Canadian Charter of Rights and Freedoms, Constitution Act, 1982, Part 1 [1];

[264] Rabat Plan of Action (n 240) [29(a)-(e)].

[265] General Recommendation No. 35 (n 240) [15].

[266] Special Rapporteur 2015 (n 197) [57]; UNHRC 'Interim Report of the Special Rapporteur on freedom of religion or belief' (28 August 2017) A/72/365 [58].

ECtHR.[267]

a) Content and form of broadcast

96. The essence of ideas lies in the substance, and the form and style in which they are conveyed.[268] Hate speech is not confined to overtly explicit remarks, but may employ indirect language and non-verbal expression[269] (*e.g.* symbols,[270] images[271] and behaviour at public gatherings[272]).

97. As submitted, X's message and the 'live' scenes of the mob attack in the 16 February broadcast[273] and X's 'thank you' message in the 28 February broadcast[274] must be viewed in tandem.[275] Although couched in ambiguous allegorical terms[276] such as "*strip them of their blindfolds*" and "*shine a light*", the video left little doubt as to its true meaning *i.e.* to provoke Suryans in attacking blindfolded *andha* adherents.[277]

---

[267] *Perinçek* v *Switzerland* (n 150) [204]-[208]; *Stomakhin* v *Russia* (n 263) [90]; *Savva Terentyev* v *Russia* (n 166) [66].

[268] Rabat Plan of Action (n 240) [29(c)]; *Savva Terentyev* v *Russia* (n 166) App no. 10692/09 (ECtHR, 28 August 2018) [68], [74]; *Gül and Others* v *Turkey* App no. 4870/02 (ECtHR,8 June 2010) [41]; *Grebneva and Alisimchik* v *Russia* App no. 8918/05 (ECtHR, 22 November 2016) [52].

[269] General Recommendation No. 35 (n 240) [7], [16]; Council Framework Decision 2008/913/JHA of 28 November on combatting certain forms and expressions of racism and xenophobia by means of criminal law, art 1(b).

[270] *Nix* v *Germany* App no. 35285/16 (ECtHR 13 March 2018) [47].

[271] *Norwood* v *the United Kingdom* (n 258) 4.

[272] *Šimunić* v *Croatia* App no. 20373/17 (ECtHR, 22 January 2019) [38], [44]-[45].

[273] Record, [15]-[17].

[274] Record, [19].

[275] Arguments, [76]-[80].

[276] *Refah Partisi (Prosperity Party) and Others* v *Turkey* (n 199) [130].

[277] *Šimunić* v *Croatia* (n 272) [44]-[45].

b) Status of speaker

98. The status of the speaker in relation to the audience is another relevant factor.[278]

99. SuryaFirst is a prominent nationalist group highly respected by Suryan society[279] and wields considerable political influence (as evinced by the inclusion of Section 220 pursuant to their aggressive campaigning[280]). Over 100,000 users subscribe to its Hiya! channel.[281] Within 15 minutes of its 'ping' notification on 16 February, 30,000 subscribers plus 5,000 other viewers immediately tune into their broadcast.[282] Hence, A and B had a large and loyal following on Hiya!.

c) Extent of broadcast

100. The Internet provides an unprecedented platform that augments free speech.[283] Online dissemination of hate speech is even more acute as it can be disseminated rapidly and widely, and persistently remain online.[284]

101. The 16 February broadcast was viewed by 35,000 users in real time and 250,000 users within

[278] Rabat Plan of Action (n 240) [29(b)]; *Perinçek* v *Switzerland* (n 150) [234]; *E.S.* v *Austria* (n 203) [51]; *Gündüz* v *Turkey* (n 255) [43]; *Refah Partisi (Prosperity Party) and Others* v *Turkey* (n 199) [115]; *Zana* v *Turkey* [GC] App no. 69/1996/688/880 (ECtHR, 25 November 1997) [50]; *Ojala and Etukeno Oy* v *Finland* (n 211) [52]; *Affaire Almeida Leitão Bento Fernandes* v *Portugal* App no. 25790/11 (ECtHR, 12 June 2015) [51]-[52]; *Petrenco* v *Moldova* App no. 20928/05 (ECtHR, 4 October 2010) [60].

[279] Record, [10].

[280] Record, [12]-[14].

[281] Record, [13].

[282] Record, [15].

[283] *Delfi* v *Estonia* (n 48) [110]; *Ahmet Yildirim* v *Turkey* App no. 3111/10 (ECtHR, 18 December 2012) [48]; *Times Newspaper Ltd* v *the United Kingdom (nos. 1 and 2)* App nos. 3002/03 and 23673/03 (ECtHR, 10 March 2009) [27].

[284] *Delfi* v *Estonia* (n 48) [110].

24 hours[285] (1% of Surya's total population[286]), and continually shared in the following days. Hence, A and B's broadcast had spread far and wide beyond its support base, akin to distribution of mass leaflets.[287]

d) Context of broadcast

102. Context refers to the social and political background at the time of the broadcast.[288] A tense atmosphere of hostility and hatred invariably heightens the risk of further incitement against long-suffering victims.[289]

103. In January 2019, tension was simmering amongst native Suryans against Tarakans, of whom SuryaFirst accused of "*corrupting the social fabric in Surya*" and demanded that they be prohibited from wearing blindfolds in public.[290] Hence, *pre*-broadcast, A and B had already been fueling hostilities against them.

e) Imminence of harm

104. Incitement to violence is an inchoate crime which merely requires proof of a reasonable

[285] Record, [19].

[286] Record, [1].

[287] *Perinçek* v *Switzerland* (n 150) [206]; *Féret* v *Belgium* (n 257) App no. 15615/07 (ECtHR, 16 July 2009) [76]; *Vejdeland and Others* v *Sweden* (n 157) [54].

[288] Rabat Plan of Action (n 240) [29(a)]; *Perinçek* v *Switzerland* (n 150) [249]-[250]; *Zana* v *Turkey* (n 278) [50], [56], [60]; *E.S.* v *Austria* (n 203) [50]; *Gündüz* v *Turkey* (n 255) [48]-[49]; *İ.A.* v *Turkey* App no. 42571/98 (ECtHR, 13 September 2005) [29]-[30]; *Mehdi Zana* v *Turkey (No. 2)* App no. 26982/95 (ECtHR, 6 April 2004) [31].

[289] *Savva Terentyev* v *Russia* (n 166) [78]; *Jersild* v *Denmark* (n 217) [31]; *Zana* v *Turkey* (n 278) [60]; *Incal* v *Turkey* App no. 41/1997/825/1031 (ECtHR, 9 June 1998) [58]; *Soulas and others* v *France* (n 258) [37]–[39]; *Sürek* v *Turkey (No. 1)* (n 138) [62].

[290] Record, [10].

possibility that the action advocated will occur.[291]

105. A and B's broadcast was a call to action for Suryan believers to harass blindfolded *andha* adherents, as evinced by the mobs chanting "*seeing is believing*"[292] – the very name of SuryaFirst's broadcast channel.[293]

f) Intent of broadcast

106. The degree of intent requires deliberation.[294] Intent may be inferred from silence (*e.g.* failure of leaders of a nationalist group to denounce their member's calls for violence[295]) or acquiescence (*e.g.* newspaper publishing readers' letters containing hate speech and glorification of violence[296]).

107. Throughout February 2019, SuryaFirst's broadcast and over 100 'copycat' videos went viral on Hiya!, and most tellingly, X publicly thanked their "*faithful followers*" on 28 February.[297] Had A and B *not* intended to instigate the mobs, they would delete their videos,[298] issue a clarification or apology, and stop broadcasting more incendiary videos. Such silence and acquiescence evince intent of advocating hatred.

---

[291] Rabat Plan of Action (n 240) [29(f)]; General Recommendation No. 35 (n 240) [16]; *Jersild* v *Denmark* (n 217) [14]; *Prosecutor* v *Nahimana et al* (28 November 2007) Case No ICTR-99-52-A [720]; Stefan Sottiaux, 'Bad Tendencies' in the ECtHR's 'Hate Speech' Jurisprudence' 7 European Constitutional Law Review (2011, No. 1) [62]-[63]; *Board of Trade* v *Owen* [1957] 1 All ER 411 (House of Lords) [416].

[292] Record, [17], [19].

[293] Record, [13].

[294] Rabat Plan of Action (n 240) [29(f)]; *Perinçek* v *Switzerland* (n 150) [232]-[233]; *Nachova And Others* v *Bulgaria* App nos. 43577/98 and 43579/98 (ECtHR 6 July 2005) [160].

[295] *Refah Partisi (Prosperity Party) and Others* v *Turkey* (n 199) [130]-[131]; *Zana* v *Turkey* (n 278) [57]-[59].

[296] *Sürek* v *Turkey (No. 1)* (n 138) [62]-[63].

[297] Record, [19].

[298] Clarifications, [44].

2. The criminal sanctions on A and B are proportionate

108. The use of criminal sanction to combat hate speech is not disproportionate *per se*.[299]

109. The Suryan court convicted A and B under Section 300 with a fine of USD2,000 each.[300] Such sanction is justified due to the constant violence targeted at *andha* adherents[301] and the lack of any remorse shown by A and B towards their suffering.[302]

[299] Council Framework Decision 2008/913/JHA (n 269), art 3(1); *Lindon, Otchakovsky-Laurens and July* v *France* (n 52) [59]; *Długołęcki* v *Poland* App no. 23806/03 (ECtHR, 24 February 2009) [47]; *Saaristo and Others* v *Finland* App no. 184/06 (ECtHR, 12 October 2010) [69]; *Pedersen and Baadsgaard* v *Denmark* [GC] App no. 49017/99 (ECtHR, 17 December 2004) [93]; *Bozhkov* v *Bulgaria* App no. 3316/04 (ECtHR, 19 April 2011) [53].

[300] Record, [26].

[301] Record, [23].

[302] Record, [19].

PRAYER

For the foregoing reasons, the Respondent respectfully request this Honorable Court to adjudge and declare the following:

1. Surya's decision to obtain personal data from Hiya! and from A and B did not violate X's rights under Article 17 of the ICCPR.
2. Surya's decision to obtain personal data regarding A and B from Hiya! did not violate their rights under Article 17 of the ICCPR.
3. Surya's prosecution and conviction of X did not violate his rights under Article 19 of the ICCPR.
4. Surya's prosecution and conviction of A and B did not violate their rights under Article 19 of the ICCPR.

Respectfully submitted 6 November 2019,

709R,

Counsel for Respondent.