

**THE 2019-2020 PRICE MEDIA LAW  
MOOT COURT COMPETITION**

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**A, B AND X  
(APPLICANTS)**

**V.**

**THE STATE OF SURYA  
(RESPONDENT)**

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**MEMORIAL FOR THE RESPONDENT**

Words: 4,988

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## LIST OF ABBREVIATIONS

<b>ACHPR</b>	African Charter on Human and Peoples' Rights
<b>ACtHPR</b>	African Court of Human and Peoples' Rights
<b>ACHR</b>	American Convention on Human Rights
<b>CCPR</b>	Centre for Civil and Political Rights
<b>CJEU</b>	Court of Justice of the European Union
<b>CoE</b>	Council of Europe
<b>EC</b>	European Commission
<b>ECHR</b>	Convention for the Protection of Human Rights and Fundamental Freedoms
<b>ECtHR</b>	European Court of Human Rights
<b>EU</b>	European Union
<b>GDPR</b>	General Data Protection Regulation
<b>HRC</b>	Human Rights Committee
<b>IACCommHR</b>	Inter-American Commission on Human Rights
<b>IACtHR</b>	Inter-American Court of Human Rights
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>UK</b>	United Kingdom
<b>UN</b>	United Nations
<b>UNGA</b>	United Nations General Assembly
<b>UNHRC</b>	United Nations Human Rights Council
<b>US</b>	United States of America

## LIST OF SOURCES/AUTHORITIES

### DECLARATIONS, TREATIES, AND CONVENTIONS

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.....1, 5, 8, 13, 14, 20, 29, 30

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### STATUTES

Arunachal Pradesh Freedom of Indigenous Faith Act of 1978 (India).....18

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## **CASES FROM THE ECtHR**

<i>Airey v Ireland</i> App no. 6289/73 (ECtHR, 9 October 1979).....	9
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<i>Bergens Tidende v Norway</i> App no 26132/95 (ECtHR, 2 August 2000).....	8
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<i>Ibragim Ibragimov and Others v. Russia</i> App No. 1413/08 and 28621/11 (ECtHR 28 August 2018).....	23
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<i>Pastörs v Germany</i> App no 55225/14 (ECtHR, 3 October 2019).....	20, 23, 29
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<i>S.H. and Others v Austria</i> App no. 57813/00 (ECtHR 3 November 2011).....	9
<i>Smith and Grady v The United Kingdom</i> App nos 33985/96 33986/96 (ECtHR, 27 September 1999).....	25, 30, 33
<i>Söderman v Sweden</i> App no. 5786/08 (ECtHR, 12 November 2013).....	9

<i>Soulas and Others v. France</i> no 15948/03 (ECtHR 10 July 2008).....	23
<i>Steel &amp; Morris v United Kingdom</i> App no 68416/01 (ECtHR, 15 February 2005).....	8
<i>Stubbings and Others v the United Kingdom</i> App nos 22083/93 and 22095/93 (ECtHR, 22 October 1996).....	9
<i>Sürek v Turkey (No. 4)</i> App no. 24762/94 (ECtHR, 8 July 1999).....	26
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**CASES FROM THE HRC:**

Human Rights Committee, <i>Borzov v Estonia</i> , (Communication No 1136/2002) UN Doc CCPR/C/81/D/1136/2002.....	15
Human Rights Committee, <i>de Groot v. The Netherlands</i> (Communication No 578/994) UN Doc CCPR/C/54/D/578/1994.....	4, 5
Human Rights Committee, <i>García v Colombia</i> (Communication 687/1996) UN Doc CCPR/C/71/D/687/1996.....	4
Human Rights Committee, <i>Hak—Chul Shin v Republic of Korea</i> , (Communication no 926/2000) UN Doc. CCPR/C/80/D/926/2000.....	29
Human Rights Committee, <i>Hertzberg and others v. Finland</i> , (Communication No. 61/1979) UN Doc CCPR/C/15/D/61/1979.....	9, 15
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Human Rights Committee, <i>Mohamed Rabbae v Netherlands</i> (Communication no. 2124/2011) UN Doc CCPR/C/117/D/2124/2011.....	23
Human Rights Committee, <i>Pinkney v Canada</i> , (Communication No 27/1977), UN Doc CCPR/C/14/D/27/1977.....	4

Human Rights Committee, <i>Robert Faurisson v France</i> (Communication No. 550/1993) UN Doc CCPR/C/58/D/550/1993.....	16
Human Rights Committee, <i>Toonen v Australia</i> (Communication No 488/1992) UN Doc CCPR/C/46/D/488/1992.....	4, 5
Human Rights Committee, <i>Van Hulst (Antonius) v Netherlands</i> (Communication No 903/1999,) UN Doc CCPR/C/82/D/903/1999.....	5

**CASES FROM THE IACtHR:**

I/A Court H.R., <i>Chaparro Álvarez and Lapo Íñiguez v. Ecuador Case</i> , judgement of 21 November 2007, Series C, No. 170.....	25, 30
I/A Court H.R., <i>Claude Reyes v Chile Case</i> , judgement of September 19, 2006, Series C, No. 151.....	8
I/A Court H.R., <i>Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism</i> , Advisory Opinion OC-5/85 of November 13, 1985 Series A, No. 5.....	8
I/A Court H.R., <i>Francisco Martorell v Chile Case</i> , judgement of 3 May 1996, Report no 11/96.....	16
I/A Court H.R., <i>Herrera Ulloa v Costa Rica Case</i> , judgement of July 2, 2004, Series C, No. 107.....	8

I/A Court H.R., *Kimel v Argentina Case*, judgement of 3 May 2008, Series C, No. 177.....6, 25, 30

I/A Court H.R., *Palamara Iribarne v Chile Case*, judgement of November 22, 2005, Series C, No. 135.....8

I/A Court H.R., *Ricardo Canese v Paraguay Case*, judgement of August 31, 2004, Series C, No. 111.....8

I/A Court H.R., *Rios et al v Venezuela Case*, judgment of 28 January 2009, Series C, No 194.....15

I/A Court H.R., *Tristán Donoso v. Panamá Case*, judgement of January 27, 2009, Series C no 193.....6, 12

**CASES FROM THE ACHPR:**

Decision Regarding Communications 105/93, 128/93, 128/94, 130/94, 152/96 (*Media Rights Agenda v Nigeria*) (Afr. Comm'n Hum. & Peoples' Rts., 31 October 1998).....15

Decision Regarding Communications 48/90, 50/91, 89/93 (*Amnesty International and Others v Sudan*) (Afr. Comm'n Hum. & Peoples' Rts., 8 November 1999).....30

Decision Regarding Communications 143/95, 150/96 ( <i>Constitutional Rights Project and Civil Liberties Organization v Nigeria</i> ) (Afr. Comm'n Hum. & Peoples' Rts., 31 October 1998).....	15
Decision Regarding Communication 242/2001 ( <i>Interights v Mauritania</i> ) (Afr. Comm'n Hum. & Peoples' Rts., 4 June 2004).....	16
Decision Regarding Communication 297/05 ( <i>Scanlen and Holderness v Zimbabwe</i> ) (Afr. Comm'n Hum. & Peoples' Rts., 3 April 2009).....	24
Decision Regarding Communication 250/2002 ( <i>Zegveld v Eritrea</i> ) (Afr. Comm'n Hum. & Peoples' Rts., 20 November 2003).....	15
Decision Regarding Communication 294/04 ( <i>Zimbabwe Lawyers for Human Rights &amp; Institute for Human Rights and Development in Africa v Zimbabwe</i> ) (Afr. Comm'n Hum. & Peoples' Rts., 3 April 2009) .....	15
 <b>CASES FROM OTHER SUPRANATIONAL COURTS AND INTERNATIONAL TRIBUNALS:</b>	
C-112/00 <i>Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich</i> [2003] ECR I-05659.....	10
C- 265/87 <i>Schröder v Hauptzollamt Gronau</i> [1989] ECR 2237.....	25, 30

*C-36/02 Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004], ECR I-09609.....10

*C-131/12 Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AEPD), Mario Costeja González* ECLI:EU:C:2014:317.....31

**CASES FROM NATIONAL COURTS:**

*Bank Mellat v HM Treasury* [2013] UKSC 39.....25, 30, 33

*Elliott v Commissioner of Police* [1997] 3 LRC 15.....24

*MN v Secretary of State for the Home Department* [2012] UKUT 389 (IAC).....18

*Quon v. Arch Wireless Operating Co. Inc.*, 445 F.Supp.2d 1116, 1130 (2006).....4, 11

*R v. Oakes* [1986] 1 S.C.R. 103.....25, 30

*Ramburn v Stock Exchange Commission* [1991] LRC (Const) 272.....24

*Re Munhumeso* [1994] 1 LRC 282.....24

*S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3.....25, 30

*Yulitha Hyde v State of Orissa* AIR 1973 Ori 116.....18

*Rev Stanislaus vs Madhya Pradesh* 1977 SCR (2) 611.....18

**BOOKS AND BOOK CHAPTERS:**

Bossuyt '*Guide to the "travaux préparatoires" of the International Covenant on Civil and Political Rights*' (Martinus Nijhoff Publishers, 1987).....4

Schabas, '*The European Convention on Human Rights: A Commentary*' (2nd edn OUP 2017) 406.....25, 30, 33

Taylor, Paul M, '*Freedom of Religion: UN and European Human Rights Law and Practice*' (Cambridge University Press, 2005) 161.....9

**ARTICLES:**

Martin, Jason A. and Anthony L. Fargo, 'Anonymity as a Legal Right: Where and Why it Matters', (2015) 16 (2) North Carolina Journal of Law & Technology 311.....10

Murphy, Erin, The Politics of Privacy in the Criminal Justice System: Information Disclosure, the Fourth Amendment, and Statutory Law Enforcement Exemptions, 111 Mich. L. Rev. 485 (2013) < <https://repository.law.umich.edu/mlr/vol111/iss4/1> > .....4, 11



Redgwell, Catherine J., "Reservations to Treaties and Human Rights Committee General Comment No.24(52)" (1997) *The International and Comparative Law Quarterly* Vol. 46 395.....17

Rolph, David, 'Defamation by Social Media' (2013) Sydney Law School Research Paper No. 13/81, 16-21 < <https://ssrn.com/abstract=2356028> >.....3, 10

**SOURCES FROM THE INTERNET:**

ARTICLE 19, 'Thresholds for the prohibition of incitement to discrimination, hostility or violence under Article 20 of the ICCPR', < <https://www.ohchr.org/Documents/Issues/Expression/ICCPR/Vienna/CRP7Callamard.pdf> >.....28

**NEWS PUBLICATIONS:**

New Law Unmasks Anonymous Web Surfers, THE LOCAL (May 3, 2013,12:35 PM), at [www.thelocal.de/20130503/49513](http://www.thelocal.de/20130503/49513).....3

**UN DOCUMENTS:**

HRC, 'Report of the Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt' (26 December 2013), UN Doc. A/HRC/25/58.....21

HRC, ‘Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin’ (28 December 2019) UN Doc A/HRC/13/37.....	6, 12
HRC, ‘Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye’ (22 May 2015), UN Doc. A/HRC/29/32.....	3
HRC, ‘Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue’, (17 April 2013) UN Doc. A/HRC/23/40.....	6, 12
HRC, ‘Promotion and protection of the right to freedom of opinion and expression’ (7 September 2012) UN Doc A/67/357.....	21
HRC, ‘Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence’ (5 October 2012) UN Doc A/HRC/22/17/Add.4.....	21
HRC, ‘Report of the United Nations High Commissioner for Human Rights on the right to privacy in the digital age’ (30 June 2014) A/HRC/27/37.....	5
HRC, General Comment 16, Art. 17 (Thirty-second session, 1988), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.9 (1988).....	1, 4, 5, 9

HRC, General Comment 22, Art. 18 (Forty-eighth session, 1993), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. CCPR/C/21/Rev.1/Add.4 (1993) ('General Comment 22').....23, 24, 28

HRC, General Comment 24, Art. 41 (Fifty-second session, 1994), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994).....17

HRC, General Comment 31, Art. 2 (Eightieth session, 2004), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (2004).....9

HRC, General Comment 34, Art. 19 (Hundred and second session, 2011), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. CCPR/C/GC/34 (2011).....4, 5, 6, 15, 19, 20, 29

Report of the Human Rights Committee, GAOR, 43rd Session Supplement No. 40, U.N. Doc A/43/40.....5

**EU LEGISLATION:**

Council Regulation (EC) 2016/679 of 27 April 2016 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) [2016] OJ L119/1 .....2

**MISCELLANEOUS:**

Donald, Alice and Erica Howard ‘The right to freedom of religion or belief and its intersection with other rights’ (ILGA-Europe, Brussels, Belgium, 2015).....23

Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Strasbourg, 28 January 1981), ETS 108 (19810, entered into force 1 October 1985).....2

Council of Europe Cybercrime Convention Committee (T-CY) Cloud Evidence Group, ‘Criminal justice access to electronic evidence in the cloud: Recommendations for consideration by the T-CY’, September 16, 2016.....4, 11

Home Office, Country Policy and Information Note Pakistan: Ahmadi Annex C ‘Note to CPIT from the International Human Rights Committee (IHRC), 25 April 2018’ .....18

IACHR, ‘Special Rapporteur on Freedom of Expression of the Inter-American Commission on Human Rights, Catalina Botero Marino’ (31 December 2013) OEA/Ser.L/V/II.....3

SS Terblanche ‘The Guide to Sentencing in South Africa’ (Butterworths, 2007).....16

Supplementary Act on Data Protection (Abuja, 16 February 2010) A/SA.1/01/10 (2010).....2

UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media, OAS Special Rapporteur on Freedom of Expression and ACHPR Special Rapporteur on Freedom of Expression and Access to Information, ‘Joint Declaration

on Freedom of Expression and the Internet' (2011) <  
<https://www.osce.org/fom/78309?download=true> >.....20

## STATEMENT OF RELEVANT FACTS

### **Surya**

1. Surya is a country of circa 25 million people. Around 90% of Surya's population are ethnically Suryan and approximately 10,000 people are Tarakan and are adherents of the *andha* faith. Close to 2% of ethnic Suryans claim to be adherents of the *andha* faith whereas the rest are adhere in the majority to the Suryan faith.

### **Hiya!**

2. Hiya! is a Suryan online messaging application specially licenced as a public broadcaster under Surya's Communications Act. Over 75% of the population use the Hiya!. A user must register using their phone number. Hiya! has a bilateral chat function for users to chat and share, *inter alia*, video files and links to online material with other users, as well as a broadcast function for users to 'live stream' or stream prerecorded video content to their subscribers.

### **Campaign against *andha***

3. In January 2019, Suryan national groups launched a campaign requesting that the government introduce laws to ban, *inter alia*, proselytism and conversion of Suryans to the *andha* faith. SuryaFirst had also requested that Tarakans be prohibited from wearing blindfolds in public due to its association with the faith. SuryaFirst maintains a broadcast channel on Hiya! called 'Seeing is Believing' which had over 100,000 subscribers and had gathered over 30,000 signatures on a petition for such a prohibition.
4. On 15 February, the Suryan government amended the Suryan Penal Act to include Section 200, which purportedly regulates proselytism. Importantly, it also provides protection for one voluntarily converting to the Suryan faith or to one's original faith.

5. On 16 February, subscribers of the Seeing is Believing channel were informed by SuryaFirst that a new live broadcast was about to begin. In the broadcast, X, who wore a mask and called himself the “Sun Prince”, encourage followers of the *andha* faith to turn away from their beliefs and encouraged others to convert *andha* followers. The message was followed by a live video where a group of masked individuals approached a blindfolded person and verbally harassed him before the group leader forcefully tore off his blindfold.
6. The video amassed 250,00 views and shares in a 24-hour period. Over the next 13 days, hundreds of similar videos were shared on Hiya! depicting groups of persons accosting blindfolded individuals on the streets of the capital. In some cases, bright flashlights were shone into the face of the visually impaired. None of these links were shared by the SuryanFirst channel itself.
7. On 28 February, a pre-recorded broadcast was released by SuryaFirst on their channel where the Sun Prince thanked these groups for their actions. Hiya!’s fAith! filter, which had been trained to accommodate the special position of Suryan faith pursuant to Section 220(3) of the Suryan Penal Act, did not identify either broadcast as hate speech.
8. A complaint was submitted by S, who claimed to be the victim in the first broadcast on 16 February. S is an ethnic Suryan who had adopted the *andha* faith. He complained that the broadcast humiliated him and subjected him to hostility and exclusion from his ethnic community. He claimed the incident was an attempt to ‘forcibly convert him from his belief’.
9. Another complaint was submitted by T under Section 300 which prohibits the advocacy of hatred against any group in a manner that constitutes incitement to discrimination, hostility or violence.

### **Investigation and conviction**

10. In the course of investigation, the prosecution contacted Hiya! to seek assistance in identifying person A, B and X. Hiya!'s legal team stated 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 to the Head Office. It is noted that the procedures under the Criminal Procedure Act enabling law enforcement authorities to obtain a judicial warrant to instruct data controllers to disclose user data was not followed.
11. The prosecution thereafter sent a formal letter to the Hiya! Head Office requesting personal data pertaining to the broadcasters of the SuryaFirst channel and the Sun Prince. Hiya's legal team gave them the mobile phone numbers of A and B, who were the broadcasters. During police interrogations, A and B revealed that X was the Sun Prince. No complaints were made about the interrogation.
12. X and A and B were charged and convicted under Section 200 and Section 300 respectively. They appealed their convictions before the Appellate Court on the basis that their convictions violated their rights to privacy and freedom of expression under Articles 8 and 10 of the Suryan Constitution. Their appeal was dismissed. X was sentenced to a suspended sentence of two years imprisonment and A and B were fined USD 2,000 each.



## **STATEMENT OF JURISDICTION**

Surya, the Respondent, alongside X, A and B, the Applicants, hereby submit this dispute to the Honourable Court, the Universal Freedom of Expression Court. The dispute in question relates to rights under Articles 17 and 19 of the ICCPR. All domestic remedies have been exhausted.

The Respondents respectfully request for this Honourable Court to adjudge the dispute in accordance with the rules and principles of international law, including any applicable declarations and treaties.

## QUESTIONS PRESENTED

The questions presented, as certified by this Honourable Court, are as follows:

- 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

**Surya's decision to obtain personal data from Hiya! and from certain other users with a view to identifying X did not amount to a violation of X's rights under Article 17 of the ICCPR.**

- A. There was no interference with X's right to privacy where the personal data obtained from Hiya! did not relate to X as an identified or identifiable individual. Further to which, the revelation of X's identity by A and B was not an interference because the right to privacy does not extend to ensure an individual's absolute anonymity especially in the context of a properly conducted criminal investigation.
  
- B. In the alternative, any alleged interference was neither lawful nor arbitrary. The interference was not unlawful where Hiya! *volunteered* the personal data of A and B and the interview of A and B complied with proper procedural standards.
  
- C. The decision was not arbitrary. First, it was taken was in accordance with the provisions, aims and objectives of the ICCPR. Second, by aiming to protect the rights of those who suffered discrimination, hostility and violence as a result of the broadcast, the measure was clearly pursuing the legitimate aim of protecting the rights of others. Given the investigation required the identification of X, the measure was connected to the aim. Moreover, the following of formal processes and correct investigation procedure ensured minimal impairment of X's privacy. In the context of such a hostile environment to *andha* followers there was a fair balance between the aim and the right.

Third, the measure was necessary to protect the rights of *andha* followers, and necessary to prevent any further harm being done to inter-religious and -ethnic relations.

D. Surya fulfilled its positive obligations. There is a margin of appreciation in the fulfillment of positive obligation which is determined by the relative importance of the interest at stake. Given the potential harm to all the followers of the *andha* faith and that there is no universally accepted standard on anonymity, Surya balanced X's rights with those of the *andha* followers and thus fulfilled its obligation.

**Surya's decision to obtain personal data regarding A and B from Hiya! did not violate their rights under Article 17 of the ICCPR.**

E. The acquisition of A and B's personal data was neither unlawful nor arbitrary. Where Hiya! *voluntarily* complied with the criminal investigation, a judicial warrant was not required. This consistent with international standards on criminal investigation.

F. The acquisition of personal data was not arbitrary. By pursuing a criminal investigation and the protection of rights of others, the measure pursued a legitimate aim. The measure was proportional in so far as the request was limited to the broadcasters of the channel and the data was only used for law enforcement purposes. Further, the measure was necessary to protect the rights of followers of the *andha* faith. Given that Surya's Appellate Court viewed A and B's actions as constituting advocacy of hatred in a manner that constitutes incitement and the ICCPR emphasises the danger of such advocacy, the measure was necessary.

G. Surya fulfilled its positive obligation under Article 17(2) insofar as it correctly struck the balance between the protecting the rights of followers of the *andha* faith and A and B's Article 17 rights. Where competing rights are at stake, deference to national courts is consistent with HRC jurisprudence.

### **Surya's prosecution and conviction of X did not violate his rights under Article 19**

H. Surya made a valid declaration at the time of ratifying the ICCPR specifying that the provisions of Article 19(2) and (3) were to be interpreted in line with Suryan law which includes the provisions of Section 220 of the Suryan Penal Act with regards conversion and attempted conversion.

I. In the alternative, the interference with X's rights is a permissible restriction under Article 19(3). First, the interference was provided for by law. Section 220 was accessible and sufficiently precise. The terms 'force' and 'social excommunication' have been adopted in other jurisdictions and deemed sufficiently precise. By encouraging others to strip *andha* followers of their blindfolds, X's conduct clearly fell within the ambit of Section 220.

J. Second, the interference was imposed for a legitimate aim. Firstly, where X's expression amounted to the advocacy of religious hatred that constitutes discrimination, hostility or violence under the Rabat Plan of Action's six-part test, the restriction was imposed in order to protect rights of others under Article 20(2). Secondly, in view of the fact that X's video targeted a minority faith, the restriction was imposed with the

legitimate aim of protecting *andha* followers' right to freedom of religion. Thirdly, in light of the hostility and disruption caused by the video, the restriction imposed attempted to protect public order.

K. Third, the restriction was necessary in a democratic society. There was a pressing social need to restrict X's freedom of speech. In consideration of the Rabat Plan of Action's six-part test, X's statements incited violence, discrimination and hostility which is recognised as dangerous in Article 20(2). The video created by X also constituted improper proselytism and his threats to "strip them of their blindfolds" is inconsistent with the freedom to manifest one's belief. Moreover, given X's endorsement of the hundreds of copycat videos on the 28<sup>th</sup> February, restricting his freedom of speech was necessary for the protection of public order.

L. The measure was proportionate because X's statements advocated religious discrimination, hostility and violence against followers of the *andha* faith and the disabled. There was no risk of there being a chilling effect on journalistic expression and the measure imposed was at the lower end of the those available to the court to impose.

**Surya's prosecution and conviction of A and B did not violate their rights under Article 19.**

M. The prosecution of A and B was provided for by law. Section 300 was accessible and precise. 'Advocacy' was also defined in the Section 300(3), and persons of a

professional capacity are expected to exercise caution and be expected to know the law and what actions will attract enforcement measures.

- N. The conviction and prosecution pursued a legitimate aim. First, Section 300 is consistent with Surya's Article 20(2) obligations. Second, in light of the growing inter-religious and -ethnic tension in Surya caused by the videos on the SuryaFirst channel, the measure aimed to protect the rights of minorities in Surya and prevent the escalation of tension.
- O. The interference was necessary in a democratic society. There was a pressing social need where X's video amounted to advocacy of hatred. There was a direct correlation between the upload of the video by A and B and the copycat videos which led to the creation of a hostile environment for followers of the *andha* faith and those with visual impairments.
- P. The interference was also proportionate. A and B were involved in the production of the video released on the 16<sup>th</sup> February and thus had sufficient agency. They also allowed the upload of the video on the 28<sup>th</sup> February endorsing the copycat videos and failed to prevent the downloading of the videos on the SuryaFirst channel. Their economic interests in advertising revenue also do not outweigh the interests of protecting ICCPR rights. The proportionality of the restriction is also clear where the penalty imposed on A and B was at the lower end of the spectrum. As they operated the SuryaFirst channel as part of a commercial enterprise a fine is not disproportionate. The measures were the least restrictive available; notice and take down procedures would not have been effective given over 250,000 saw the video in one day.

## ARGUMENTS

### **I: SURYA'S DECISION TO OBTAIN PERSONAL DATA FROM HIYA! AND FROM CERTAIN OTHER USERS DID NOT VIOLATE X'S RIGHTS UNDER ARTICLE 17**

1. Every person has the right to protection against arbitrary and unlawful interferences with their privacy<sup>1</sup> irrespective of whether the interference originates from State authorities or from natural or legal persons.<sup>2</sup>
  
2. Nevertheless, there was no violation of X's rights under Article 17 where (A) Surya's decision to obtain personal data from Hiya! and from certain other users did not amount to an interference. In the alternative (B) any interference was lawful and not arbitrary and (C) Surya discharged its positive obligations to protect X's right to privacy.

#### **A. There was no interference by Surya with X's right to privacy**

3. Neither the acquisition of A and B's personal data, nor the revelation by A and B of X's name amounted to an interference with X's privacy.

#### **I. The acquisition of A and B's personal data**

<sup>1</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, *entered into force* 23 March 1976) 999 UNTS 171 ('ICCPR') Article 17

<sup>2</sup> Human Rights Committee, General Comment 16, Art. 17 (Thirty-second session, 1988), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.9 (1988) ('General Comment 16'), [1]



4. Personal data is defined as “any information relating to an identified or identifiable individual”.<sup>3</sup> The data collected from Hiya! did not identify X, and nor was X identifiable from the information. Judge Vehabović in *Benedik v Slovenia* opined that information relating to one individual which allows for the identification of a different individual does not have the sufficient proximity as to qualify as personal data of the individual intended to be identified.<sup>4</sup> This is a logical approach to take as the term “personal data” suggests a close nexus between the data and individual concerned.

## II. The revelation of X’s name by A and B

5. Where the right to privacy does not extend to ensure an individual’s absolute anonymity, the fact that A and B voluntarily revealed X’s identity in the course of a properly conducted police interview cannot amount to an interference with X’s rights under Article 17.
6. Whilst the importance of confidentiality of communications is appreciated by international courts such as the ECtHR, it is recognised that any guarantee of privacy ‘cannot be absolute and must yield on occasion to other legitimate imperatives, such as the prevention of disorder or crime or the protection of the rights and freedoms of others’<sup>5</sup>

<sup>3</sup> Council Regulation (EC) 2016/679 of 27 April 2016 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) [2016] OJ L119/1, art 4(1); Supplementary Act on Data Protection (Abuja, 16 February 2010) A/SA.1/01/10 (2010); Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Strasbourg, 28 January 1981), ETS 108 (19810, *entered into force* 1 October 1985)

<sup>4</sup> *Benedik v Slovenia* App no. 62357/14 (ECtHR, 24 April 2018) (*‘Benedik’*)

<sup>5</sup> *K.U. v. Finland* App no. 2872/02 (ECtHR, 2 December 2008), [49]; *Delfi AS v. Estonia* App no. 64569/09 (ECtHR, 16 June 2015) (*‘Delfi’*), [149]

7. This is in line with the position of a number of signatories to the ICCPR, including Germany,<sup>6</sup> Brazil,<sup>7</sup> Australia,<sup>8</sup> South Africa,<sup>9</sup> and the Philippines.<sup>10</sup>
8. Moreover, the HRC and IACCommHR have further expressed the view that online anonymity should be permitted for the narrow purpose of enabling journalists and civil society to exercise the right to freedom of expression without the fear of reprisal.<sup>11</sup>
9. In attempting to convert persons from the *andha* faith by the use of force, including the threat of divine displeasure, and in so doing encouraging others to commit the same offence in contravention of Section 220 of the Suryan Penal Act, X's actions clearly fail to qualify for the limited protection for anonymity provided for by the right to privacy.

**B. In the alternative, the impugned interference was neither unlawful nor arbitrary**

<sup>6</sup> New Law Unmasks Anonymous Web Surfers, THE LOCAL (May 3, 2013, 12:35 PM), at <[www.thelocal.de/20130503/49513](http://www.thelocal.de/20130503/49513)> accessed 28 December 2019.

<sup>7</sup> Constituição da República Federativa do Brasil (Brazil), art. 5

<sup>8</sup> David Rolph, 'Defamation by Social Media' (2013) Sydney Law School Research Paper No. 13/81, 16-21 <<https://ssrn.com/abstract=2356028>> accessed 19 November 2019

<sup>9</sup> Regulation of Interception Communication-Related Information, 2002 Act 70 of 2003 (S. Afr.), s 1

<sup>10</sup> Cybercrime Prevention Act of 2012 (Philippines) Rep. Act No. 10175 (2012)

<sup>11</sup> HRC, 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye' (22 May 2015), UN Doc. A/HRC/29/32, [1]; IACHR, 'Special Rapporteur on Freedom of Expression of the Inter-American Commission on Human Rights, Catalina Botero Marino' (31 December 2013) OEA/Ser.L/V/II.

10. Any interference with the right to privacy is permissible only if neither unlawful<sup>12</sup> nor arbitrary.<sup>13</sup> These factors are cumulative.<sup>14</sup>

I. The interference was lawful

11. The Criminal Procedure Act enables law enforcement authorities to obtain a judicial warrant to instruct data controllers to disclose user data.<sup>15</sup> Given that Hiya! *volunteered* the personal data of A and B, it was unnecessary to acquire such a warrant.<sup>16</sup> This is in line with regulation of data disclosures in the US and Europe.<sup>17</sup>

12. Norms can be regarded as law if they are formulated with sufficient precision to enable citizens to regulate their conduct<sup>18</sup> and foresee with appropriate advice the

<sup>12</sup> General Comment 16, [8]; Human Rights Committee, *Pinkney v Canada*, (Communication No 27/1977), UN Doc CCPR/C/14/D/27/1977

<sup>13</sup> Human Rights Committee, *Toonen v Australia* (Communication No 488/1992) UN Doc CCPR/C/46/D/488/1992, [8.3] ('Toonen'); Bossuyt 'Guide to the "travaux préparatoires" of the International Covenant on Civil and Political Rights' (Martinus Nijhoff Publishers, 1987)

<sup>14</sup> Human Rights Committee, *García v Colombia* (Communication 687/1996) UN Doc CCPR/C/71/D/687/1996.

<sup>15</sup> Clarifications, [7]

<sup>16</sup> Fact pattern, [24] and [32]

<sup>17</sup> Electronic Communications and Privacy Act 1986 (ECPA) 41, 2701(2); *Quon v. Arch Wireless Operating Co. Inc.*, 445 F.Supp.2d 1116, 1130 (2006); Erin Murphy, The Politics of Privacy in the Criminal Justice System: Information Disclosure, the Fourth Amendment, and Statutory Law Enforcement Exemptions, 111 Mich. L. Rev. 485 (2013) < <https://repository.law.umich.edu/mlr/vol111/iss4/1> > accessed 31 December 2019; Council of Europe Cybercrime Convention Committee (T-CY) Cloud Evidence Group, 'Criminal justice access to electronic evidence in the cloud: Recommendations for consideration by the T-CY', September 16, 2016

<sup>18</sup> Human Rights Committee, *de Groot v. The Netherlands* (Communication No 578/994) UN Doc CCPR/C/54/D/578/1994 ('*de Groot*'), [4.3]; *Delfi*, [121]; *Lindon, Otchakovsky-Laurens and July v. France* App no 21279/02 and 36448/02 (ECtHR, 2 October 2017) ('*Lindon*'), [41]; Human Rights Committee, General Comment 34, Art. 19 (Hundred and second session, 2011), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. CCPR/C/GC/34 (2011) ('General Comment 34'), [25].

consequences of a given action.<sup>19</sup> Since it is common practice for interviewees in police interrogations to reveal the names of other suspects, and since a lawyer was present in A and B's interrogation, the police were following reasonable procedure.

## II. The interference was not arbitrary

13. An interference will not be considered arbitrary if it is in accordance with the provisions, aims and objectives of the ICCPR and is reasonable in the particular circumstances of the case.<sup>20</sup>

### a. In accordance with provisions, aims and objectives of the Covenant

14. The measure aimed to protect S's rights under Articles 12, 18, 22 and 27<sup>21</sup> and was thus in accordance with the provisions, aims and objectives of the Covenant

### b. Reasonable in the particular circumstances of the case

15. 'Reasonable' means that 'any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.'<sup>22</sup>

<sup>19</sup> *de Groot* [4.3]; *Delfi*, [121]; *Lindon*, [41]; General Comment 34, [25].

<sup>20</sup> Report of the Human Rights Committee, GAOR, 43rd Session Supplement No. 40, U.N. Doc A/43/40, [4]; Human Rights Committee, 'Report of the United Nations High Commissioner for Human Rights on the right to privacy in the digital age' (30 June 2014) A/HRC/27/37, [21]; Human Rights Committee, *Van Hulst (Antonius) v Netherlands* (Communication No 903/1999,) UN Doc CCPR/C/82/ D/903/1999 ('*Van Hulst*'), [7.3]; General Comment 16, [4]

<sup>21</sup> ICCPR, Article 12(3), Article 18(3), Article 19(3), Article 21, and Article 22(2).

<sup>22</sup> *Toonen* [8.3]; General Comment 16 [4].

i. Proportional to the end sought

16. Proportionality is to be assessed according to the following four-part test requiring that there be (a) a legitimate aim be pursued, (b) a rational connection between the measure and the aim; (c) minimal impairment of the right to privacy, and (d) a fair balance struck between the aim and the right.<sup>23</sup>

(a) Legitimate aim

17. The permissible restrictions under the ICCPR are to protect national security, public order, public health or morals, and to respect the rights and reputations of others.<sup>24</sup>
18. The acquisition of data was in response to a complaint by S that he had suffered social excommunication as a result of his public humiliation as part of X's broadcast.<sup>25</sup> The investigation into X's identity was thus clearly concerned with protecting S's rights and therefore pursued a legitimate aim.

<sup>23</sup> HRC, 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin' (28 December 2019) UN Doc A/HRC/13/37, [14]-[19]; HRC, 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue', (17 April 2013) UN Doc. A/HRC/23/40, [28]-[29]; Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd ed., 2005) 383; I/A Court H.R., *Tristán Donoso v. Panamá* Case, judgement of January 27, 2009, Series C no 193, [56]; I/A Court H.R., *Kimel v Argentina* Case, judgement of 3 May 2008, Series C, No. 177 [74]

<sup>24</sup> General comment 34, [28]

<sup>25</sup> Fact pattern, [23]

19. Moreover, given that X's video received over 250,000 views and led to a number of copycat videos which cumulatively caused a hostile environment for *andha* followers, Surya was also pursuing the legitimate aim of protecting the rights of *andha* followers.

(b) Rational connection

20. Without identifying A, B and X, it would be impossible to investigate further the complaints made under the Penal Act.

(c) Minimal impairment

21. By using a *formal* process to obtain the personal data of A and B and identify X,<sup>26</sup> there were sufficient safeguards<sup>27</sup> and thus the minimal impairment to X's privacy. A and B's interview was conducted in the presence of a lawyer<sup>28</sup> without the use of pressure or coercion to extract X's identity.

(d) Fair balance between aim and right

22. X's videos had led to the social excommunication, physical injury, and the creation or worsening of a hostile environment to individuals in Surya. Thus, the identification and

<sup>26</sup> Fact pattern, [24]

<sup>27</sup> *Malone v United Kingdom* App no 8691/79 (ECtHR, 2 August 1984); *Kruslin v France* App no 11801/85 (ECtHR, 24 April 1990) ('*Kruslin*'); *Huvig v. France* App no 11105/84 (ECtHR, 24 April 1990) ('*Huvig*') [32]-[35]; *Christie v United Kingdom* App no. 28957/95 (ECtHR 11 July 2002); *Kopp v Switzerland* App no 23224/94 (ECtHR 25 March 1998) [72]-[73]; *Valenzuela Contreras v Spain* App no 27671/95 (ECtHR, 30 July 1998) ('*Valenzuela*') [46]; *Khan v. United Kingdom* App no 35394/97 (ECtHR, 12 May 2000) [24]; *PG and JH v. United Kingdom* App no 44787/98, (ECtHR, 25 September 2001) ('*PG and JH*') [39]

<sup>28</sup> Fact pattern, [25]

arrest of A and B aimed to prevent further physical harm by preventing the production of similar videos and to protect S and T's right to not be discriminated against<sup>29</sup> or face inhumane or degrading treatment.<sup>30</sup> Given the measures protected the interests and rights of society, Surya correctly balanced the aim and measure.

ii. Necessary in the circumstances of the given case

23. The interference is necessary only if it fulfils a pressing social need in the context of the circumstances at the time.<sup>31</sup> There exists a margin of appreciation where there are competing private interests or Convention rights.<sup>32</sup>
24. Given the growing hostility to the Tarakan minority<sup>33</sup> and to those with visual impairments,<sup>34</sup> it was necessary to identify and arrest X to prevent further harm being done to inter-religious and inter-ethnic relations. This needed to be done quickly and

<sup>29</sup> ICCPR Article 2(1), Article 26, Article 27

<sup>30</sup> ICCPR Article 7

<sup>31</sup> *Otegi Mondragon v Spain* App no 2034/07 (ECtHR, 15 September 2011) [49]; *Fuentes Bobo v Spain* App no 39293/98 (ECtHR, 29 February 2000) ('Bobo') [43]; *Mamere v France* App no 12697/03 (ECtHR, 7 November 2006) ('Mamere') [19]; *Steel & Morris v United Kingdom* App no 68416/01 (ECtHR, 15 February 2005) ('Steel') [87]; *Lehideux & Isorni v France* App no 55/1997/839/1045 (ECtHR, 23 September 1998) ('Lehideux') [51]; *Bergens Tidende v Norway* App no 26132/95 (ECtHR, 2 August 2000) ('Bergens') [48]; I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Advisory Opinion* OC-5/85 of November 13, 1985 Series A, No. 5, para 46; I/A Court H.R., *Herrera Ulloa v Costa Rica* Case, judgement of July 2, 2004, Series C, No. 107, para 122; I/A Court H.R., *Ricardo Canese v Paraguay* Case, judgement of August 31, 2004, Series C, No. 111, para 96; I/A Court H.R., *Palamara Iribarne v Chile* Case, judgement of November 22, 2005, Series C, No. 135 ('Palamara'), para 85; I/A Court H.R., *Claude Reyes v Chile* Case, judgement of September 19, 2006, Series C, No. 151, para 91.

<sup>32</sup> *Evans v the United Kingdom* App no 6339/05 (ECtHR, 10 May 2007) ('Evans') [77]; *Chassagnou and Others v. France* App nos. 25088/94, 28331/95 and 28443/95 (ECtHR, 24 May 1999) [11] ('Chassagnou and Others'); *Ashby Donald and Others v. France* App no 36769/08 (ECtHR 10 January 2013) [40] ('Ashby Donald'); *Delfi* [139]

<sup>33</sup> Fact pattern [10]

<sup>34</sup> Fact pattern [23]

efficiently to prevent further growing hostilities and to protect the rights of the minorities in Surya.

### C. Surya discharged its positive obligations to protect X's right to privacy

25. Read alongside of Article 2(1), Article 17 imposes both negative and positive obligations upon Surya.<sup>35</sup> Positive obligations require Surya to adopt a legislative, adjudicatory and enforcement framework to secure respect for privacy between private actors.<sup>36</sup>
26. The ECtHR has held that a State enjoys a 'margin of appreciation' in discharging its positive obligations.<sup>37</sup> The breadth of this margin stands to be determined by the extent of consensus as to the relative importance of the interest at stake.<sup>38</sup> The margin will also be wider where the State is required to strike a balance between competing private and public interests or Convention rights.<sup>39</sup>

<sup>35</sup> Human Rights Committee, General Comment 31, Art. 2 (Eightieth session, 2004), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (2004) ('General Comment 31'), [8]; General Comment 16, [1] and [9]

<sup>36</sup> General comment 31, [7]; *Hämäläinen v. Finland* App no. 37359/09 (ECtHR, 16 July 2001) ('*Hämäläinen*') [63]; *Airey v Ireland* App no. App no. 6289/73 (ECtHR, 9 October 1979) ('*Airey*'), [33]; *Marckx v Belgium* App no. 6833/74 (ECtHR, 13 June 1979) ('*Marckx*'), [31]; *Söderman v Sweden* App no. 5786/08 (ECtHR, 12 November 2013) ('*Söderman*') [68]; *Von Hannover v Germany* App no. 59320/2000 (ECtHR, 24 September 2004) ('*Von Hannover*') [57]; *Stubbings and Others v the United Kingdom* App nos 22083/93 and 22095/93 (ECtHR, 22 October 1996) ('*Stubbings*') [61]-[62]; *Mosley v The United Kingdom* App no. 48009/08 (ECtHR, 15 September 2011) ('*Mosley*') [105]

<sup>37</sup> Human Rights Committee, *Hertzberg and others v. Finland*, (Communication No. 61/1979) UN Doc CCPR/C/15/D/61/1979; Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd ed., 2005); Taylor, Paul M, *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge University Press, 2005) 161

<sup>38</sup> *X, Y and Z v. the United Kingdom* App no 21830/93 (ECtHR, 2 May 1997) [44]; *Fretté v. France* App no 36515/97 (ECtHR, 26 February 2002) ('*Fretté*') [41]; *Hämäläinen*, [67]

<sup>39</sup> *Hämäläinen*, [67]; *Fretté* [41]; *Evans* [77]; *Odièvre v France* App no 42326/98 (ECtHR, 13 February 2003) [44]-[49]; *S.H. and Others v Austria* App no. 57813/00 (ECtHR 3 November 2011) [94]; *Dickson v The United Kingdom* App no 44362/04 (ECtHR, 4 December 2007) [78]; C-112/00 *Eugen Schmidberger, Internationale*



27. Surya had to balance between, on the one hand, protecting the rights of its minority population and preventing crime and, on the other, maintaining X's privacy. Since there is no universally accepted standard on the right of anonymity<sup>40</sup> the Suryan public authorities are best placed to determine the balance struck between the competing interests and if there has been an interference with an individual's right to privacy as protected by Article 8 of the Suryan Constitution.
28. Since the Appellate Court had considered the question of whether the convictions violated the right to privacy under Article 8 of the Suryan Constitution<sup>41</sup> which is directly lifted from Article 17, Surya discharged its positive obligations under Article 17(2).

## **II: SURYA'S DECISION TO OBTAIN PERSONAL DATA REGARDING A AND B FROM HIYA! DID NOT VIOLATE THEIR RIGHTS UNDER ARTICLE 17**

29. Surya's decision to obtain personal data regarding A and B from Hiya! did not violate their rights under Article 17 where (A) said conduct was both lawful and not arbitrary and (B) Surya had discharged its positive obligation to protect A and B's right to privacy.

*Transporte und Planzüge v Republik Österreich* [2003] ECR I-05659; C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004], ECR I-09609.

<sup>40</sup> Jason A. Martin and Anthony L. Fargo, 'Anonymity as a Legal Right: Where and Why it Matters', (2015) 16 (2) North Carolina Journal of Law & Technology 311, 348-9; Constituição da República Federativa do Brasil (Brazil), art. 5; David Rolph, 'Defamation by Social Media' (2013) Sydney Law School Research Paper No. 13/81, 16-21 < <https://ssrn.com/abstract=2356028> > accessed 19 November 2019; Regulation of Interception Communication-Related Information, 2002 Act 70 of 2003 (S. Afr.), s 1

<sup>41</sup> Fact pattern, [28]

**A. The interference was neither unlawful nor arbitrary**

I. The interference was lawful<sup>42</sup>

30. The Criminal Procedure Act enables law enforcement authorities to obtain a judicial warrant to instruct data controllers to disclose user data.<sup>43</sup> Where Hiya! was not compelled but rather volunteered the personal data of A and B, it was unnecessary to acquire such a warrant.<sup>44</sup> This is in line with regulation of private to public voluntary disclosures in the US and Europe.<sup>45</sup>

II. The interference was not arbitrary<sup>46</sup>

a. In accordance with provisions, aims and objectives of the Covenant

31. The interference with A and B's privacy was concerned with the protection of rights of the vulnerable *andha* minority which is consistent with the provisions, aim and objectives of the Covenant.

<sup>42</sup> Para [10] and [11] of this Memorial.

<sup>43</sup> Clarifications [7]

<sup>44</sup> Fact pattern [24] and [32]

<sup>45</sup> Electronic Communications and Privacy Act 1986 (ECPA) 41, 2701(2); *Quon v. Arch Wireless Operating Co. Inc.*, 445 F.Supp.2d 1116, 1130 (2006); Erin Murphy, The Politics of Privacy in the Criminal Justice System: Information Disclosure, the Fourth Amendment, and Statutory Law Enforcement Exemptions, 111 Mich. L. Rev. 485 (2013) < <https://repository.law.umich.edu/mlr/vol111/iss4/1> > accessed 31 December 2019; Council of Europe Cybercrime Convention Committee (T-CY) Cloud Evidence Group, 'Criminal justice access to electronic evidence in the cloud: Recommendations for consideration by the T-CY', September 16, 2016

<sup>46</sup> Para [13] of this Memorial

b. Reasonable in the particular circumstances of the case<sup>47</sup>

i. Proportional to the end sought<sup>48</sup>

(a) Legitimate aim

32. The interference with A and B's privacy was clearly carried out in the interests of public order. From 18-28 February over 100 videos mimicking the SuryaFirst video<sup>49</sup> were uploaded to Hiya! indicating a proliferation of harassment against the Tarakan minority.

33. In addition, it was clearly carried out in order to respect the rights of others. The acquisition of data was in response to a complaint by T that she had suffered verbal assaults as well as fearing for her own safety as a result of the rise of discriminatory and abusive behaviour.<sup>50</sup> As in the case of S, the investigation was thus clearly concerned with protecting T's rights under Articles 12, 18, 22 and 27.<sup>51</sup>

(b) Rational connection

<sup>47</sup> Para [15] of this Memorial

<sup>48</sup> HRC, 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin' (28 December 2019) UN Doc A/HRC/13/37, [14]-[19]; HRC, 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue', (17 April 2013) UN Doc. A/HRC/23/40, [28]-[29]; Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd ed., 2005) at 383; I/A Court H.R., *Tristán Donoso v. Panamá* Case, judgement of January 27, 2009, Series C no 193, [56].

<sup>49</sup> Fact pattern, [19]

<sup>50</sup> Fact pattern, [23]

<sup>51</sup> ICCPR, Article 12(3), Article 18(3), Article 19(3), Article 21, and Article 22(2).

34. There was also a rational connection between the investigation and the need to identify the ‘broadcasters’ of the SuryaFirst broadcast channel.

(c) Minimal impairment

35. By limiting the request of data to the ‘broadcasters’ of the SuryaFirst broadcast channel<sup>52</sup> the aim was pursued with a minimal impairment to privacy. This personal data was subsequently used only for law enforcement purposes.<sup>53</sup> The consideration by the Suryan Courts that there was an arbitrary interference with A and B’s privacy also shows there was sufficient oversight.<sup>54</sup>

(d) Fair balance

36. A fair balance between A and B’s right to privacy and the State’s aim patently existed; the discriminatory violence had escalated for a sustained period not only against those adhering to the *andha* philosophy but also those with visual impairments.<sup>55</sup>

ii. Necessary in the circumstances<sup>56</sup>

<sup>52</sup> Fact pattern, [24]

<sup>53</sup> Fact pattern, [25]

<sup>54</sup> Fact pattern, [33]

<sup>55</sup> Fact pattern, [19] and [23]

<sup>56</sup> Para [23] of this Memorial

37. As described above at [23] – [24], a pressing social need existed in relation to the protection of rights of persons as guaranteed by Articles 18, 20, 23, and 27 of the ICCPR. The prosecution of A and B would prevent the channel from releasing further videos which was necessary given the reach of the channel and its evident influence.
38. Surya’s Appellate Court also considered A and B’s actions to constitute advocacy of hatred in a manner that constitutes incitement to discrimination, hostility or violence. The Covenant emphasises the danger of such advocacy,<sup>57</sup> and recognises that it warrants a significant State response.<sup>58</sup>

**B. Surya had discharged its positive obligation to protect A and B’s right to privacy<sup>59</sup>**

39. The identification of A and B clearly required the Suryan State to strike a balance between the competing interests of A and B on the one hand, and the rights protected by the ICCPR, including Articles 19 and 20, on the other. Given the seriousness of the need to protect the minority adhering to the *andha* faith and those with disabilities, Surya correctly struck the balance.
40. Further to which, the Suryan authorities are best positioned to decide whether the voluntary divulgence of personal data by a private actor constitutes an interference with

<sup>57</sup> ICCPR Article 20.

<sup>58</sup> *Jersild v Denmark* App no. 15890/89 (ECtHR, 23 September 1994) (*‘Jersild’*); *Lehideux and Isorni v. France* App no 24662/94 (ECtHR, 23 September 1998) [53]

<sup>59</sup> Para [25]-[26] of this Memorial.

an individual's right to privacy as protected by Article 8 of the Suryan Constitution.

This deference to national authorities is consistent with HRC decisions.<sup>60</sup>

### **III: SURYA'S PROSECUTION AND CONVICTION OF X DID NOT VIOLATE HIS RIGHTS UNDER ARTICLE 19**

41. The Respondents respectfully submit that the inference imposed on X's freedom of expression are permissible under Article 19(3).
42. The right to freedom of expression under Article 19(2) is not absolute.<sup>61</sup> An interference with such a right would be permissible if it is: (A) Provided for by law; (B) imposed for a legitimate aim under Article 19(3); and (C) necessary in a democratic society.<sup>62</sup>
43. The Respondents submit that the interference has fulfilled this three-part test.

#### **A. Impugned interference**

<sup>60</sup> Human Rights Committee, *Hertzberg and others v. Finland*, (Communication No. 61/1979) UN Doc CCPR/C/15/D/61/1979; Human Rights Committee, *Borzov v Estonia*, (Communication No 1136/2002) UN Doc CCPR/C/81/D/1136/2002, [7.3]-[7.4];

<sup>61</sup> General Comment 34; I/A Court H.R., *Rios et al v Venezuela Case*, judgment of 28 January 2009, Series C, No 194; Decision Regarding Communication 250/2002 (*Zegveld v Eritrea*) (Afr. Comm'n Hum. & Peoples' Rts., 20 November 2003) [59]

<sup>62</sup> General Comment 34, [22]; Decision Regarding Communications 105/93, 128/93, 128/94, 130/94, 152/96 (*Media Rights Agenda v Nigeria*) (Afr. Comm'n Hum. & Peoples' Rts., 31 October 1998) [63]-[71]; Decision Regarding Communications 143/95, 150/96 (*Constitutional Rights Project and Civil Liberties Organization v Nigeria*) (Afr. Comm'n Hum. & Peoples' Rts., 31 October 1998); *Handyside v United Kingdom* App no 5493/72 (ECtHR, 7 December 1976) ('*Handyside*') [43]; Decision Regarding Communication 294/04 (*Zimbabwe Lawyers for Human Rights & Institute for Human Rights and Development in Africa v Zimbabwe*) (Afr. Comm'n Hum. & Peoples' Rts., 3 April 2009) [74]-[75]; Decision Regarding Communication 242/2001 (*Interights v Mauritania*) (Afr. Comm'n Hum. & Peoples' Rts., 4 June 2004) [78] – [79]; I/A Court H.R., *Francisco Martorell v Chile Case*, judgement of 3 May 1996, Report no 11/96 [55].

44. The impugned interference refers to the restriction of X's freedom of expression by his prosecution and conviction for his expressions in the videos on 16 and 28 February,<sup>63</sup> and not Section 220 considered *in abstracto*.<sup>64</sup>

## **B. Reservation**

45. It is submitted that Surya's declaration regarding Article 19 is a valid reservation and its obligations under Article 19(3) should be interpreted vis-a-vis the aforementioned reservation.
46. If a treaty is silent on the issue of reservations, states are permitted to formulate a reservation that is not incompatible with the object and purpose of the treaty.<sup>65</sup>
47. The ICCPR is silent on the issue of reservations.<sup>66</sup> General Comment 24 notes that states are permitted to enter into a reservation to specific articles in the ICCPR while accepting the generality of obligations in the ICCPR.<sup>67</sup> It is submitted that Surya accepted the generality of the obligations in the ICCPR and the reservation is only

<sup>63</sup> Human Rights Committee, *Robert Faurisson v France* (Communication No. 550/1993) UN Doc CCPR/C/58/D/550/1993 ("*Faurisson*") (Judges Nisuke Ando, Elizabeth Evatt, David Kretzmer and Eckart Klein); *Dmitriyevskiy v Russia* App no. 42168/06 (ECtHR, 29 January 2019), [79]; SS Terblanche 'The Guide to Sentencing in South Africa' (Butterworths, 2007)

<sup>64</sup> *Faurisson*

<sup>65</sup> Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 art 19(3)

<sup>66</sup> Catherine J. Redgwell, "Reservations to Treaties and Human Rights Committee General Comment No.24(52)" (1997) *The International and Comparative Law Quarterly* Vol. 46 395

<sup>67</sup> Human Rights Committee, General Comment 24, Art. 41 (Fifty-second session, 1994), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994) ('General Comment 24'), [8]

entered with respect to Article 19. Since Article 19 is not recognised as a peremptory norm,<sup>68</sup> it is submitted that the reservation is valid.

### **C. The interference with X's rights is provided for by law**

48. For an interference to be provided for by law, it must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly<sup>69</sup> and it must be made accessible to the public.<sup>70</sup> The level of precision required depends on the content of the law in question and the field it is designed to cover. It is emphasised that the interference needs not be absolutely precise, it only needs to be sufficiently precise.<sup>71</sup>

49. Firstly, Section 220 was a published law<sup>72</sup> and was thus accessible.

50. Secondly, Section 220 was sufficiently precise so as to allow X to regulate his conduct accordingly.

<sup>68</sup> General Comment 24, [8]

<sup>69</sup> General comment No. 34 [25]; *Sunday Times* [47]; *de Groot, VgT Vereingegen Tierfabriken v Switzerland* App no. 24699/94, (ECtHR, 28 June 2001) [52]

<sup>70</sup> *Muller v Switzerland* App no. 10737/82 (ECtHR, 24 May 1988) [29]; *Kokkinakis v Greece* App no. 14307/88 (ECtHR, 25 May 1993) ('*Kokkinakis*') [40]; *Editorial Board of Pravoye Delo and Shtekel v Ukraine* App no. 33014/05 (ECtHR, 5 May 2011) [52]

<sup>71</sup> *Kokkinaki* [49]; *Delfi AS* [121]; *Kruslin* [29]; *Kopp* [59]

<sup>72</sup> Fact pattern [14]



51. Section 220(1) prohibits conversions by use of force. Section 220(2) defines the word “force” to include “a threat of injury of any kind” and “social excommunication”.<sup>73</sup>
52. The words “social excommunication” and “threat of injury of any kind” are sufficiently precise to enable an individual to regulate his or her conduct accordingly. “Social excommunication” has been adopted by the UNHRC,<sup>74</sup> and parties to the ICCPR such as the UK<sup>75</sup> and India,<sup>76</sup> to refer to situations where persons have faced extreme ostracism and often, threats of violence. “Threat of injury of any kind” plainly includes threat of physical injury.

**D. The interference is imposed for a legitimate aim under Article 19(3)**

53. Freedom of expression can be restricted for the respect of the rights and reputation of others, or the protection of national security, public order, public health or morals.<sup>77</sup> The “rights” referred to in Article 19(3) include human rights enshrined in the ICCPR and more generally, in international human rights law.<sup>78</sup>

<sup>73</sup> Fact pattern, [14]

<sup>74</sup> Home Office, *Country Policy and Information Note Pakistan: Ahmadis* Annex C ‘Note to CPIT from the International Human Rights Committee (IHRC), 25 April 2018’

<sup>75</sup> *MN v Secretary of State for the Home Department* [2012] UKUT 389 (IAC), [189]

<sup>76</sup> State of Orissa Freedom of Religion Act 1967, ss 2(b) and 3; *Yulitha Hyde v State of Orissa* AIR 1973 Ori 116; *Rev Stanislaus vs Madhya Pradesh* 1977 SCR (2) 611; The Madhya Pradesh Freedom of Religion Act of 1968; The Madhya Pradesh Dharma Swatantrya Adhinyam 1986, ss 2(b) and 3; Arunachal Pradesh Freedom of Indigenous Faith Act of 1978 (No. 40 of 1978), ss 2(d), 3; The Chhatisgarh Dharma Swatantrya (Sanahodhan) Vidheyak, 2006, ss 2(c) and 3; The Gujarat Freedom of Religion Act 2003, ss 2(c) and 3

<sup>77</sup> General Comment 34, [21]

<sup>78</sup> General Comment 34, [28]

54. The interference is imposed for the legitimate aim of: 1) protecting prohibiting incitement of violence, discrimination and hostility against a religious minority, 2) protecting the freedom to adopt a religion and freedom to manifest the beliefs of the *andha* faith and 3) maintaining public order.
55. X had explicitly advocated on an extremely public platform for Suryans to “strip [the followers of the *andha* faith] of their blindfolds”. This resulted in actual violence to members of the *andha* faith as a result of their religious identity.<sup>79</sup>
56. The restriction also pursues the legitimate aim of maintaining public order. Given that several hundred copycat videos involving violence to followers of the *andha* faith were produced,<sup>80</sup> a strong censure against X’s statements will deter others from committing similar acts of violence.

#### **E. The restriction must be necessary in a democratic society**

57. For an interference to be necessary in a democratic society, it must (I) correspond to a pressing social need and (II) be proportionate to the legitimate aims pursued.<sup>81</sup>

<sup>79</sup> Fact pattern, [17]

<sup>80</sup> Fact pattern [17]

<sup>81</sup> General Comment 34, [22], [33], [34]; *Balsytė-Lideikienė v Lithuania* App no 72596/01 (ECtHR, 4 November 2008) (*‘Balsytė-Lideikienė’*) [76]; *Pastörs v Germany* App no 55225/14 (ECtHR, 3 October 2019) (*‘Pastörs’*) [48]; *Perinçek v Switzerland* App no 27510/08 (ECtHR, 15 October 2015) (*‘Perinçek’*) [98]; *Karácsony and Others v Hungary* App nos. 42461/13 and 44357/13 (ECtHR, 17 May 2016) (*‘Karácsony’*) [54]; *Mouvement raëlien suisse v Switzerland* App no 16354/06 (ECtHR, 13 July 2012) (*‘Mouvement raëlien Suisse’*) [48]; *Animal Defenders International v The United Kingdom* App no 48876/08 (ECtHR, 22 May 2013) (*‘Animal Defenders International’*) [100]; *Delft*, [131]; UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media, OAS Special Rapporteur on Freedom of Expression and ACHPR Special Rapporteur on Freedom of Expression and Access to Information, ‘Joint Declaration on

I. Pressing social need

a. Prevent of violence, discrimination and hostility

63. Firstly, X's expressions had incited actual violence, discrimination and hostility against followers of the *andha* faith.<sup>82</sup> There was thus a pressing social need and an obligation under Article 20(2) to protect followers of the *andha* faith.<sup>83</sup>

64. The Rabat Plan of Action<sup>84</sup> requires a court to consider: the context in which the expression was made, the speaker, the intent to incite hatred, the content and form of the speech, the extent of the speech act and the likelihood of incitement.<sup>85</sup>

i. Context

65. X's statements were made when there was already a campaign against followers of the *andha* faith,<sup>86</sup> making it likely that his statements would incite hostility and violence.

Freedom of Expression and the Internet' (2011) < <https://www.osce.org/fom/78309?download=true> > accessed 2 January 2020; *Observer and Guardian v United Kingdom* App no 13585/55 (ECtHR, 26 November 1991) [59]

<sup>82</sup> Fact pattern [21] and [23]

<sup>83</sup> ICCPR Article 20

<sup>84</sup> Human Rights Committee, 'Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence' (5 October 2012) UN Doc A/HRC/22/17/Add.4; HRC, 'Report of the Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt' (26 December 2013), UN Doc. A/HRC/25/58 at [58].

<sup>85</sup> Human Rights Committee, 'Promotion and protection of the right to freedom of opinion and expression' (7 September 2012) UN Doc A/67/357; *Faurisson* (Judges Elizabeth Evatt, David Kretzmer, and Eckart Klein); *Perinçek*; *Norwood v The United Kingdom* App no 23131/03 (ECtHR, 16 November 2004) ('*Norwood*')

<sup>86</sup> Fact pattern [10]

ii. Speaker

63. By portraying himself as the ‘Sun Prince’,<sup>87</sup> X would have significant influence in Surya given the Suryan faith calls for worship of the sun.<sup>88</sup>

iii. Intent

63. By asking Suryans to “strip [followers of the *andha* faith] of their blindfolds, and force them to see the light”,<sup>89</sup> and approving of the actions of those who tore off blindfolds,<sup>90</sup> X clearly intended hostility and violence towards followers of the *andha* faith.

iv. Content and form

66. By using florid language and rhetorical devices,<sup>91</sup> X statement was provocative and incited violence and hostility.

v. Extent of the speech act

<sup>87</sup> Fact pattern [25]

<sup>88</sup> Clarification [41]

<sup>89</sup> Fact pattern [16]

<sup>90</sup> Fact pattern [19]

<sup>91</sup> Fact pattern [16]

67. The speech was and was intended to be public in nature. The SuryaFirst channel alerted subscribers to the broadcast<sup>92</sup> showing an intent to maximise viewership. 35,000 tuned in to the broadcast and in just one day 250,000 saw the broadcast.<sup>93</sup> By using Hiya!, an app which 75% of the population used,<sup>94</sup> the potential reach of the statement was significant.

vi. Likelihood, including imminence

68. By showing a clip of Suryans attacking S before imploring Suryans to ‘Immediately go shine a light on Suryans who have adopted the *andha* blindness’<sup>95</sup> X was patently asking others to do the same, increasing the likelihood of violent attacks *andha* followers.

69. X’s statements also militate against the values of tolerance, social peace and non-discrimination that underpin the ICCPR.<sup>96</sup> There was thus a pressing social need to prescribe the interference.<sup>97</sup>

<sup>92</sup> Fact pattern [15]

<sup>93</sup> Fact pattern [19]

<sup>94</sup> Fact pattern [3]

<sup>95</sup> Fact pattern [17]

<sup>96</sup> *Balsytė-Lideikienė*; *Pastörs*; *Gündüz v. Turkey* App No. 35071/97 (ECtHR 14 June 2014) (*‘Gündüz’*); *Ibragim Ibragimov and Others v. Russia* App No. 1413/08 and 28621/11 (ECtHR 28 August 2018) (*‘Ibragim Ibragimov’*); *Soulas and Others v. France* no 15948/03 (ECtHR 10 July 2008) (*‘Soulas’*); *Erbakan v. Turkey* App no. 59405/00 (ECtHR, 6 October 2006) (*‘Erbakan’*); *Perinçek*; *Karácsony*; *Mouvement raëlien Suisse*; *Animal Defenders International*.

<sup>97</sup> Human Rights Committee, *Malcolm Ross v Canada* Communication no. 736/2007 UN Doc CCPR/C/70/D/736/1997; Human Rights Committee, *Mohamed Rabbae v Netherlands* Communication no. 2124/2011 UN Doc CCPR/C/117/D/2124/2011; *Faurisson*.

b. Protection of the freedom to adopt a religion and to manifest beliefs

70. X's expressions constitute a limitation on the freedom to have or adopt a religion or belief of those following the *andha* faith. This freedom is absolute and cannot be limited.<sup>98</sup> X's expressions had also constituted improper proselytism through the threats and use of force to convert others.<sup>99</sup>

71. Further, the freedom to manifest a belief encompasses practices integral to acts expressing one's belief and include the wearing of distinctive clothing.<sup>100</sup> X's threats to "strip them of their blindfolds" is inconsistent with such freedoms and there is thus a pressing social need to protect such rights.

c. Protection of public order

72. There was a pressing social need to maintain public order. Public order is synonymous with the maintenance of public peace, safety and tranquillity,<sup>101</sup> and it is sufficient that X's expressions created the inevitable risk of arousing feelings of distrust, rejection or hatred.<sup>102</sup>

<sup>98</sup> Human Rights Committee, General Comment 22, Art. 18 (Forty-eighth session, 1993), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. CCPR/C/21/Rev.1/Add.4 (1993) ('General Comment 22') [1]

<sup>99</sup> *Kokkinakis*, [48]; *Larissis and others v Greece* App no. 23372/94, 26377/94 and 26378/94 (ECtHR February 24 1998) ("*Larissis*"), [45]; Alice Donald and Erica Howard 'The right to freedom of religion or belief and its intersection with other rights' (ILGA-Europe, Brussels, Belgium, 2015) 9.

<sup>100</sup> General Comment 22 [4]

<sup>101</sup> Decision Regarding Communication 297/05 (*Scanlen and Holderness v Zimbabwe*) (Afr. Comm'n Hum. & Peoples' Rts., 3 April 2009) [19]; *Ramburn v Stock Exchange Commission* [1991] LRC (Const) 272; *Re Munhumeso* [1994] 1 LRC 282; *Elliott v Commissioner of Police* [1997] 3 LRC 15

<sup>102</sup> *Féret v Belgium* App no 15615/07 (ECtHR, 16 July 2009).

73. From the 18<sup>th</sup>-28<sup>th</sup> February similar videos were shared showing masked individuals “accosting blindfolded individuals on the streets”.<sup>103</sup> This is a clear threat to public safety; X’s videos had caused widespread rejection and hatred against a vulnerable religious minority and there was a high possibility that public order would further erode.
74. X’s prosecution and conviction sends out a strong censure against such behaviour to deter further breaches of public order.

## II. Proportionality

75. The interference is proportionate to the legitimate aim pursued. Proportionality requires consideration of the nature of the speech in the context of the legitimate aim sought to be protected, the nature of the impact of the impugned expression, the process applied and the sanctions imposed.<sup>104</sup> Proportionality also requires that the restriction be the least restrictive measure to achieve the legitimate aim pursued.<sup>105</sup>

<sup>103</sup> Fact pattern, [19]

<sup>104</sup> *Karácsony*, [85]; *Szél v Hungary* App no 44357/13 (ECtHR 17 May 2016) [85]

<sup>105</sup> *Smith and Grady v The United Kingdom* App nos 33985/96 33986/96 (ECtHR, 27 September 1999) [102]; *Szuluk v The United Kingdom* App no. 36936/05 (ECtHR, 3 June 2009), [19]; I/A Court H.R., *Kimel v Argentina Case*, judgement of 3 May 2008, Series C, No. 177 para 74; I/A Court H.R., *Chaparro Álvarez and Lapo Ñiiguez v. Ecuador Case*, judgement of 21 November 2007, Series C, No. 170; *R v. Oakes* [1986] 1 S.C.R. 103, [70]; C- 265/87 *Schröder v Hauptzollamt Gronau* [1989] ECR 2237, [21]; *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3, [104]; *Bank Mellat v HM Treasury* [2013] UKSC 39, [20]; Schabas, ‘The European Convention on Human Rights: A Commentary’ (2nd edn OUP 2017) 406.

76. Firstly, X's statements advocate religious discrimination, hostility and violence against followers of the *andha* faith<sup>106</sup> and the disabled.<sup>107</sup> Given the effect his speech had on a vulnerable minority and that it exacerbated religious tension, X's prosecution and conviction was proportionate.
77. Secondly, the Suryan Court considered X's right to freedom of expression under Article 10 of the Suryan Constitution<sup>108</sup> and held his rights were not violated.<sup>109</sup> Therefore, the legal process applied was fair and just.
78. Thirdly, X is neither a media professional nor a journalist. There is thus no risk of a chilling effect on the exercise of journalistic freedom of expression and dissuading the press from openly discussing matters of public concern.<sup>110</sup>
79. Fourthly, the penalty imposed falls in the lower range of the spectrum the court is entitled to impose. As the penalty is on the condition no further offences are committed, it is effectively a warning, distinguishable from a custodial sentence.<sup>111</sup> Given that X did not control the Hiya! account, notice and takedown procedures would not have achieved the proposed aim.

<sup>106</sup> Para [64] – [70] of this Memorial.

<sup>107</sup> Fact pattern, [23]

<sup>108</sup> Suryan Constitution, Article 10(1)

<sup>109</sup> Suryan Constitution, Article 10(2)

<sup>110</sup> *Dmitriyevskiy*, [94]; *Süreç v Turkey (no. 4)* App no. 24762/94 (ECtHR, 8 July 1999), [54]; *Erdoğan* [59]

<sup>111</sup> *Sinkova v Ukraine* App no 39496/11 (ECtHR, 27 February 2018), [111]



**IV: SURYA’S PROSECUTION AND CONVICTION OF A AND B DID NOT VIOLATE THEIR RIGHTS UNDER ARTICLE 19**

80. It is submitted that the prosecution and conviction of A and B did not violate their rights under Article 19 as it was (A) provided for by law; (B) pursued a legitimate aim; (C) was necessary in a democratic society.

**A. Impugned restriction**

81. In the instant case, the impugned restriction refers to the prosecution and conviction of A and B under Section 300 of the Suryan Penal Act for causing the advocacy of hatred against the followers of the *andha* faith in a manner that constitutes incitement to discrimination, hostility or violence through the sharing of audio and video files and hyperlinks to content on the internet.

82. This interfered with their rights to freedom of expression and ability to impart information.

**B. Surya’s conviction and prosecution of A and B were provided for by law**

83. Section 300 is a published law and hence accessible.

84. Section 300 was sufficiently precise for A and B to foresee that enforcement actions would follow if content advocating hatred appeared on their channel.

85. Firstly, Section 300 (3) stated ‘advocacy’ shall “include the sharing of photographs, audio and video files, and hyperlinks to content on the Internet.”<sup>112</sup>
86. Secondly, persons acting in a professional capacity are expected to act with a degree of care and caution in their occupation,<sup>113</sup> and can be expected to know the law and take legal advice concerning the publication of material.<sup>114</sup> The SuryaFirst channel had over 100,000 subscribers and A and B were running it commercially.<sup>115</sup> In the circumstances, they can be expected to have known they would attract enforcement measures if they published content advocating or causing the advocacy of hatred.
87. Thirdly, even if Section 300 carried an element of uncertainty, the interpretation of such terms is for the Suryan Courts to determine and apply.<sup>116</sup>

**C. Surya’s conviction and prosecution of A and B pursued a legitimate aim**

88. Freedom of expression can be restricted for the respect of the rights and reputation of others, or the protection of national security, public order, public health or morals.
89. Section 300(1) echoes almost exactly the prohibition on hatred in Article 20(2). Such legislation is prevalent in many liberal democracies that are signatories of the ICCPR,

<sup>112</sup> Fact pattern, [22]

<sup>113</sup> *Delfi* [122]

<sup>114</sup> *Delfi* [129]

<sup>115</sup> Fact pattern [13], [29]

<sup>116</sup> *Krone Verlag GmbH & Co. KG v Austria* App no. 34315/96 (ECtHR, 26 February 2002) [23]; *News Verlags GmbH & Co. KG v Austria* App no. 31457/96 (ECtHR, 14 December 2006) [43]; *Delfi* [122]

including the UK<sup>117</sup> and Canada,<sup>118</sup> and is essential to protect the rights and lives of minorities such as *andha* followers.<sup>119</sup>

90. The influx of hostility towards minorities, including those with disabilities and followers of the *andha* faith, following the upload by A and B of the video posed a serious risk of growing inter-religious and -ethnic hostilities if left unaddressed. To this end, the interferences aimed to protect public order and ensure the respect of rights.

**D. The restriction was necessary in a democratic society**

91. For an interference to be necessary in a democratic society, it must 1) correspond to a pressing social need and 2) be proportionate to the legitimate aims pursued.<sup>120</sup>

I. Pressing social need.

<sup>117</sup> Public Order Act 1986 (UK), s. 17

<sup>118</sup> Criminal Code (Canada), s. 319

<sup>119</sup> *Delfi*, [48]; General Comment 22, [9]; ARTICLE 19, ‘Thresholds for the prohibition of incitement to discrimination, hostility or violence under Article 20 of the ICCPR’, < <https://www.ohchr.org/Documents/Issues/Expression/ICCPR/Vienna/CRP7Callamard.pdf> > accessed 31 December 2019

<sup>120</sup> General Comment 34, [22], [33], [34]; *Balsytė-Lideikienė*, [76]; *Pastörs*, [48]; *Perencik*, [98]; *Karácsony*, [54]; *Mouvement raëlien Suisse*, [48]; *Animal Defenders International*, [100]; *Delfi*, [131]; *Observer and Guardian v United Kingdom* App no 13585/55 (ECtHR, 26 November 1991) [59]

92. To show there was a pressing social need, the reasons advanced by the State should be relevant and sufficient.<sup>121</sup> Sufficiency of the reasons depends on the public interest involved<sup>122</sup> and the correlation between the expression and protected interest.<sup>123</sup>
93. Firstly, as explained above,<sup>124</sup> X's video amounted to advocacy of hatred that constituted incited discrimination, hostility or violence. Article 20(2) requires such advocacy to be prohibited by law.<sup>125</sup>
94. Secondly, the upload of the video by A and B led to the creation of over 100 'copycat' videos from the 18<sup>th</sup>-28<sup>th</sup> February.<sup>126</sup> Therefore, there was a direct correlation between the upload by A and B and the creation of a hostile environment for followers of the *andha* faith and those with visual impairments. Protecting such minorities rights, such as the freedom to adopt and manifest one's religion and the freedom to enjoy one's one culture<sup>127</sup> was clearly in the public interest and fulfilled a pressing social need.

## II. Proportionality

<sup>121</sup> *Tønsberg Blad and Haukom v Norway* App No 510/04 (ECtHR, 1 March 2007) ('Tønsberg v Norway') [54]; *Handyside* [50]

<sup>122</sup> *Sunday Times v the United Kingdom* App no 6538/74 (ECtHR, 26 May 1979) [62] ('Sunday Times'); *Handyside* [22] – [24]

<sup>123</sup> *Perinçek* [71]; Human Rights Committee, *Hak—Chul Shin v Republic of Korea*, Communication no 926/2000, UN Doc. CCPR/C/80/D/926/2000

<sup>124</sup> Para [63] and [67] of this Memorial.

<sup>125</sup> ICCPR, Article 20(2)

<sup>126</sup> Fact pattern, [17]

<sup>127</sup> ICCPR, Article 18, Article 26, Article 27

95. In assessing the proportionality of the interference, the Court will consider the nature and context of the expression in the context of the legitimate aim sought to be protected, the nature of the impact of the impugned expression, the process applied and the sanctions imposed.<sup>128</sup> Proportionality also requires that the restriction be the least restrictive measure to achieve the legitimate aim pursued.<sup>129</sup>

a. Nature and context of the expression in the context of the legitimate aim

96. First, given the device connected to the broadcaster's phone number must be used to broadcast messages,<sup>130</sup> A and B must have been involved in the uploading of the video on the 16<sup>th</sup> February. They were also involved in the production of the video.<sup>131</sup> Therefore, the restriction was proportionate in light of their agency in the creation of the video.

97. Second, A and B allowed a further upload on the 28<sup>th</sup> endorsing the copycat videos and hostility towards *andha* followers.<sup>132</sup> They also failed to prevent the downloading of the video by turn on the 'protected' feature which would have lessened the likelihood

<sup>128</sup> *Karácsony*, [85]; *Szél v Hungary* App no 44357/13 (ECtHR 17 May 2016) [85]; *Delfi* [142]

<sup>129</sup> Decision Regarding Communications 48/90, 50/91, 89/93 (*Amnesty International and Others v Sudan*) (Afr. Comm'n Hum. & Peoples' Rts., 8 November 1999); *Smith and Grady v The United Kingdom* App nos 33985/96 33986/96 (ECtHR, 27 September 1999) [102]; *Szuluk v The United Kingdom* App no. 36936/05 (ECtHR, 3 June 2009), [19]; I/A Court H.R., *Kimel v Argentina* Case, judgement of 3 May 2008, Series C, No. 177 para 74; I/A Court H.R., *Chaparro Álvarez and Lapo Íñiguez v. Ecuador* Case, judgement of 21 November 2007, Series C, No. 170; *R v. Oakes* [1986] 1 S.C.R. 103, [70]; C- 265/87 *Schröder v Hauptzollamt Gronau* [1989] ECR 2237, [21]; *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3, [104]; *Bank Mellat v HM Treasury* [2013] UKSC 39, [20]; Schabas, 'The European Convention on Human Rights: A Commentary' (2nd edn OUP 2017) 406.

<sup>130</sup> Fact pattern, [5]

<sup>131</sup> Clarification, [41]

<sup>132</sup> Fact pattern, [19]

of copycat videos.<sup>133</sup> A and B thus have a substantial degree of control<sup>134</sup> and were not passive in the advocacy of hatred by X by facilitating his video and message.

98. Third, by pinging subscribers 15 minutes before the broadcast began, A and B took conscious steps to attract viewers to the page.<sup>135</sup> As a commercially run enterprise that generated income from advertising, SuryaFirst and A and B had an economic interest in attracting viewers. However, economic interests do not outweigh consideration of rights protected by the ICCPR as a general rule<sup>136</sup> and taking active steps to spread hateful content justifies a restriction on their expression and ability to impart information.<sup>137</sup>

b. Nature of the impact of the impugned expression

99. The ‘rights and interests of others and of society as a whole [can justify] ... liability on Internet’ publishers.<sup>138</sup>
100. As explained at [94] there was a direct correlation between the SuryaFirst video and the hundreds of copycat videos from the 18<sup>th</sup> to 28<sup>th</sup> February. These videos displayed harassment, force and demeaning conduct directed towards individuals wearing

<sup>133</sup> Fact pattern, [9]

<sup>134</sup> *Delfi*, [145]

<sup>135</sup> Fact pattern, [15]

<sup>136</sup> *Delfi* [56]; Case C-131/12 *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AEPD)*, Mario Costeja González ECLI:EU:C:2014:317 [81]

<sup>137</sup> *Delfi* [144]

<sup>138</sup> *Delfi* [161]

blindfolds, with one video showing the forcible removal of a blindfold.<sup>139</sup> Both *andha* followers and those with disabilities were affected.<sup>140</sup>

101. The impact of the impugned expression was clearly the creation of a hostile and demeaning environment for followers of the *andha* faith and those with disabilities,<sup>141</sup> and failure on the part of Surya to counter further expression would inevitably risk further deterioration of inter-religious and -ethnic tension.

c. Process applied and sanctions imposed

102. First, the fact that A and B were in charge of the SuryaFirst channel<sup>142</sup> means the fact X was the primary creator of the video does not impact on their responsibility for its release and effects, especially where section 300 specifically defines ‘advocacy’ to include sharing hyperlinks.
103. Second, the penalty imposed fell in the lower range of the spectrum the court is entitled to impose (a fine over imprisonment).<sup>143</sup> Given A and B operated the SuryaFirst Channel as part of a commercial enterprise, such a penalty is not disproportionate.<sup>144</sup>

<sup>139</sup> Fact pattern, [17]

<sup>140</sup> Fact pattern, [17]

<sup>141</sup> Fact pattern, [21] and [23]

<sup>142</sup> Fact pattern, [24]

<sup>143</sup> Fact pattern, [22]

<sup>144</sup> *Delfi*, [160]

104. Third, the measures adopted by Surya were the least restrictive measure to achieve the aim.<sup>145</sup> Given the video had been shared over 250,000 times in one day and had been saved by users any notice and take-down procedure would not have been an effective method at preventing the advocacy of hatred.
105. Fourth, given the margin of appreciation afforded states where there are competing private interests or Convention rights,<sup>146</sup> deference should be given to the decision of the Suryan Court that A and B's right to freedom of expression under Article 10 of the Suryan Constitution<sup>147</sup> was not violated. <sup>148</sup>
106. All things considered, the restriction on A and B's freedom of expression was proportionate.

<sup>145</sup> *Smith and Grady v The United Kingdom* App nos 33985/96 33986/96 (ECtHR, 27 September 1999) [102]; *Szuluk v The United Kingdom* App no. 36936/05 (ECtHR, 3 June 2009), [19]; *Bank Mellat v HM Treasury* [2013] UKSC 39, [20]; Schabas, 'The European Convention on Human Rights: A Commentary' (2nd edn OUP 2017) 406.

<sup>146</sup> *Evans* [77]; *Chassagnou and Others v. France* App nos. 25088/94, 28331/95 and 28443/95 (ECtHR, 24 May 1999) [11]; *Ashby Donald* [40]; *Delfi* [139]

<sup>147</sup> Suryan Constitution, Article 10(1)

<sup>148</sup> Suryan Constitution, Article 10(2)



## **PRAYER/ RELIEF SOUGHT**

For the foregoing reasons, the Respondent respectfully request this Honourable Court to adjudge and declare that:

1. Surya's decision to obtain personal data from Hiya! and from certain other users 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 03 January 2020

Agents for the Respondent