Ad perpetuam rei memoriam II.

ELTE Law School’s memorials for the Monroe E. Price Media Law Moot Court Competition

Editors:
Gergely Gosztonyi
Anna Zanathy

2019
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ELTE Law School’s memorials for the Monroe E. Price Media Law Moot Court Competition

In 2008 University of Oxford established the Monroe E. Price Media Law Moot Court Competition with the aims to foster and cultivate interest in freedom of expression issues and the role of the media and information technologies in societies around the world. The competition challenges students to engage in comparative research of legal standards at the national, regional and international levels, and to develop their arguments (in written and oral forms) on cutting-edge questions in media and ICT law.

ELTE Law School joined the competition in 2015 at the South-East European Regional Round. Since that time ELTE Law School participated every year and its results are getting better and better.

With the publication of the written Memorials after each competition, ELTE Law School would like to appreciate the dedicated work of its students and help the future mooters to learn from their efforts.

We hope that our students will actually reach the stars and that we will find their names and scientific achievements in similar publications in the future as well.

Budapest, 2019.

The Editors

1 http://pricemootcourt.socleg.ox.ac.uk/about-the-programme/
2 http://pricemootcourt.socleg.ox.ac.uk/competitions/regional-rounds/south-east-europe/
Memorial for Applicants
2017/2018

REBEKA, ERDŐSI - GERGELY, GOSZTONYI - ANDREA, KOVÁCS - ANDRÁS, MOZOLITS - FLÓRA, SZALAI - ATtila, TATÁR

EÖTVŐS LORÁND UNIVERSITY FACULTY OF LAW // ELTE LAW SCHOOL
THE 2017-2018 MONROE E. PRICE

INTERNATIONAL MEDIA LAW MOOT COURT COMPETITION

Niam Peaps & Scoops

(Applicants)

v.

Federal Republic of Turtonia

(Respondent)

MEMORIAL FOR APPLICANTS

Word Count for Argument Section: 4,944
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<td>ACHPR</td>
<td>African Charter on Human and Peoples’ Rights</td>
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<td>ACHR</td>
<td>American Convention on Human Rights</td>
</tr>
<tr>
<td>ACMHPR</td>
<td>African Commission on Human and Peoples’ Rights</td>
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<td>ArCHR</td>
<td>Arab Charter on Human Rights</td>
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<td>CJEU</td>
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<td>Compromis</td>
<td>The 2017/2018 Price Media Law Moot Court Competition Case</td>
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<tr>
<td>EECD</td>
<td>European Electronic Commerce Directive</td>
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<td>EU</td>
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<td>FoE</td>
<td>Freedom of Expression</td>
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<td>Honourable Court</td>
<td>Universal Court of Human Rights</td>
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<td>IA</td>
<td>The Information Act of 2006 of the Federal Republic of Turtonia</td>
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<tr>
<td>IACtHR</td>
<td>Inter-American Court of Human Rights</td>
</tr>
<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>NTDS</td>
<td>Notice-and-Takedown System</td>
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<tr>
<td>ODPA</td>
<td>The Online Dignity Protection Act of 2015 of the Federal Republic of Turtonia</td>
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<td>Abbreviation</td>
<td>Full Form</td>
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<tr>
<td>OSCE</td>
<td>Organisation for Security and Co-operation in Europe</td>
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<td>UN</td>
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IV. STATEMENT OF RELEVANT FACTS

Socio-Political Background

Federal Republic of Turtonia is a small country with a democratically elected government and an ethnically homogeneous population.\(^1\) Turtonia is a member of the United Nations and has ratified the International Covenant on Civil and Political Rights (ICCPR).\(^2\) Turtonia has a civilian system and sets up a modern judiciary.\(^3\) The law adjudicated in court is primarily codal in nature.\(^4\) Appeals from trial courts are made directly to the Supreme Court which has discretion whether or not to hear appeal.\(^5\)

In the past three years, Turtonia has seen a significant influx of immigrants from neighboring country Aquaria.\(^6\) Aquaria is also a democratic country, and the majority of its citizens share the same ethnicity and religion as the Turtonians.\(^7\) Aquarian immigrants has caused a furor among Turtonians, who claim that the immigrants have disrupted the economy and diluted the culture.\(^8\) Beginning in late 2015, a nationalist group, the Turton Power began demonstrating against the Turtonian Minister of Immigration, Wani Kola and calling for her resignation for

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\(^1\) Compromis, para 1.1
\(^2\) Compromis, para 1.1
\(^3\) Compromis, para 2.2
\(^4\) Compromis, para 2.2
\(^5\) Compromis, para 2.2
\(^6\) Compromis, para 1.1
\(^7\) Compromis, para 2.1
\(^8\) Compromis, para 4.1
allowing Aquarians to enter the country. Kola is known for being a champion of immigration who believes in the success of the integration of Aquarians.

Since 2015, a religious extremist group called True Religion has gained popularity in Aquaria. True Religion is widely regarded as a terrorist organization in Turtonia, Aquaria and many other countries. The radicals have attacked mainstream religious institutions and schools. The leader of the group, named Prinsov Parkta has been in hiding for some time to avoid arrest.

**Media platforms in Turtonia**

Scoops, a Turtonian based social media platform, is the most popular in its category. Through the application, users build a profile that consists of a screen name, topics of interest and friends. Users can upload photos and videos and tag the posts with up to two topics of interest. When users hit “send”, the content will appear on the devices of friends of the poster and up to 20 other users, who have listed matching a topic of interest. These other 20 users are selected by an algorithm. The viewers of the post can dismiss the content or

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9 Compromis, para 4.1
10 Compromis, para 4.1
11 Compromis, para 3.1
12 Compromis, para 3.2
13 Compromis, para 3.1
14 Compromis, para 3.2
15 Compromis, para 5.1
16 Compromis, para 5.1
17 Compromis, para 5.1
18 Compromis, para 5.1
19 Compromis, para 5.1
forward to their own friends and to another 20 people. Every user has a publicly visible “influencer score”, that shows how many people have seen content from him or her.

XYZ News is a well-respected, reliable and objective TV news network in Turtonia and neighbouring countries. XYZ maintains an account on Scoops.

TurtonTimes is a major print and online newspaper in Turtonia, which affiliated to the political party that opposes Kola’s party.

**Niam Peaps’ post**

Niam Peaps is a Turton Power member who, on May 1, created a Scoops account with the screen name “XYZ News12”. Peaps has no connection with XYZ News.

At noon on May 2, Peaps posted an image that appeared to show Kola standing naked with the leader of True Religion. The photo appears to have been taken from outside the hotel room window. Peaps selected “XYZ News” as the Topic of Interest for the post and gave a caption to the post.

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20 Compromis, para 5.2

21 Compromis, para 5.3

22 Compromis, para 6.1

23 Compromis, para 6.2

24 Compromis, para 9.3

25 Compromis, para 7.1

26 Compromis, para 7.1
Aftermath

At 5:00pm on May 2, XYZ News’ corporate department of public affairs released a statement and declared that XYZ News had no role in the post. At the same time, Kola’s office released a statement calling the post “a horrific lie with no basis in fact”.

At 7:00pm on May 2, Kola’s staff reported the post of Scoops through Scoops’ online reporting form as a violation of Scoops Terms of Service. Kola’s staff selected the option of “a nude image of me shared without my consent” as the reason to request removal, however Kola’s staff failed to complete the form.

On May 3, at 11:00am, Kola’s legal counsel submitted a letter to Scoops, threatening a civil action for defamation and violation of privacy. Scoops removed the post and all shares of the post at 1:00pm on May 5.

On May 3, TurtonTimes ran a factual article about the post and also an opinion piece mentioning that the post coincided with growing dissatisfaction with Kola and that it was time for her to resign. Further, the opinion piece cited that True Religion might begin to take root in Turtonia.

On May 4 and May 5, protesters gathered outside Kola’s office calling for her resignation which was by far the largest, numbering more than 100. Many held signs criticizing Kola,
also some of them had slogans related to the post of Peaps. Kola resigned from office on May 10 without public statement.

Legal basis

In 2015, the Online Dignity Protection Act of 2015 was passed in response to a growing problem of Non Consensual Sharing of Intimate Images after two separate suicides of Turtonian teenage girls in February 2013 and March 2014.\textsuperscript{35} Knowingly distributing a non-consensual shared image of another person shall be punishable by a term of imprisonment or a fine.\textsuperscript{36}

The Information Act of 2006 was passed in order to preserve the integrity of the democratic process and safeguard the peace.\textsuperscript{37} A violation of IA shall punishable by fine, imprisonment or both.\textsuperscript{38}

Prosecutions

Peaps was identified through a Turtonian criminal search warrant, then prosecuted and convicted of the following offences in Turtonia. Distributing an image of Kola in violation of the ODPA, Peaps was sentenced to a two-year imprisonment. Inciting violence, or being reckless as to whether violence was incited, through false information in violation of Section 1(b) of the IA, Peaps was sentenced to a fine equivalent of 100,000 USD.\textsuperscript{39}

\textsuperscript{35} Compromis, para 10.1
\textsuperscript{36} Compromis, para 10.2
\textsuperscript{37} Compromis, para 11.1
\textsuperscript{38} Compromis, para 11.2
\textsuperscript{39} Compromis, para 12.1
Scoops was prosecuted and convicted of the following offenses in Turtonia. Distributing an image of Kola in violation of the ODPA, Scoops was sentenced to a fine equivalent to 200,000 USD. Knowingly communicating false information in violation of Section 1(a) of the IA, Scoops was sentenced to a fine equivalent of 100,000 USD.\textsuperscript{40}

\textsuperscript{40} Compromis, para 13.1
V. STATEMENT OF JURISDICTION

Niam Peaps and Scoops (Applicants) have applied to the Universal Freedom of Expression Court, the special Chamber of the Universal Court of Human Rights hearing issues relating to the right of freedom of expression under Article 19 of the UDHR and Article 19 of the ICCPR.

Both Niam Peaps’ sentence and Scoops’ fine were declined to be considered by Turtonia’s Supreme Court, exhausting their domestic appeals. This Honourable Court has jurisdiction as the final arbiter over all regional courts where parties have exhausted all domestic remedies.

Niam Peaps and Scoops (Applicants) request this Honourable Court to issue a judgement in accordance with relevant international law, including the UDHR, the ICCPR, conventions, jurisprudence developed by relevant courts, and principles of international law.
VI. QUESTIONS PRESENTED

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

1. Whether Turtonia’s prosecution of Peaps under the ODPA violates international principles including Article 19 of UDHR and Article 19 of ICCPR?

2. Whether Turtonia’s prosecution of Scoops under the ODPA violates international principles including Article 19 of UDHR and Article 19 of ICCPR?

3. Whether Turtonia’s prosecution of Peaps under the IA violates international principles including Article 19 of UDHR and Article 19 of ICCPR?

4. Whether Turtonia’s prosecution of Scoops under the IA violates international principles including Article 19 of UDHR and Article 19 of ICCPR?
VII. SUMMARY OF ARGUMENTS

A. Freedom of expression is the cornerstone of progression, therefore the conflict with other fundamental rights is indispensable. If Turtonia would like to enact a restriction on free speech, law must be prescribed. However, prosecution of Niam Peaps under the ODPA was not prescribed by law since the Act failed to define the terms and did not have adequate safeguards.

The prosecution had a legitimate aim, but since it did not have a pressing social need, it was unlawful. First of all, the image is a part of public interest, since Wani Kola is a well-known person. Secondly, Wani Kola known as pioneer of immigrant politics, therefore doubts had been raised regarding her duties.

In addition, prosecution of Peaps was not proportionate. The Court sentenced Peaps to a two-year imprisonment under the ODPA, however imprisonment for defamation is never an appropriate penalty.

B. Internet freedom is an indispensable tool to shield the right to freedom of expression, however more governments than ever before targeting social media. Turtonia’s prosecution of Scoops was not prescribed by law since ODPA made impossible for Scoops to foresee the consequences arising from it.

The prosecution was unjustified since there was no pressing social need to fine Scoops. First, Scoops is a passive intermediary as it does not have a substantial degree of control over its user content. Second, Scoops has taken all the necessary measures to prevent the unlawful content on its platform. Third, Scoops was not in the position to distribute the image by disregarding a substantial risk as the company was not notified properly.
Additionally, the fine of USD 200,000 was disproportionate since the liability of the actual author served as a sensible alternative to the liability of Scoops and such a huge fine on Scoops could easily lead to a more severe censorship, thus the judgment would have a chilling effect on freedom of expression.

C. The Turtonian government enacted the IA in order to safeguard the States’ democracy and peace. However, the prosecution of Peaps’ under the IA is not consistent with the international principles. First of all, the IA is not prescribed by law since the text of IA is overly vague and fails to adequately warn the citizens. Secondly, the seriousness of the post’s topic had the legitimate aim to be shared with the public, even if it is part of Kola’s private life. Thirdly, Peaps’ prosecution was unnecessary in a democratic society, because it did not correspond with pressing social need. Plus, the amount of fine is disproportionate and easily can freeze the free speech of society.

D. Turtonia’s prosecution of Scoops under the IA was not prescribed by law since its provisions were lacking the sufficient precision to enable Scoops to regulate its conduct which eventually lead to arbitrary interpretation. The prosecution was unjustified since there was no pressing social need to fine Scoops. First, Scoops played a merely passive role. Second, technology experts of intermediaries cannot judge the unlawfulness of a post. Third, Scoops was not notified properly, thus it could not act in order to remove the disputed post. Lastly, the fine was disproportionate. The sum of USD 100,000 was disproportionate, because other states impose less severe fines on intermediaries, thus this judgment could be a huge blow to the free and open internet.
VIII. ARGUMENT

1. TURTONIA’S PROSECUTION OF PEAPS UNDER THE ODPA VIOLATES HIS RIGHT TO FREEDOM OF EXPRESSION

Freedom of Expression\(^41\) constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress\(^42\) and for each individual’s self-fulfilment.\(^43\)

The presented case focuses on how or whether the right of expressing views freely should be restricted in the name of a public figure’s right to privacy.

1. Niam Peaps’ prosecution was not prescribed by law

The ECtHR stated in *The Sunday Times v the United Kingdom (No 1)*\(^44\) that there are two requirements which are needed to find a restriction justifiable. “Firstly, the law must be adequately accessible and […] also, a norm cannot be regarded as a “law” unless it is

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\(^42\) Handyside v the United Kingdom App no 5493/72 (ECtHR, 7 December 1976) [49]; *The Sunday Times v the United Kingdom* App no 6538/74 (ECtHR, 26 April 1979) [65]; *Lingens v Austria* App no 9815/82 (ECtHR, 8 July 1956) [41] Axel Springer AG v Germany App no 39954/08 (ECtHR, 7 February 2012) [78]

\(^43\) Lindon, Ochakovsk-Laurens and July v France App no 21279/02 and 36448/02 (ECtHR, 22 October 2007) [45]; Frankowicz v Poland App no 53025/99 (ECtHR, 4 May 2009) [38]; Herrera Ulloa v Costa Roca IACHR (2004) Serious C No 107 [113],[126]; Law Offices of Ghazi Suleiman v Sudan App no 228/99 (AfComHPR, 2003) [48]; Kenneth Good v Republic of Botswana App no 313/05 (ACmHPR, 2010) [197]; Case C-368/95 Familiapress v Heinrich Bauer Verlag ECLI:EU:C:1997:325 [26]

\(^44\) *The Sunday Times v the United Kingdom* (No 1) App no 6538/74 (ECtHR, 26 April 1979) [49]
formulated with sufficient precision to enable the citizen to regulate his conduct”. Otherwise it can cause judicial arbitrary and judges may interpret regulations broadly.

In case of the ODPA, Applicants submit that it was not a precisely formulated act, because of the following reasons.

\[ a) \text{ The ODPA is not sufficiently precise} \]

While the ODPA in Section 2. attempts to delineate the definitions of “distribute” and “image” through a non-exhaustive list, Applicants submit that it fails to define the terms.

The “other reproduction” grants the Court a certain discretion to decide whether something is an image or not, it must therefore also provide procedural protection against arbitrary use of that discretion. In this present case, the Court has extensive discretion regarding which illustrations they qualify as images.

\[ b) \text{ The ODPA does not have adequate safeguards} \]

Besides a sufficiently precise drafting, this criterion also requires legal basis and adequate safeguards. Applicants submit that prosecution of Peaps under the ODPA did not have adequate safeguards. The judiciary system of Turtonia has only one level, as appeals from trial courts are made directly to the three-judge Supreme Court which has discretion whether or not to hear an appeal. The Supreme Court declined to consider Peaps’ appeal, thereby leaving Peaps without any kind of legal domestic remedy which is an essential safeguard in every democratic country.
ODPA\textsuperscript{45} established exemption from liability for disclosures made in the public interest including the reporting of unlawful conduct. Kola’s alleged romance with the leader of a terrorist group undisputedly falls within the scope of the Act, thus there was no legal basis to prosecute Peaps.

2. Peaps’ prosecution has legitimate aim

Applicants acknowledge the growing problem of non-consensual sharing of intimate images. However, information is the oxygen of democracy.\textsuperscript{46} In addition, the importance of public interest has been emphasized under international law.\textsuperscript{47} Public interest includes situations where the benefits of disclosure outweigh the harm.\textsuperscript{48} Accordingly, the image\textsuperscript{49} showing Kola with her secret lover who is the leader of a terrorist group is undisputedly a matter of public interest. Since privacy laws shall not inhibit the dissemination of information of public interest,\textsuperscript{50} prosecution of Peaps does not pursue a legitimate aim.

\textsuperscript{45} Compromis, para 10.2 Section 3 (b)


\textsuperscript{47} European Council of Europe, Recommendation CM/Rec(2014)7 of 30 April 2014 on the protection of whistleblowers’ 5; African Commission on Human and Peoples’ Rights, Declaration of Principles on Freedom of Expression in Africa, principles IV (2), XII (2); Inter-American Commission on Human Rights, Inter-American Declaration of Principles on Freedom of Expression, Principle 10


\textsuperscript{49} Compromis, para 8.2

\textsuperscript{50} African Commission on Human and Peoples’ Rights, Declaration of Principles on Freedom of Expression in Africa, Principles 4 (2), 12 (2); Inter-American Commission on Human Rights, Inter-American Declaration of Principles on Freedom of Expression, Principle 10
3. Peaps’ prosecution was not necessary

To decide whether a restriction is necessary in a democratic society, the existence of a “pressing social need” must exist for which it is not enough if the restriction is “useful”, “reasonable” or “desirable”.\(^{51}\) Here the balancing between the right to FoE and the right to respect for private life shall be done, for which the ECtHR laid down the following five criteria:\(^{52}\)

*Contribution to the public debate of general interest*

The ECtHR has previously agreed with the Finnish Courts that information concerning a minister’s private life may contribute to the public debate if it contains elements of general public interest.\(^{53}\) In this present case, Kola’s alleged affair with the leader of a foreign terrorist group is a matter of public interest, as she is the Minister of Immigration.\(^{54}\) The circumstances of the publication constitute a legitimate public interest, as there has been an ongoing debate on Kola’s immigration policy.\(^{55}\) Moreover, the allegation of giving out visas in exchange for sex by a politician presupposes the violation of a law. The allegation of such violation may constitute a matter of legitimate public interest.\(^{56}\)

*How well-known the person is and the subject of the report*

\(^{51}\) IACtHR 'Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Article 13, 29 of the American Convention on Human Rights) (13 November 1985); Advisory Opinion OC-5/85, Series A No 5 [46]

\(^{52}\) Axel Springer AG v Germany App no 39954/08 (ECtHR, 7 February 2012) [89]

\(^{53}\) Ruusunen v Finland App no 7359/10 (ECtHR, 14 January 2014) [49]

\(^{54}\) Compromis, para 4.1

\(^{55}\) Björk Eidsdóttir v Iceland App no 46443/09 (ECtHR, 10 July 2012) [67]

\(^{56}\) Tonsbergs Blad AS and Haukom v Norway App no 510/04 (ECtHR, 1 March 2007) [87]
Kola is a politician and this way the certain aspects of her private life may be of public interest especially if these are related to her function as a public person.\textsuperscript{57} The limit of public interest is whether the sole purpose of the article is to satisfy the curiosity of a particular readership.\textsuperscript{58}

In the case of \textit{Oberschlick v Austria}\textsuperscript{59} it was declared that the limits of acceptable criticism are accordingly wider regarding a politician acting in his public capacity than in relation to a private individual. The former inevitably and knowingly lays him open to close scrutiny of his every word and deed by both journalists and the public at large, and he must display a greater degree of tolerance, especially when he himself makes public statements that are susceptible of criticism.

The scope for restrictions under Article 10 of the Convention on “political speech or on debate on questions of public interest” and that “the limits of permissible criticism are wider with regard to the government than in relation to a private citizen or even a politician” stated by the ECtHR in case of \textit{Sürek v Turkey}.\textsuperscript{60}

The ECtHR also stated in \textit{Von Hannover v Germany}\textsuperscript{61} that a state has to assess certain aims in case of restricting the right to FoE. It must be determined how well-known the person is, since public figures and everyday people have different expectation of privacy. Regarding balancing free speech and privacy, public interest of disclosures is determinative. Public interest includes debating on political matters and public officials as well as everyday

\textsuperscript{57} Axel Springer AG v Germany App no 39954/08 (ECtHR, 7 February 2012) [91]

\textsuperscript{58} Von Hannover v Germany (No 1) App no 59320/00 (ECtHR, 24 June 2004) [65]

\textsuperscript{59} Oberschlick v Austria App no 11662/85 (ECtHR, 23 May 1991) [59]

\textsuperscript{60} Sürek v Turkey (No 1) App no 26682/95 (ECtHR, 8 July 1999) [62]

\textsuperscript{61} Von Hannover v Germany (No 1) App no 59320/00 (ECtHR, 24 June 2004) [77]; Von Hannover v Germany (No 2) App no 60641/08 (ECtHR, 7 February 2012) [110]
activities of public figures. Therefore if Kola has intimate relationship with the leader of a terrorist group, it does not matter if it is part of her private life due to the fact it affects her duties as well as has impact on the public.

Prior conduct of the person concerned

Kola is known for being a champion of immigrants who believes that they can contribute to the Turtonian society, therefore doubts has been raised regarding her duties.62

Method of obtaining the information and its veracity

To raise the question whether false information had been disseminated, it should be examined whether the post was a value judgement or a statement of facts. Only the latter can be subject to criminal procedure and verified whether it was true.63 This image shall qualify as a ’statement of facts’ as it is used as evidence to increase the credibility of the post.64 As it was only a reproduction of said image,65 the effect of standard proof cannot be required.66

Content, form and consequences of the publication

The ECtHR declared in Cantoni v France that in case of statutory definitions there will often be grey areas at the interpretation of definitions and it is the task of the courts to interpret

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62 Compromis, para 4.1
63 Tristán Donoso v Panamá IACtHR (2009) Series C No 193 [124]
64 Fontevecchia and D’Amico v Argentina IACtHR (2011) Series C No 238 [68]
65 Compromis, para 12.3 2
them.\textsuperscript{67} In case of false information, the unlawful nature can only be determined after the unsuccessful verification of the fact contained.

There had been protests against Kola before the post was published,\textsuperscript{68} although there were 100 people attending the one following the post’s publication, it can still be considered as a small number of people. Moreover, most of the signs appearing at the protest on May 4 and 5 were not related to Peaps’ post.\textsuperscript{69}

\textit{Peaps’ penalty is not proportionate}

In violation of the ODPA, Peaps was sentenced to two years’ imprisonment and no fine.\textsuperscript{70} Under international principles, imprisonment for defamation, particularly against a public figure\textsuperscript{71} is considered disproportionate, therefore it is a violation of FoE\textsuperscript{72} that is never an appropriate penalty.\textsuperscript{73} Even if it is applied by a state, it should be used only as a last resort,\textsuperscript{74} when there is a serious threat to the enjoyment of other human rights.\textsuperscript{75} The exceptional

\textsuperscript{67} \textit{Cantoni v France} App no 17862/91 (ECtHR, 11 November 1996) [32]

\textsuperscript{68} Compromis, para 9.4

\textsuperscript{69} Compromis, para 9.4

\textsuperscript{70} Compromis, para 12.11

\textsuperscript{71} \textit{Lohé Issa Konaté v Burkina Faso} Comm no 004/2013 (ACmHRP, 2014) [141]


\textsuperscript{73} UNHRC ‘General Comment No 34: Article 19 ( Freedoms of Opinions and Freedom of Expression)’ [47]

\textsuperscript{74} \textit{Trisant Donoso v Panama} IACtHR (2009) Series C No 193 [20]

\textsuperscript{75} \textit{Gavrilovic v Moldavia} App no 25464/05 (ECtHR, 15 December 2009) [60]
circumstances justifying a prison term are for example, the case of hate speech or incitement to violence\textsuperscript{76} that creates “a clear and present danger”. \textsuperscript{77}

In the present case,\textsuperscript{78} protesters had appeared from time to time outside Kola’s office throughout her three years in office. After the post, the number of the protesters was only a bit higher and most of the signs were still unrelated to the content.\textsuperscript{79} Thus, Applicants submit that the punishment was disproportionate since there was no exceptional circumstance that would have justified the prison term. Instead of criminal proceedings, civil proceedings should be preferred in defamation cases.\textsuperscript{80}

II. TURTONIA’S PROSECUTION OF SCOOPS UNDER THE ODPA VIOLATES ITS RIGHT TO FREEDOM OF EXPRESSION

Scoops is a social media platform\textsuperscript{81} storing information provided by its users, thus is qualified as a hosting service provider\textsuperscript{82} that acts as an intermediary.\textsuperscript{83} As the ECtHR\textsuperscript{84} pointed out FoE

\textsuperscript{76} Cumpana and Mazare v Romania App no 33348/96 (ECtHR, 1 December 2004) [115]; Mahmudov and Agazade v Azerbaijan App no 38577/04 (ECtHR, 18 December 2008) [50]

\textsuperscript{77} Karatas v Turkey App no 23168/94 (ECtHR, 8 July 1999) Concurring Opinion of Judge Bonello, Schenck v United States 249 U.S. 47 (1919)

\textsuperscript{78} Compromis, para 12. 2

\textsuperscript{79} Compromis, para 9.4

\textsuperscript{80} Lehideux et Isorni v France App no 55/1997/839/1045 (ECtHR, 23 September 1998) [57]; Radio France and Others v France App no 53984/00 (ECtHR, 30 March 2004) [40] ; Raichinov v Bulgaria App no 47579/99 (ECtHR, 20 April 2006) [50]; Kubaszewski v Poland App no 571/04 (ECtHR, 2 February 2010) [45]; Mahmudov and Agazade v Azerbaijan App no 35877/04 (ECtHR, 18 December 2008) [50]; Lyashko v Ukraine App no 21040/02 (ECtHR, 10 August 2006) [41]; Fedchenko v Russia App no 33333/04 (ECtHR, 11 February 2010); Aleksandr Krutov v Russia App no 15469/04 (ECtHR, 3 December 2009); Lombardo et al v Malta App no 7333/06 (ECtHR, 24 April 2007)

\textsuperscript{81} Compromis, para 5.1

guarantees to “everyone”, including legal persons. Consequently, Scoops and its users possess the right to FoE.

Exercise of FoE85 is one of the essential foundations of a democratic society.86 Internet freedom is an indispensable tool to shield that right, however Internet freedom has declined for the sixth consecutive year, with more governments than ever before targeting social media.87

Applicants submit that Scoops’ FoE guaranteed under international conventions88 had been interfered by the Court’s decision. Moreover, such interference with Scoops’ FoE under the IA violates ICCPR and UDHR,89 since it does not pass the three-part cumulative test.


84 Casado Coca v Spain App no 15450/89 (ECtHR, 24 February 1994) [35]; Autronic AG v Switzerland App no 12726/87 (ECtHR, 22 May 1990) [47]


88 ICCPR Article 19 (3); UDHR Article 19

89 ICCPR Article 19 (3); UDHR Article 19
1. Scoops prosecution was not prescribed by law

For a prosecution to be prescribed by law, an act must be sufficiently precise.\textsuperscript{90} However, in this present case ODPA\textsuperscript{91} uses so vague terms that it makes impossible for Scoops to foresee the consequences arising from ODPA.

For example, ODPA defines the term “distribute” that includes only active conducts such as “transferring, publishing or reproducing”.\textsuperscript{92} However, as Scoops is a merely passive intermediary,\textsuperscript{93} it cannot be expected from the company to even consider the possibility of being classified as a distributor according to ODPA. Applicants note that even if Scoops might be regarded as distributor, it must have been under the impression of being exempted from its obligation based on Section 3.b of ODPA.

Moreover, ODPA determines the category of image including photographs, films, videotapes, recording, digitals, or other reproduction.\textsuperscript{94} In this present case, Kola’s head was photoshopped onto pornographic material engaged in sexual intercourse. These so-called face swap pictures are digitally manipulated photographs that do not fall under the scope of ODPA.

As it is seen, the Act includes vague terms and non-exhaustive lists which can lead to abuse and arbitrary decisions.


\textsuperscript{91} Compromis, 10.2

\textsuperscript{92} Compromis, 10.2 2. a

\textsuperscript{93} Council Directive (EC) 178/1 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) [2000] L178/1

\textsuperscript{94} Compromis, 10.2 2. b
2. Scoops prosecution did not have a legitimate aim

As stated above, the prosecution did not have a legitimate aim.

3. Scoops prosecution was not necessary

Interference must be an option of last resort and is necessary in a democratic society if it a) corresponds to a pressing social need and b) it is proportionate to the legitimate aim pursued.

a) The interference does not correspond to a pressing social need

According to the ECtHR and the CJEU, the following factors may be considered to determine intermediary liability: i) the nature of the intermediary; ii) the nature of its user content, iii) measures taken by the intermediary.

i) The nature of the intermediary

Applicants submit that Scoops is a passive intermediary as its conduct is merely automatic and technical, however it loses protection if it establishes a substantial degree of editorial

95 Arguments 2.2
96 Delfi AS v Estonia App no 64569/09 (ECtHR, 10 October 2013) [85]; Delfi AS v Estonia App no 64569/09 (ECtHR, 16 June 2015) [142]-[143]; Magyar Tartalomzolgáltatók Egyesülete and Index.hu Zrt v Hungary App no 22947/13 (ECtHR, 2 February 2016) [69]; Pihl v Sweden App no 74742/14 (ECtHR, 9 March 2017) [28]
97 C-236/08 Google France, Google Inc v Louis Vuitton Malletier SA EU:C:2010:159 (CJEU, 23 March 2010) [113]-[114]; L’Oréal SA v eBay C-324/09 (CJEU, 12 July 2011) [111]-[113]
98 C-236/08 Google France, Google Inc v Louis Vuitton Malletier SA EU:C:2010:159 (CJEU, 23 March 2010) [113]-[114]
control over its user content.\textsuperscript{100} In the case of \textit{Delfi AS v Estonia}, once a comment was posted, the author could not modify or delete it, solely the news portal had the ability to do it. Therefore it was considered an active intermediary and deemed liable for clearly unlawful content.\textsuperscript{101}

However, in this present case Scoops did not create or practice editorial control over its content.\textsuperscript{102} The fact that it occasionally removed unlawful content\textsuperscript{103} cannot challenge Scoops’ passive role, and therefore cannot prevent it from being exempt from liability.\textsuperscript{104}

\textit{ii) The nature of its user content}

Applicants acknowledge that distributing an image of another person who is identifiable and whose intimate parts are exposed, without legitimate purpose can cause harm.\textsuperscript{105} However, the picture in question is undisputedly digitally manipulated since the naked body was taken from a free pornography site.\textsuperscript{106} Further, the photo concerned the alleged romance of Parkta and Kola whose conduct had already generated numerous criticism. Hence, there was a public interest as legitimate purpose to inform citizens of Turtonia. Even if it was a manifestly illicit

\textsuperscript{100} \textit{Delfi AS v Estonia} App no 64569/09 (ECtHR, 16 June 2015) [144]-[146]; \textit{Kaschke v Gray} [2010] EWHC 690 [186]

\textsuperscript{101} \textit{Delfi AS v Estonia} App no 64569/09 (ECtHR, 16 June 2015) [128], [144]-[146]

\textsuperscript{102} Compromis, 5

\textsuperscript{103} Compromis, 9.2

\textsuperscript{104} \textit{Kascheke v Hilton} (2010) EWHC 1907; \textit{Karim v Newsquest Media Group Ltd} [2009] EWHC 3205


\textsuperscript{106} Compromis, para 12.3 2
image and there was no public interest, intermediaries must not be expected to evaluate the legality of the image.\textsuperscript{107}

\textit{iii) Measures taken by the intermediary}

Applicants submit that Scoops has taken all the necessary measures to prevent the illicit content on its platform. Firstly, Scoops has prepared a ToS\textsuperscript{108} in which it specifies that they do not allow harmful and malicious content such as non-consensual sharing of intimate images. Secondly, Scoops has created a NTDS\textsuperscript{109} so that unlawful content can be removed. Scoops is liable under the ODPA\textsuperscript{110} if knowingly distributes a sexually explicit image of another person without consent. Forasmuch intermediaries are not obliged to monitor their platform seeking illegal content,\textsuperscript{111} Scoops knowingly distributes an unlawful image if only being notified about it, however fails to act properly. It is true that Kola’s staff sent a request of removal by starting to fill out the form, however, failed to complete it.\textsuperscript{112} Therefore Scoops was not notified in time, thus could not act accordingly.

Even if Scoops knowingly distributed an illicit image under the ODPA, Applicants highlight that this Act does not apply to disclosure made in the public interest.\textsuperscript{113} As stated above,\textsuperscript{114}

\textsuperscript{107} The Manila Principles on Intermediary Liability (24 March 2015)
\textsuperscript{108} Compromis, para 9.2
\textsuperscript{109} Compromis, para 9.2
\textsuperscript{110} Compromis, para 10.2 1
\textsuperscript{112} Compromis, para 9.2
\textsuperscript{113} Compromis, para 10.2 3. b
\textsuperscript{114} Arguments 1. 2
the alleged romance was a matter of public interest\textsuperscript{115} therefore Scoops should be exempted from liability.

Therefore Applicants submit the followings: Scoops was not in the position to distribute the image by disregarding a substantial risk as the company was not notified properly. Even if it was, the image does not fall under the scope of ODPA since it was a digitally manipulated one with the body of another person. Even if the image fell under the scope of ODPA, Scoops should be exempted from liability because the disclosure was made in the public interest.

Lastly, intermediaries should not judge whether a content is lawful or not,\textsuperscript{116} because restriction on FoE falls within the competence of courts. However, if intermediaries judge it, it is likely to act too quickly to remove the content that can lead to censorship.\textsuperscript{117}

\hspace{1cm} \textit{b) The interference is not proportionate to the legitimate aim pursued}

The principle of proportionality implies that an interference cannot be overbroad and it must be the least intrusive instrument amongst those which might achieve their protective function.\textsuperscript{118} Scoops was sentenced to a fine equivalent to 200,000 USD.\textsuperscript{119} Applicants submit that the fine is disproportionate for the following reasons:

\begin{itemize}
\item \textsuperscript{115} Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary App no 22947/13 (ECtHR, 2 February 2016) [72]
\item \textsuperscript{116} Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda (The UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and ACHPR Special Rapporteur on Freedom of Expression and Access to Information, 3 March 2017) FOM.GAL/3/17
\item \textsuperscript{117} Declaration on freedom of communication on the Internet; \textless https://www.article19.org/data/files/medialibrary/38355/Joint-Declaration-on-Freedom-of-Expression-and-Countering-Violent-Extremism-2016.pdf\textgreater accessed 22 November 2017
\item \textsuperscript{118} Shelton v Tucker 364 US (1960) [479], [488]
\item \textsuperscript{119} Compromis, para 13.1 1
\end{itemize}
First, Scoops is a passive intermediary.\textsuperscript{120} On the contrary, in the case of Delfi AS v Estonia, an active intermediary was sentenced to a fine equivalent to only 320 €.\textsuperscript{121} As well as in other similar cases, intermediaries\textsuperscript{122} were sentenced to much lesser fines.

Secondly, in the case of Index v Hungary,\textsuperscript{123} since the unlawful content on the platform of the intermediary could be regarded as a matter of public interest, the company was not held liable.

Thirdly, liability of the actual author served as a sensible alternative to the liability of Scoops in a case like the present one. As the author’s identity was revealed by Scoops, Kola could bring a claim against Peaps.\textsuperscript{124}

Erroneously censoring user content on social media is already a well-known phenomenon.\textsuperscript{125} However, such a huge fine on Scoops could easily lead to a more severe censorship, thus the judgment would have a chilling effect on FoE.

\section*{III. TURTONIA’S PROSECUTION OF PEAPS UNDER THE IA VIOLATES HIS RIGHT TO FREEDOM OF EXPRESSION}

Applicants submit that the restriction on Peaps' FoE under the IA is not consistent with Turtonia's international obligations. The IA fails the three-part cumulative test regarding

\begin{itemize}
\item \textsuperscript{120}Arguments 2.3
\item \textsuperscript{121}Delfi AS v Estonia App no 64569/09 (ECtHR 16 June 2015) [160]
\item \textsuperscript{122}Lancelotti v Facebook IACtHR (2016) Series C No 524
\item \textsuperscript{123}Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary App no 22947/13 (ECtHR, 2 February 2016) [72]
\item \textsuperscript{124}Delfi AS v Estonia App no 64569/09 (ECtHR 16 June 2015) [147]
\item \textsuperscript{125}Alice Ross and Julia Carrie Wong ‘Facebook deletes Norwegian PM’s post as ‘napalm girl’ row escalates <https://www.theguardian.com/technology/2016/sep/09/facebook-deletes-norway-pms-post-napalm-girl-post-row> accessed: 23 November 2017
\end{itemize}
ICCPR Article 19. First, the IA was not prescribed by law, since it does not fulfil the preconditions stated in international obligations. Secondly, IA does not pursue a legitimate aim. Finally, the restriction of IA is not necessary and it imposes disproportionate and wrongful penalties.127

1. Peaps’ prosecution was not prescribed by law

According to the following judgement of the ECtHR, a legal instrument is considered as prescribed by law, if it accomplishes two requirements: the law must be adequately accessible, and formulated with a sufficient precision to enable citizens to regulate their conduct and they must be able to foresee the consequences what a given action may entail.128 Turtonian government passed the IA in order to preserve the integrity of the democratic process and safeguard the peace of Turtonia.129 In fact, the prosecution based on the regulation was not prescribed by law as the IA is imprecise, and there is no legal basis to prosecute Peaps. Furthermore, the term of “violence” does not appear in the text of IA.130 The IA is imprecise as the scope of the terms “civil unrest”, “hatred” and “damage the national unity” is overly vague. As drafted, the IA is not prescribed by law since it fails to adequately warn Turtonian citizens of what their punishment might be due to undefined language.131

126 ICCPR Article 19
127 UNHRC ‘General Comment No 34’ (2011) UN Doc CCCPR/C/GC/34 [25]-[35]
128 The Sunday Times v the United Kingdom App no 6538/74 (ECtHR, 26 April 1979) [50]; Hashman and Harrup v the United Kingdom App no 25594/94 (ECtHR, 25 November 1999) [31]; Kokkinakis v Greece App no 14307/88 (ECtHR, 25 May 1993) [40]
129 Compromis, 11.1
130 Compromis, 11.2
131 Compromis, 11.2
2. Peaps’ prosecution lacks legitimate aim

International covenants declare the legitimate aims in pursuit of which rights might be limited by the State.\textsuperscript{132} These are the rights for the reputation of others, the protection of national security, public order, public health or morals.\textsuperscript{133} However, there must be a fair balance between the restrictions and the right of FoE.\textsuperscript{134}

In the landmark cases of \textit{Axel Springer v Germany}\textsuperscript{135} and \textit{Von Hannover v Germany (No 2)},\textsuperscript{136} it was declared that an attack on a person’s reputation must attain a certain level of seriousness. The criteria which are relevant when balancing the right to FoE against the right to respect private life are: the contribution to a debate of general interest, how well known the person concerned is and what the subject of the report is, his or her prior conduct, the method of obtaining the information and its veracity, the content, form and consequences of the publication, and the severity of the sanction imposed.

Furthermore, in \textit{Krone Verlag GmbH & Co. KG v Austria},\textsuperscript{137} the ECtHR stated that the fact of being a politician brought an individual into the sphere of public life with the attendant consequences. The Court also recognised the public's right to information, including facts concerning private life, even where the individual concerned held no public office.

\textsuperscript{132} ICCPR Article 19 (3), ECHR Article 10 (2), ACHR Article 13 (2)

\textsuperscript{133} ICCPR Article 19 (3), ACHR Article 13 (2)

\textsuperscript{134} \textit{Couderc and Hachette Filipacchi Associés v France} App no 40454/07 (ECtHR, 10 November 2015) [83]-[93]

\textsuperscript{135} \textit{Axel Springer AG v Germany} App no 39954/08 (ECtHR, 7 February 2012) [83], [89]-[95]

\textsuperscript{136} \textit{Von Hannover v Germany (no 2)} App no 40660/08 and 60641/08 (ECtHR, 26 June 2012) [108]-[113]

\textsuperscript{137} \textit{Krone Verlag GmbH & Co. KG v Austria} App no 34315/96 (ECtHR, 26 February 2006); \textit{Von Hannover v Germany} (No 1) App no 59320/00 (ECtHR, 24 June 2004) [62], [76]
As the ECtHR stated in *Ólaffson v Iceland*,\(^\text{138}\) even if the determinations were defamatory, the concerned person is in the public interest and the seriousness of the post's topic had the legitimate aim to be shared with the public, even if it is part of his private life. Furthermore, there was an opportunity to react to the allegations.

In this present case, Kola as the Turtonian Minister of Immigration\(^\text{139}\) has to accept the consequences of holding a public role and has narrower private life sphere than a normal citizen. The citizens of Turtonia have the right to know what the Minister does in her free time, especially if it affects her work because she is a democratically elected member of the government.

3. Peaps’ prosecution was not necessary

The prosecution was unnecessary, because there is no link between the expression and violent event. Applicants submit that the prosecution of Peaps was unnecessary in a democratic society, because it did not correspond to a pressing social need.\(^\text{140}\) The principle whether an interference with FoE is “necessary in a democratic society” is well established in the ECtHR’s case-law.\(^\text{141}\) According to *Chauvy and Others v France*,\(^\text{142}\) it must be determined whether the interference in question was “proportionate to the legitimate aims pursued” and

\(^{138}\) *Ólaffson v Iceland* App no 58493/13 (ECtHR, 16 June 2017) [62], [76]

\(^{139}\) Compromis, para 4.1

\(^{140}\) *Kurier Zeitungsverlag und Druckerei GmbH v Austria* App no 1593/06 (ECtHR, 19 June 2012) [47]

\(^{141}\) *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [131-132]; *Węgrzynowski and Smolczewski v Poland* App no 33846/07 (ECtHR, 16 July 2013) [51]; *Editorial Board of Pravoye Delo and Shtekel v Ukraine* App no 33014/05 (ECtHR, 5 August 2011) [63]

\(^{142}\) *Chauvy and Others v France* App no 64915/01 (ECtHR, 29 September 2004) [70]
whether the reasons are “relevant and sufficient”. In addition, the State has to prove necessity:
direct or immediate connection between the expression and the threat.\textsuperscript{143}

The prosecution of Peaps relies on the incitement of violence,\textsuperscript{144} however, there were no
disturbances in connection with Peaps’ post. In this present case, the only significant sign of
influence was a peaceful protest on May 4 and 5 in front of Kola's office where most of the
signs were unrelated to the post.\textsuperscript{145} Subsequently, there is no direct or immediate link between
Peaps' post and the violence against Aquarians.\textsuperscript{146}

Turtonia passed on a disproportionate 100,000 USD fine, generating a chilling effect for
Turtonians. UNHCR states clearly in its own general comment that defamation laws do not
serve the aim of stifling the FoE and the application of criminal law should only be
countenanced in the most serious cases and imprisonment is never an appropriate penalty.\textsuperscript{147}

The ECtHR found that a long suspended imprisonment is not proportionate to the legitimate
aim pursued.\textsuperscript{148} The ECtHR also considered that the unusually severe sanction imposed in the
case must have had a chilling effect on the Applicant and other people.

The length of imprisonment and the amount of fine in IA is a chimera for Turtonian society,
because the unnecessary and contrary language of the law provokes a chilling effect.
Furthermore, the fine of 100,000 USD, in this present case, exceeds the amount recognized as

\textsuperscript{143} UNHRC ‘General Comment No 34’ (2011) UN Doc CCCPR/C/GC/34 [35]

\textsuperscript{144} Compromis, 12.1

\textsuperscript{145} Compromis, 9.4

\textsuperscript{146} Compromis, 9.5

\textsuperscript{147} UNHRC ‘General Comment No 34’ (2011) UN Doc CCCPR/C/GC/34 [47]

\textsuperscript{148} Taranenko v Russia App no 19554/05 (ECtHR, 13 October 2014) [90]
proportionate in relevant case-law.\textsuperscript{149} Therefore, the imposition of such fine obviously infringes the principle of proportionality.

In conclusion, Applicants submit that Peaps’ prosecution under the IA violates international principles, including Articles 19 of UDHR and Article 19 of the ICCPR. Peaps’ expressions in his post are covered by the scope of FoE. As clearly stated above, restrictions imposed under the IA are not permissible limitations under the three-part cumulative test. Firstly, they were not prescribed by law. Secondly, restrictions were not pursuant to the legitimate aim. Thirdly, restrictions were not necessary and proportionate in a democratic society.

Therefore, Applicants submit that the measures taken by the government were not necessary as they were not under pressing social need.

\textbf{IV. TURTONIA’S PROSECUTION OF SCOOPS UNDER THE IA VIOLATES ITS RIGHT TO FREEDOM OF EXPRESSION}

\textbf{1. The interference is not prescribed by law}

Applicants submit that Turtonia’s interference with Scoops under the IA was not prescribed by law, since the provisions of the IA are neither sufficiently precise to foresee the consequences of actions, nor provide sufficient safeguards against abusive restrictive measures.\textsuperscript{150}

\textsuperscript{149} Ólaffson v Iceland App no 58493/13 (ECtHR, 16 June 2017) [61]; Cojocaru v Romania App no 32104/06 (ECtHR, 10 February 2015) [33]

In the present case, the IA\textsuperscript{151} establishes vague terms, such as “information knows to be false”, “public hatred” and “expeditiously remove”. Even though the ECtHR has acknowledged in *Lindon, Otchakovsky-Laurens and July v France*\textsuperscript{152} that many laws are inevitably couched in terms which are vague and whose interpretation and application are questions of practice, the ECtHR always reiterates that an Act must be formulated with sufficient precision to enable the citizen to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.\textsuperscript{153} The Applicants submit that the notion of “false information” is too vague to preclude subjective and arbitrary interpretation, as a consequence any legal prohibition of “false information” would inevitably create a chilling effect on the media\textsuperscript{154} thus it is incompatible with international standards for restrictions on FoE.\textsuperscript{155}

In addition, the subjective nature of “hatred” could undermine legal certainty and may open the door to arbitrary application.\textsuperscript{156} Furthermore, the requirement of expeditious removal is overly vague and broad, because neither IA, nor relevant case-law provide any interpretation

\textsuperscript{151} Compromis, 11. 2 1. a

\textsuperscript{152} *Lindon, Otchakovsky-Laurens and July v France* App no 21279/02 and 36448/02 (ECtHR, 22 October 2007) [41]; Centro Europa 7 S.r.l. and Di Stefano v Italy App no 38433/09 (ECtHR, 07 June 2012) [141]

\textsuperscript{153} Verein gegen Tierfabriken Schweiz (VgT) v Switzerland App no 24699/94 (ECtHR, 03 June 2009) [52]; Rotaru v Romania App no 28341/95 (ECtHR, 28 June 2001) [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]


\textsuperscript{155} Joint Declaration on Freedom of Expression and Countering Violent Extremism (The UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and ACHPR Special Rapporteur on Freedom of Expression and Access to Information, 3 May 2016) [2 a]

of the term or any guidance how it should be conducted.\textsuperscript{157} On the contrary, other acts impose liability only after the intermediary failed to remove the unlawful content within a reasonable time\textsuperscript{158} or within the time stated in a court order.\textsuperscript{159}

In conclusion, the provisions of the IA were lacking the sufficient precision to enable Scoops to regulate his conduct which eventually lead to arbitrary interpretation.\textsuperscript{160}

2. **The interference does not pursue a legitimate aim**

As stated above, the interference does not pursue a legitimate aim.

3. **The interference is not necessary in a democratic society**

An interference must be an option of last resort and is necessary in a democratic society if it a) corresponds to a pressing social need and b) is proportionate to the legitimate aim pursued.

\textsuperscript{157}Dzimitry Miscevich, ‘Comparative Analysis of online intermediary liability regimes in US and EU’ (CEU 2012) 19

\textsuperscript{158} Anti-Fake News Act of 2017 Section 3 (PH)

\textsuperscript{159} Law No 12.965 of 2014 of the Establishment of Principles, Guarantees, Rights and Obligations for the Use of the Internet in Brazil

\textsuperscript{160}Rotaru v Romania App no 28341/95 (ECtHR, 4 May 2000); Gawęda v Poland App no 26229/95 (ECtHR, 14 March 2002); Amann v Switzerland App no 27798/95 (ECtHR, 16 February 2000); Kopp v Switzerland App no 13/1997/797/1000 (ECtHR, 25 March 1998)
a) The interference does not correspond to a pressing social need as Scoops was not in the position to knowingly communicate false information

As stated above, the following elements may be taken into consideration to determine intermediary liability: i) the nature of the intermediary; ii) the nature of its user content; iii) measures taken by the intermediary.

i) The nature of the intermediary

Scoops is a social media platform that does not create its content, but represents a hosting service for user-generated content. As such, Scoops plays a merely passive role.

ii) The nature of its user content

Applicants acknowledge that the content was capable to defame. However, in cases of defamation, legal assessment of their content is very difficult. Scoops is liable for posts containing information that they know to be false or they are aware of fact or circumstances that make the infringement apparent and their conduct is deliberate. As only statement of facts can be proved to be false, posts containing value judgements do not fall within IA’s

161 Arguments 2. 3
162 Compromis, para 5.1
165 Compromis, para 11.2
166 Tristán Donoso v Panamá IACtHR (2009) Series C No 193 [124]; Lingens v Austria App no 9815/82 (ECtHR, 8 July 1986) [46]
scope of application.\textsuperscript{167} However, technology experts of intermediaries cannot judge the unlawfulness of a post\textsuperscript{168} and indirectly to do the delicate balancing of interest required when limiting the FoE. First, because they lack the necessary judiciary qualifications, and second, because they are more probable to err on the side of caution.\textsuperscript{169} In conclusion, the protection of the users’ FoE requires from Scoops not to have the authority to decide on the removal of their posts.

\textit{iii) Measures taken by the intermediary}

Immunity from liability ceases to exist under the IA\textsuperscript{170} if Scoops is being notified about the illegal content or observes it and fails to remove it expeditiously. In \textit{L’Oréal SA v eBay International AG,}\textsuperscript{171} the CJEU stated that actual knowledge is deduced where a diligent economic operator can identify the illegality in question thus can act accordingly. Therefore a “notice” that is sent to an intermediary must be sufficiently precise and substantiated.\textsuperscript{172}

Considering the above in this present case Scoops was not notified properly, thus it could not act accordingly.

\textsuperscript{167} Compromis, para 11.2


\textsuperscript{170} Compromis, para 11.2, 3 (c)

\textsuperscript{171}C-324/09 L’Oréal SA v eBay International AG, [2011] ECR I-06011 [120]

\textsuperscript{172}Commission, Online services, including e-commerce, in the Single Market, Accompanying the document, COM (2011) 942 25
Firstly, in order to be notified to remove illegal content, Scoops uses an online reporting form. Kola’s staff sent a request for removal by starting to fill the form, however, failed to complete it.\(^{173}\)

Secondly, after Kola’s legal counsel submitted a letter to Scoops, its employees saw the post.\(^{174}\) However, this simple notification about a defamatory nature did not affect that Scoops had actual knowledge of unlawful content or awareness of facts or circumstances from which it would have been apparent that the information was unlawful.\(^{175}\)

Thirdly, even positive knowledge of the defamatory meaning alone should not suffice to hold the intermediary liable; the information may be true, or the original author may have other defences available the intermediary is not aware of.\(^{176}\)

The NTDS\(^{177}\) system that is used by Scoops, by lacking the opportunity to appeal a takedown incentivises intermediaries to remove content, rather than investing resources to investigate the validity of the request. Further, risk a lawsuit,\(^{178}\) which can lead to the censoring of legitimate expression\(^{179}\) and to silence online critics.\(^{180}\) Furthermore, having examined the

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173 Compromis, para 9.2

174 Clarifications, 7


178 Rebecca MacKinnon, Elonnai Hickok, Allon Bar, Hae Lim (eds), Fostering Freedom Online: The Role of the Internet Intermediaries in World Trends in Freedom of Expression and Media Development (UNICEF 2015) [93], [105]- [106]

practice in countries that impose liability on intermediaries demonstrates that such indirect methods of control are as dangerous for FoE and others rights as direct government censorship.

Also, it is worth to notice that international bodies have also criticised NTDS system as they lack clear legal basis and does not require judicial intervention for the removal of unlawful content. Hence, some states only impose liability on intermediaries if they fail to take down content that was prescribed by a court order.

It can be disputed whether removal 50 hours after the submission was not expeditious. However, the form was not completed, Scoops had no actual knowledge about defamation, the increasing amount of request to remove material, the unprecedented rate at which users

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180 Nart Villeneuve, ‘Evasion Tactics: Global online censorship is growing, but so are the means to challenge it and protect privacy’ (November 2007) 74–76 <http://www.nartv.org/mirror/evasiontactics-indexoncensorship.pdf> accessed: 22 November 2017


183 Law No 12.965 of 2014 of the Establishment of Principles, Guarantees, Rights and Obligations for the Use of the Internet in Brazil

generate and distribute content\textsuperscript{185} and the fact that in other cases,\textsuperscript{186} the unlawful material was available on the portal for weeks, but in this present case it was accessible only for four days.

\textit{b) The interference is not proportionate to the legitimate aim pursued}

The principle of proportionality implies that an interference must not be overbroad and it must be the least intrusive instrument amongst those which might achieve their protective function.\textsuperscript{187}

In violation of the IA, Scoops was sentenced to a fine equivalent of 100,000 USD.\textsuperscript{188} Applicants submit that the fine is disproportionate.

First, the active intermediary in the case of \textit{Delfi AS v Estonia}\textsuperscript{189} was obliged to pay 320€, despite the fact that the manifestly unlawful comments were available for six weeks on its portal. Likewise, Twitter was sentenced to an approximately 43,000 USD fine for failing to remove terrorist propaganda.\textsuperscript{190} On the contrary, Scoops is a passive intermediary and the not manifestly unlawful content was accessible only for four days.


\textsuperscript{186} \textit{Delfi AS v Estonia} App no 64569/09 (ECtHR, 16 June 2015) [19], [152]; \textit{Pihl v Sweden} App no 74742/14 (ECtHR, 07 February 2017) [32]

\textsuperscript{187} \textit{Shelton v Tucker} 364 US (1960) [479], [488]

\textsuperscript{188} Compromis, para 13.1 2

\textsuperscript{189} \textit{Delfi AS v Estonia} App no 64569/09 (ECtHR, 16 June 2015) [15], [114], [160]

The fine could be seen disproportionate as Acts of other countries impose much less severe fines on intermediaries.  

When intermediaries are liable for the content created by others, they will strive to reduce their liability risk, whereas harsh sanctions exert a significant chilling effect on the right to FoE. Such fine can be a huge blow to the free and open internet. Scoops may self-censor, err on the side of caution therefore take down material that may be perfectly legitimate and lawful. These consequences would be extremely damaging since social media is an indispensable tool for promoting social justice and political liberty.

Unlike, in civil penalties for defamation, the law should give preference to the use of non-pecuniary remedies, including for example, apology, rectification and clarification.

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191 The Copyright Act of 2001 (KE) <http://www.kenyalaw.org/Downloads/Acts/Copyright%20Act.pdf> [38]


IX. PRAYER FOR RELIEF

In the light of arguments advanced and authorities cited, the Applicants respectfully request this Honourable Court to adjudge and declare that:

1. Turtonia’s prosecution against Peaps under the IA violated his right to Freedom of Expression according to Article 19 of ICCPR.

2. Turtonia’s prosecution against Scoops under the IA violated its right to Freedom of Expression according to Article 19 of ICCPR.

3. Turtonia’s prosecution against Peaps under the ODPA violated his right to Freedom of Expression according to Article 19 of ICCPR.

4. Turtonia’s prosecution against Scoops under the ODPA violated its right to Freedom of Expression according to Article 19 of ICCPR.

On behalf of Niam Peaps and Scoops,

302A

Agents for the Applicants
Memorial for Respondent 2017/2018
THE 2017-2018 MONROE E. PRICE

INTERNATIONAL MEDIA LAW MOOT COURT COMPETITION

Niam Peaps & Scoops

(Applicants)

v.

Federal Republic of Turtonia

(Respondent)

MEMORIAL FOR RESPONDENT

Word Count for Argument Section: 4,972
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<td>ACHPR</td>
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IV. STATEMENT OF RELEVANT FACTS

*Socio-political background*

Turtonia has a democratically elected government and is a member of the United Nations and has ratified the International Covenant on Civil and Political Rights (ICCPR).\(^1\) Regarding Turtonia’s jury system, the law adjudicated in court comes from the Turtonia Codes and Turtonia law is primarily codal in nature. Appeals from trial courts are made directly to the three-judge Supreme Court which has discretion whether or not to hear an appeal.\(^2\)

As in the past three years, Turtonia has seen an influx of immigrants from neighboring country Aquaria.\(^3\) Moreover, many Turtonians claim that the immigrants have disrupted the economy and diluted the culture.\(^4\)

A religious extremist terror group called True Religion is widely regarded as a terrorist organization in Aquaria, Turtonia, and many other countries (including members of the UN Security Council) and has gained popularity with some young people in Aquaria and has attacked mainstream religious institutions and schools, including murdering a dozen people on a university campus.\(^5\)

Wani Kola, the Turtonian Minister of Immigration, is known for being a champion of immigration who believes Aquarian immigrants can contribute meaningfully to the Turtonian...
society. She has been subjected to harassment and abuse online, and one person – a member of Turton Power – has been convicted of attempting to assault her in a public place.6

**Scoops and Peaps**

Scoops is the most popular social media platform. Users can upload photos and videos with up to 200 words of text and tag the post with up to two topics of interest. When they hit “send,” the content will appear on the screens of the devices of friends of the poster and up to 20 other users who have listed a matching topic of interest. These 20 other users are selected by an algorithm. Scoops also uses human review to assist the algorithm in reaching the right users who may be interested in the content. Scoops CEO said: “Whether people are sharing news, an opinion, or just the latest gossip, we want people to hear it first on Scoops”.7

XYZ News is a well-respected TV news network in Turtonia for being a reliable and objective news source.8 Niam Peaps is a Turton Power member who created a Scoops account on May 1, with the screen name “XYZ News12”, however, he had no affiliation with XYZ News.9

**The matter in question**

At noon on May 2, Peaps used the “XYZ News12” account to post an image that appeared to show Kola standing naked in a hotel room. She is facing another individual who appears to be

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6 Compromis, para 4.1

7 Compromis, paras 5.1, 5.3

8 Compromis, para 6.1

9 Compromis, para 7.1
Parkta, the leader of True Religion. The photo appears to have been taken from outside the hotel room window, and neither person in the image appears to be aware of the camera.\textsuperscript{10}

The "XYZ News12" account had no friends.\textsuperscript{11} Within the first hour of appearing, the post reached more than 10,000 people.\textsuperscript{12}

By 5:00pm, XYZ Media's corporate department of public affairs released a statement, declaring that XYZ Media had no role in the post and no connection to the XYZ News12 account. At the same time, Kola’s office released a statement calling the post “a horrific lie with no basis in fact,” and asserting that Kola's head had been photoshopped onto a stranger's body in the image.\textsuperscript{13}

In the wake of the post, Kola received harassment and death threats online and offline, including threatening phone calls at her office. On May 2 at 7:00pm, Kola’s staff reported the post to Scoops through Scoops' online reporting form selecting “a nude image of me shared without my consent” as the reason to request removal. Scoops responded with an electronic message that read, “Thanks for letting us know. Before we can remove this image, we need you to please enter your name and check the box below to certify that you are the person depicted in this image.” On May 3, Kola’s legal counsel submitted a letter to Scoops, threatening a civil action for defamation and violation of privacy. Scoops removed the post and all shares of the post 50 hours after the submission of the complaint. At that point, it had 21,000 shares and 145,000 views.\textsuperscript{14}

\textsuperscript{10} Compromis, para 8.1

\textsuperscript{11} Compromis, para 8.3

\textsuperscript{12} Compromis, para 8.4

\textsuperscript{13} Compromis, para 9.1

\textsuperscript{14} Compromis, para 9.2
On May 4 and May 5, protesters gathered outside Kola’s office calling for her resignation which was by far the largest, numbering more than 100. Many held signs criticizing Kola, also some of them had slogans related to the post of Peaps, also two Aquarian immigrants were beaten to death by an angry mob of at least 10 people that were yelling anti-Aquarian epithets.  

**Legal basis, procedure**

The Online Dignity Protection Act of 2015 was passed in response to a growing problem of Non Consensual Sharing of Intimate Images (commonly known as “revenge porn”).

The Information Act of 2006 was passed after the distribution of fake documents, which purported to be real, private documents.

In Peaps’ prosecution it was declared that Parkta's figure in the image had been photoshopped from a video of Parkta speaking to True Religion followers. By publishing the image on Scoops, Peaps knowingly distributed an image of Kola appearing to show her intimate parts. At the time Peaps distributed the image, he knew or consciously disregarded a substantial and unjustified risk that Kola had not consented to the disclosure. Peaps was not entitled to protection under section (3)(b) of the ODPA.

Distributing an image of Kola in violation of the ODPA, Peaps was sentenced to a two-year imprisonment. Inciting violence, or being reckless as to whether violence was incited through

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15 Compromis, paras 9.4, 9.5

16 Compromis, para 10.1

17 Compromis, para 11.1

18 Compromis, para 12.3
false information in violation of Section 1(b) of the IA, Peaps was sentenced to a fine equivalent of 100,000 USD.\textsuperscript{19}

In Scoops’ prosecution it was declared that Scoops received notice of the image when Kola's staff reported the image as “a nude image of me shared without my consent.” After that report, Scoops knew or consciously disregarded a substantial and unjustified risk that Kola had not consented to the disclosure. Scoops failed to remove the post within a reasonable time.\textsuperscript{20}

Distributing an image of Kola in violation of the ODPA, Scoops was sentenced to a fine equivalent to 200,000 USD. Knowingly communicating false information in violation of Section 1(a) of the IA, Scoops was sentenced to a fine equivalent of 100,000 USD.\textsuperscript{21}

\textsuperscript{19} Compromis, para 12.1

\textsuperscript{20} Compromis, para 13.2

\textsuperscript{21} Compromis, para 13.1
V. STATEMENT OF JURISDICTION

Federal State of Turtonia (Respondent) has approached the Universal Freedom of Expression Court, the special Chamber of the Universal Court of Human Rights hearing issues relating to the right of freedom of expression under Article 19 of the UDHR and Article 19 of the ICCPR.

Both Niam Peaps’ sentence and Scoops’ fine have been upheld in Turtonia’s Supreme Court, exhausting their domestic appeals. This Honourable Court has jurisdiction as the final arbiter over all regional courts where parties have exhausted all domestic remedies.

Federal State of Turtonia (Respondent) requests this Honourable Court to issue a judgement in accordance with relevant international law, including the UDHR, the ICCPR, conventions, jurisprudence developed by relevant courts, and principles of international law.
VI. QUESTIONS PRESENTED

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

1. Whether Turtonia’s prosecution of Peaps under the ODPA violates international principles including Article 19 of UDHR and Article 19 of ICCPR?

2. Whether Turtonia’s prosecution of Scoops under the ODPA violates international principles including Article 19 of UDHR and Article 19 of ICCPR?

3. Whether Turtonia’s prosecution of Peaps under the IA violates international principles including Article 19 of UDHR and Article 19 of ICCPR?

4. Whether Turtonia’s prosecution of Scoops under the IA violates international principles including Article 19 of UDHR and Article 19 of ICCPR?
A. Turtonia’s prosecution of Niam Peaps under the ODPA does not violate his right to freedom of expression. The Act is prescribed by law, as it is sufficiently precise with the foreseeable consequences of the restrictions. It contains adequate safeguards as the Turtonian legal system allows appeals and the prosecution is based on a properly legislated legal instrument. Peaps’ prosecution pursued the legitimate aim of protecting people from non-consensual sharing of nude images. Peaps’ prosecution was necessary to protect the values of a democratic society. Turtonia followed a pressing social need as the significant community strain led to the resignation of Wani Kola, the Turtonian Minister of Immigration, and the tragic death of two Aquarians. Moreover, the manipulated image was published on a social media platform and humiliated a well-known person, who already faced harassment and abuse both online and offline. Peaps’ penalty was proportionate to his crime as the post went viral on the public media and eroded the principles of the Turtonian society.

B. Turtonia’s prosecution of Scoops under the ODPA does not violate its right to freedom of expression. Firstly, the ODPA is clear, specific and narrowly drawn as Scoops can see the consequences arising from it. Even if they were not clear enough, as a professional company, Scoops could also have sought legal advice. Secondly, the ODPA has legitimate aim, namely the protection of people from being victim of non-consensual sharing of nude images. Thirdly, the prosecution was necessary because Scoops is an active intermediary, thus it should have acted promptly in response to the notification in order to avoid liability. Finally, the prosecution was proportionate as other states impose more severe punishment on intermediaries and the fine reflected the economic capacity of Scoops.
C. Turtonia’s prosecution of Peaps under the IA does not violate his right to freedom of expression. First of all, the IA meets the requirement of being “prescribed by law”, as the law was formally enacted by the Turtonian government in 2006, after the distribution of false documents in the Turtonian Elections in 2005. Furthermore, the wording of the law is sufficiently precise and foreseeable, as Peaps could reasonably know the consequences of his activity. Secondly, the prosecution pursues a legitimate aim of protecting public order, including the social benefit of Turtonian citizens. Thirdly, the prosecution was necessary in a democratic society, because the heated situation in Turtonia posed a threat to the citizens’ well-being. The disinformation of Peaps resulted in hatred against Kola and violence against two innocent Aquarian immigrants. Plus, the restrictions are proportionate since the amount of fine shows a fair balance between the interests of the community and the protection of the individuals.

D. Turtonia’s prosecution of Scoops under the IA does not violate its right to freedom of expression. First of all, the prosecution was prescribed by law, since it was foreseeable that a media publisher running a social media platform for an economic purpose could be held liable under the IA for storing clearly unlawful content. Secondly, it pursued a legitimate aim namely the respect of the rights or reputations of others. Thirdly, Scoops is an active intermediary and obtained knowledge of the unlawful material, however, failed to remove it within a reasonable time. Lastly, the fine was proportionate as the Court took the international practice into consideration and it applied less severe consequences.
VIII. ARGUMENTS

1. TURTONIA’S PROSECUTION OF PEAPS UNDER THE ODPA DOES NOT VIOLATE HIS RIGHT TO FREEDOM OF EXPRESSION

Freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man.\(^{22}\)

In order to ensure that everyone can exercise his right properly, the State must adopt different kind of norms in case protected values conflict. Exercising human rights can only be limited by the exercise of another fundamental right. The presented case highlights that it is the State’s obligation to set the boundaries for its citizens regarding the exercise of their rights while simultaneously ensuring other people’s right to act in the same way.

Respondent suggests to apply a three-part cumulative test to Niam Peaps’ prosecution. It should be examine whether it was prescribed by law, had a legitimate aim, and if it was necessary and proportionate.

1. Prosecution of Peaps is prescribed by law

A norm is prescribed by law if the following requirements are met:

a) it is sufficiently precise;

b) it contains adequate safeguards; and

c) prosecutions based on it have a legal basis.\(^{23}\)

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\(^{23}\) *Silver and Others v the United Kingdom* App no 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, 7136/75 (ECtHR, 25 March 1983) [85]–[90]; *Malone v the United Kingdom* App no 8691/79 (ECtHR, 2 August 1984) [67]–[68]; *Ahmet Yıldırım v Turkey* App no 3111/10 (ECtHR, 18 December 2012) [57]–[59]
The ECtHR stated that there are two requirements which are needed to find a restriction justifiable. “Firstly, the law must be adequately accessible and […] also, a norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able […] to foresee the consequences which a given action may entail. Those consequences need to be foreseeable with absolute certainty”. Otherwise, it can cause judicial arbitrary and judges’ interpretation of the regulations might be too broad.

In case of the ODPA, Respondent submits that it is a precisely formulated Act for the following reasons:

a) *The ODPA is sufficiently precise*

The ODPA is sufficiently precise as Peaps could foresee the limits and consequences of sharing Kola’s nude image on Scoops. Respondent submits that laws need not be absolutely precise to “keep pace with changing circumstances”. Therefore, given the continuous development of online data, the ODPA had to be drafted in broader terms.

The Act properly defines its aim, concept, exceptions and penalty. Every provision is strictly regulated, therefore the norm guarantees its accurate adaptation.

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24 *The Sunday Times v the United Kingdom* (No 1) App no 6538/74 (ECtHR, 26 April 1979) [49]

25 *Müller and Others v Switzerland* App no 10737/84 (ECtHR, 24 May 1988) [29]; *Kokkinakis v Greece* App no 14307/88 (ECtHR, 25 May 1993) [40]; *Delfi AS v Estonia* App no 64569/09 (ECtHR, 10 October 2013) [71]. [75]
b) Adequate safeguards

The “law must indicate with sufficient clarity the scope of any [...] discretion and the manner of its exercise”. Respondent submits that prosecution of Peaps under the ODPA had adequate safeguards.

The right to appeal is an adequate safeguard. Turtonia’s jury system allows appeals from trial courts to be reconsidered by the Supreme Court. Its supervision therefore grants legal remedy against the judgement of a trial court.

c) Prosecution of Peaps had a legal basis

Peaps’ prosecution was based on the ODPA, which is a properly legislated Act in Turtonia, therefore Respondent submits that prosecutions may be based on it.

2. The ODPA has legitimate aim

A fundamental right may only be restricted for rightful purposes. In case of the ODPA, this purpose is to protect people from being victim of non-consensual sharing of their nude image. Respondent emphasizes the existence of this legitimate aim.

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26 Malone v the United Kingdom App no 8691/79 (ECtHR, 2 August 1984) [68]; Liu v Russia (No 2) App no 29157/09 (ECtHR, 26 July 2011) [88]; Silver and Others v the United Kingdom App nos 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, 7136/75 (ECtHR, 25 March 1983) [90]

27 Klass v Germany App no 5029/71 (ECtHR, 6 September 1978) [56]; Uzun v Germany App no 35623/05 (ECtHR, 2 September 2010) [72]; Gürtelkin and Others v Cyprus App nos 60441/13, 68206/13 and 68667/13 (ECtHR, 11 March 2014) [28]

28 Compromis, para 2.2
3. The prosecution under ODPA was necessary

To decide whether the restriction is necessary in a democratic society, the existence of a “pressing social need” is essential, for which it is not enough if the restriction is “useful”, “reasonable” or “desirable”. Here the balance between the right to FoE and the right to respect for private life must be examined, for which the ECtHR has laid down the following five criteria:

*Contribution to the public debate of general interest*

Peaps said during his prosecution that he wanted to illustrate the text of his post with a picture. The purpose of an illustration is to increase the credibility of the information in text, but in this case the only purpose of posting the picture was to increase the embarrassment of Kola as it was a photoshopped image.

*How well-known the person is and the subject of the report*

Respondent does not argue that Kola is a public figure as she holds a public office, therefore she might be considered as a well-known person. The subject of the report, however,

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30 Axel Springer AG v Germany App no 39954/08 (ECtHR, 7 February 2012) [89]

31 Compromis, para 12.2

32 Fontevecchia and D’Amico v Argentina IACtHR (2011) Series C No 238 [68]

33 Mosley v the United Kingdom App no 48009/08 (ECtHR, 10 May 2011) [115], [130]

34 Compromis, para 12.2
regarding the image does not have any connection with her public duties, as it was very intimate.

Prior conduct of the person concerned

Kola is known for being a champion of immigration who believes immigrants can contribute meaningfully to the Turtonian society.\textsuperscript{35} However, her work has never raised doubts before, and no factual basis can be stated that would verify the need of showing her intimate parts to make a statement of her activities.

Method of obtaining the information and its veracity

Information concerning the private life of a politician can be divided into two groups: value judgements and statements of facts. This division is applicable to pictures as well.\textsuperscript{36} As it required a legal proceeding to find that the picture had been photoshopped\textsuperscript{37} and it had been used as an illustration, not as evidence verifying the information stated,\textsuperscript{38} it must be judged as a statement of facts, thus verification is required.\textsuperscript{39}

If the Honourable Court decides that the picture complies with the criteria above,\textsuperscript{40} it must be considered that by sharing this image, Peaps exercises a “public watchdog” of similar to the

\begin{itemize}
  \item \textsuperscript{35} Compromis, para 4.1
  \item \textsuperscript{36} News Verlags GmbH &Co.KG v Austria App no 31457/96 (ECtHR, 11 January 2000)
  \item \textsuperscript{37} Compromis, para 12.3
  \item \textsuperscript{38} Compromis, para 12.2
  \item \textsuperscript{39} Kimel v Argentina, IACtHR (2008) Series C No 177 [79]
  \item \textsuperscript{40} Arguments, 1. 3
\end{itemize}
press, as it draws attention to matters of public interest.\(^{41}\) In this situation Applicant should have made reasonable efforts to verify the truthfulness of the statements as it would not have required any particular efforts.\(^{42}\)

Peaps maintained that he did a quick online search and had found the picture published on Turton Power’s website.\(^{43}\) The content of the website was publicly accessible, and as a member of Turton Power, there was a higher chance that he saw the content of the website, and also he could reach the content regardless of his membership.\(^{44}\) In this situation, he did not act in good faith,\(^{45}\) as with due diligence should have known that the picture was fake.

His bad faith is proven by that he deliberately chose a screen name that would urge other users to share his post and believe its content. He also said that he decided to use the image to “illustrate the relationship for my Scoops friends”, but “XYZ News12” account had no friends.\(^{46}\)

The display of the concerned image infringes Kola’s right to privacy as it arouses her embarrassment.\(^{47}\)

\(^{41}\) *Animal Defenders International v the United Kingdom App no 48876/08 (ECtHR, 22 April 2013) [103]*

\(^{42}\) *Madžlis Islamske Zajednice Brcko and Others v Bosnia and Herzegovina App no 17224/11 (ECtHR, 27 June 2017) [115]*

\(^{43}\) Compromis, para 12.2

\(^{44}\) Clarifications, para 6

\(^{45}\) *Fressoz and Roire v France App no 29183/95 (ECtHR, 21 January 1999) [54]*

\(^{46}\) Compromis, para 8.3

\(^{47}\) Compromis, 9.2
Content, form and consequences of the publication

The degree of infringement depends on whether the content is available for a smaller amount of people or nationwide.\textsuperscript{48} The ECtHR established that the nationwide publication of content can infringe a person’s privacy to a greater degree than the previous publication of the same content in a media that has more limited circulation.\textsuperscript{49}

By publishing the image of Kola, Peaps knowingly influenced a mass of people, as when Scoops removed the post, it has already had 21,000 shares and 145,000 views. It also resulted in protests, as people gathered outside of Kola’s office demanding her resignation. Although small groups of protestors appeared from time to time, the protests on May 4 and 5 were by far the largest, with 100 participants. Moreover, their slogans were clearly related to Peaps’ post.\textsuperscript{50}

Respondent submits that Peaps’ disclosure of the image was clearly harmful to the dignity of Kola, as the exercise of FoE did not justify the deliberate use of knowingly false expression which could lead to civil unrest and hatred,\textsuperscript{51} moreover clearly impugned the respectability of the minister.

Further, in this specific picture, she was naked and in a state of reduced self-control,\textsuperscript{52} which is the core of the right to privacy and as both privacy and FoE deserve equal appreciation.\textsuperscript{53} Kola has been subjected to harassment and abuse online.\textsuperscript{54} In the wake of the post, Kola

\textsuperscript{48} Axel Springer AG v Germany App no 39954/08 (ECtHR, 7 February 2012) [94]

\textsuperscript{49} Karhuvaara and Italehti v Finland App no 53678/00 (ECtHR, 16 November 2004) [47]

\textsuperscript{50} Compromis, paras 9.2, 9.4

\textsuperscript{51} Compromis, paras 9.4, 9.5

\textsuperscript{52} Egeland and Hanseid v Norway App no 34438/04 (ECtHR, 16 April 2009) [61]

\textsuperscript{53} Council of Europe Parliamentary Assembly Resolution 1165 ’Right to Privacy’ (1998) [11]

\textsuperscript{54} Compromis, para 4.1
received harassment and death threats both online and offline, including threatening phone calls at her office.

Between the time of the legal complaint’s submission and the post’s removal, 50 hours elapsed. In the Ceylan v Turkey a concurring opinion stated that “to support a finding of clear and present danger […] it must be shown either that immediate serious violence was expected or was advocated, or that the past conduct of the applicant furnished reason to believe that”. As mentioned above, serious violence was expected.

The ODPA fulfills the requirement of proportionality

The Court sentenced Peaps to two years’ imprisonment under the ODPA. Respondent submits that in view of the consequences of publishing the image, the judgement of the Court was proportionate. The consequences, which make the penalty proportionate, are the following: Peaps’ post not only caused protests and triggered the resignation of Kola, but it also resulted in the death of two Aquarian immigrants.

The Court determined that the image was photoshopped, however, users of Scoops still could have believed it was real as not everyone has the ability to identify false images.

55 Compromis, para 9.2

56 Ceylan v Turkey App no 23556/94 (ECtHR, 8 July 1999) Concurring opinion of Judge Bonello

57 Compromis, para 4.1


59 Compromis, paras 9.5, 9.6
Also, Peaps was not only aware of the fact that he disclosed a false picture, but deliberately violated Scoops’ ToS that specifically stipulates that no harmful and malicious content such as non-consensual sharing of intimate images is allowed, which he had agreed to.  

Further, Peaps created a Scoops account with the screen name “XYZ News12”, although, he has no affiliation with XYZ News by any means.

The ODPA states that its violation shall be punishable by a term of imprisonment not to exceed five years. Respondent declares that the term of Peaps’ imprisonment did not even reach half of the imposable sentence, and for the three ruined lives, acting in bad faith and the deliberate violation of ToS, his two-year imprisonment is proportionate.

Respondent submits that for the aforementioned reasons, Peaps’ prosecution was necessary.

2. TURTONIA’S PROSECUTION OF SCOOPS UNDER THE ODPA DOES NOT VIOLATE ITS RIGHT TO FREEDOM OF EXPRESSION

Scoops is a social media platform storing information provided by its users, thus is qualified as a hosting service provider that acts as an intermediary. As the ECtHR pointed out in

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60 Compromis, para 9.2

61 Compromis, para 7.1


63 Compromis, para 5.1

Casado Coca v Spain, FoE guarantees “everyone”, including legal persons. Consequently, Scoops and its users are granted the right to FoE.

Although the right to FoE is an essential foundation of a democratic society, this right is not absolute. Thus, it can be limited under international law. Respondent submits that although Turtonia’s prosecution of Scoops under the IA interferes with the FoE of Scoops’ and its users, it is a justified interference under Article 19(3) of the ICCPR and Article 29(2) of UDHR, since it (1) is prescribed by law, (2) pursues a legitimate aim and (3) it is necessary in a democratic society, and it is proportionate.

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66 Casado Coca v Spain App no 15450/89 (ECtHR, 24 February 1994) [35]; Autronic AG v Switzerland, App no 12726/87 (ECtHR, 22 May 1990) [47]


68 Von Hannover v Germany (No 1) App no 59320/00 (ECtHR, 24 June 2004) [58]

69 ICCPR Article 19 3; UNHRC ‘General Comment No 34: Article 19 (Freedoms of Opinions and Expression)’ (12 September 2011) UN Doc CCPR/C/GC/34 [21]

70 The Sunday Times v the United Kingdom (No 1) App no 6538/74 (ECtHR, 26 April 1979) [42]
1. The prosecution of Scoops was prescribed by law

This requirement implies that law must be accessible, unambiguous, drawn narrowly in order to enable individuals to foresee whether a particular action is unlawful. ODPA is clear, specific and narrowly drawn enough, therefore Scoops could foresee that its failure to regulate manifestly unlawful content fulfils the criterion of deliberate disclosure in Section 1. Even if the consequences were not clear enough, as a professional company, Scoops could also have sought legal advice.

2. The ODPA has legitimate aim

There is an increasing recognition that the non-consensual dissemination of illegal images, as a form of gendered hate speech that harms and silences women is a human rights issue. Imposing liability on intermediaries like Scoops for hosting intimate images that has been shared non-consensually ensures the respect of the rights or reputations of others. Especially because the growth of social media facilitates the distribution of such material, the phenomenon commonly known as “revenge porn” has already become a world-wide issue.

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71 Johannesburg Principles on National Security, Freedom of Expression and Access to Information (1 October 1995) 1.1

72 Delfi AS v Estonia App no 64569/09 (ECtHR, 16 June 2015) [129]


74 ICCPR Art 19 3 (a)


This is obviously applicable to Turtonia as well, as the ODPA was passed in response to this growing problem.\(^\text{77}\)

3. **The prosecution of Scoops under the ODPA was necessary**

Interference is necessary in a democratic society if it a) corresponds to a pressing social need and b) it is proportionate to the legitimate aim pursued.\(^\text{78}\)

\(\text{a) The interference corresponds to a pressing social need}\)

According to the E CtHR\(^\text{79}\) and the CJEU,\(^\text{80}\) the following factors may be considered to determine intermediary liability: i) the nature of the intermediary, ii) the nature of its user content, iii) measures taken by the intermediary.

\(\text{i) The nature of the intermediary}\)

Firstly, Respondent submits that Scoops is an active intermediary\(^\text{81}\) as it runs on a commercial basis,\(^\text{82}\) exercises a substantial degree of control over the content published on its portal\(^\text{83}\) and

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\(^\text{77}\) Compromis, para 10.1

\(^\text{78}\) Lingens v Austria App no 9815/828 (EctHR, 8 July 1986) [39]-[40]; Delfi AS v Estonia App no 64569/09 (EctHR, 16 June 2015) [131]; Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary App no 22947/13 (EctHR, 2 February 2016) [54]; Hertel v Switzerland App no 59/1997/843/1049 (EctHR, 25 August 1998) [46]; Steel and Morris v the United Kingdom App no 68416/01 (EctHR, 15 February 2005) [87]; Zana v Turkey, App no 69/1996/688/880 (EctHR, 25 November 1997) [51]; UNHRC ’General Comment No 34: Article 19 ( Freedoms of Opinions and Expression)’ (12 September 2011) UN Doc CCPR/C/GC/34 [22], [33]-[34]; Mr Vladimir Velichkin v Belarus, Communication No 1022/2001, UN Doc CCPR/C/85/D/1022/2001 (2005) [7.3]

\(^\text{79}\) Delfi AS v Estonia App no 64569/09 (EctHR, 10 October 2013) [85], Delfi AS v Estonia App no 64569/09 (EctHR, 16 June 2015) [142]-[143]; Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary App no 22947/13 (EctHR, 2 February 2016) [69]; Pihl v Sweden App no 74742/14 (EctHR, 9 March 2017) [28]

\(^\text{80}\) Case C-236/08 Google France, Google Inc v Louis Vuitton Malletier SA EU:C:2010:159 [113]-[114]; Case C-324/09 L’Oréal SA v eBay EU:C:2011:474 [111]-[113]
obtains knowledge on whether some content is unlawful.\textsuperscript{84} In this present case, when sharing content on Scoops, users can pay to boost their posts so that they reach more users.\textsuperscript{85} Hence, Scoops runs on a commercial basis that imposes liability on it to regulate its content.\textsuperscript{86}

In addition, Scoops undoubtedly has a substantial degree of control over all of the content posted by its users as it has the right to remove it in accordance with its ToS.\textsuperscript{87} Hence, similarly to the case of \textit{Delfi AS v Estonia},\textsuperscript{88} the fact that Scoops did not create its content does not mean that it had no control over its user’s content.

Lastly, on the basis of evidence presented at the trial, Kola’s staff reported the image as “a nude image of me shared without my consent”, thus the company obtained knowledge of its unlawful nature.\textsuperscript{89} From that point, Scoops was considered as an active intermediary and should have acted promptly in response to the notification in order to avoid liability.\textsuperscript{90} In summary, Respondent submits that a media platform is considered a “publisher” under the

\begin{footnotesize}

\footnotesubscript{82} \textit{Delfi AS v Estonia} App no 64569/09 (ECtHR, 16 June 2015) [112]-[113], [126], [144]

\footnotesubscript{83} \textit{Delfi AS v Estonia} App no 64569/09 (ECtHR, 16 June 2015) [145]

\footnotesubscript{84} Case C-236/08 \textit{Google France, Google Inc v Louis Vuitton Malletier SA} EU:C:2010:159 [120]

\footnotesubscript{85} Compromis, para 5.1

\footnotesubscript{86} \textit{Delfi AS v Estonia} App no 64569/09 (ECtHR, 16 June 2015) [112]-[113], [126], [144]-[146]

\footnotesubscript{87} Compromis, para 9.2

\footnotesubscript{88} \textit{Delfi AS v Estonia} App no 64569/09 (ECtHR, 16 June 2015) [144]

\footnotesubscript{89} Compromis, para 13.2

\footnotesubscript{90} Byrne v Deane [1937] 1 KB 818, at 830; Godfrey v Demon Internet Ltd [1999] EWHC QB 240 (23\textsuperscript{rd} April, 1999); Tamiz v Google Inc [2013] EWCA Civ 68 [13]-[14], [23]-[25], [36]
\end{footnotesize}
scope of the law on defamation after having been notified that defamatory content is displayed on its platform.91

   ii)  The nature of its user content

Applicant may submit that Scoops cannot have the authority to decide on the FoE of a person. However, Scoops had the obligation to prevent the publication of unlawful content according to Section 1 of the ODPA. The disclosure of sexually explicit images without consent and for no legitimate purpose could cease immediate, devastating and irreversible harm,92 as it entailed harassment against Kola both offline and online. As the ECtHR stated that the imposition on a company of an obligation to remove from its website without delay after publication, content that is clearly unlawful even if it was a digitally manipulated, cannot be considered a disproportionate interference with its FoE.93

   iii)  Measures taken by the intermediary

Even though Scoops has taken some measures (NTDS, ToS) to prevent the disclosure of non-consensual intimate images, in the present case, it failed to protect Kola’s right to privacy for the following reasons:

Firstly, Kola was unable to submit the proper form as the image was not a nude picture of her but a digitally manipulated one.94 The number of digitally manipulated images is increasing.95

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91 *Byrne v Deane* [1937] 1 KB 818, at 830; *Davison v Habeeb and Others* [2011] EWHC 3031 (QB) [47]; *Tamiz v Google* [2013] EWCA Civ 68 [27]; *Sadiq v Baycorp* (NZ) Ltd. [2008] case no CIV 2007-404-6421 [48]


93 *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [153]

94 Compromis, para 12.3 3
As the most popular social media platform,\textsuperscript{96} Scoops should have been aware of this phenomenon, but as it is seen, it did not grant any protection to Kola who therefore could not complete the form.\textsuperscript{97}

Secondly, Respondent submits that Scoops’ NTDS was not capable to grant enough protection to Kola as the post was still available for 66 hours even though Scoops had been notified.

Unlike Scoops, other online intermediaries are beginning to take the threat and damage\textsuperscript{98} that revenge porn could cause much more seriously. For example Twitter\textsuperscript{99} offers a detailed form that users can fill out to report abuse, whilst Reddit\textsuperscript{100} directs its users to contact them via email.


\textsuperscript{96} Compromis, para 5.1

\textsuperscript{97} Compromis, para 9.2


b) The interference is proportionate to the legitimate aim pursue

The principle of proportionality implies that an interference cannot be overbroad, and it must be the least intrusive instrument amongst those that might achieve their protective function.\(^{101}\) In violation of the ODPA, Scoops was sentenced to a fine equivalent to 200,000 USD.\(^{102}\)

Other states may impose more severe fines on intermediaries,\(^{103}\) arrest\(^{104}\) or sentence\(^{105}\) the executives of the intermediaries to imprisonment, threaten to block\(^{106}\) or block intermediaries.\(^{107}\)

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\(^{102}\) Compromis, para 13.1 1


\(^{105}\) Bill of the Anti-Fake News Act of 2017 of the Philippines, SB No 1942 of 2017 s (3); Act on Computer Crime of Thailand, BE 2550 (2007) (Thailand) s 14


Additionally, under the European Union competition law, the payable fine is limited to the annual turnover of the company,\textsuperscript{108} and it reflects its economic capacity.\textsuperscript{109}

Similarly, the ECtHR also considers the size of intermediaries in hosting content when imposing liability.\textsuperscript{110} In the case of \textit{Pihl v Sweden},\textsuperscript{111} the website was not held liable as it was unknown to the wider public. Thus, it was unlikely that it would be widely read. However, in the case of \textit{Delfi AS v Estonia},\textsuperscript{112} the news portal was held liable since it was one of the biggest Internet media portals of Estonia.

In this present case, Respondent submits that the fine equivalent to 200,000 USD was proportional since Scoops had an annual revenue of USD 100 million, and it is the most popular social media platform.\textsuperscript{113} Respondent states that the fine would force Scoops to prepare an online report form that is more detailed, thus it would grant more effective protection.

\textbf{3. TURTONIA'S PROSECUTION OF PEAPS DOES NOT VIOLATE ITS RIGHT TO FREEDOM OF EXPRESSION UNDER THE IA}

As stated above, FoE is not an absolute right and may be restricted under principles of international law. The fabricated and malicious post of Peaps resulted in a lawful prosecution


\textsuperscript{109} Case T-201/04 Microsoft Corp v Commission of the European Communities T-201/04 2007 II-03601 [1363]

\textsuperscript{110} \textit{Delfi AS v Estonia} App no 64569/09 (ECtHR, 16 June 2015), \textit{Pihl v Sweden} App no 74742/14 (ECtHR, 9 March 2017)

\textsuperscript{111} \textit{Pihl v Sweden} App no 74742/14 (ECtHR, 9 March 2017) [31], [37]

\textsuperscript{112} \textit{Delfi AS v Estonia} App no 64569/09 (ECtHR, 16 June 2015) [117], [144]

\textsuperscript{113} Compromis 5.1
under the IA. Respondent submits that Turtonia has properly prosecuted Peaps, because it (1) was prescribed by law (2) pursued a legitimate aim and (3) the prosecution was necessary and proportionate in a democratic society.\textsuperscript{114}

1. IA meets the requirement of “prescribed by law”

Limitations of FoE must be both materially and formally provided by the law.\textsuperscript{115} As it was stated by the ECtHR, regarding restrictions two requirements flow from the expression in order to be considered as “prescribed by law”, namely a) the law must have a basis in domestic law and must be adequately accessible and b) it must be sufficiently precise, consequently foreseeable.\textsuperscript{116}

\begin{itemize}
  \item \textit{IA has its basis in domestic law and adequately accessible}
  
  The IA was passed in response to the distribution of fake documents, in order to safeguard the peace.\textsuperscript{117} With the acceptance of IA, Turtonian legislators responded to the growing political tensions and saved the integrity of democratic values.\textsuperscript{118} Restrictions formulated in IA were established prior to the post of Peaps, therefore, Peaps’ prosecution is unquestionably founded in domestic law.
\end{itemize}


\textsuperscript{115} Kimel v Argentina, IACtHR (2008) Series C No 177 [63]

\textsuperscript{116} The Sunday Times v the United Kingdom (No 1) App no 6538/74 (ECtHR, 26 April 1979) [49]

\textsuperscript{117} Compromis, para 11.1

\textsuperscript{118} Compromis, para 11.1
As the ECtHR stated, a citizen must have an indication that is adequate in the circumstances of the legal rules applicable in a given case.\textsuperscript{119} In this present case, IA is accessible as the government has formally enacted it.

\textit{b) The text of IA sufficiently precise and foreseeable}

The second requirement that must meet the standards of “prescribed by law” is sufficiency and foreseeability. However, “experience shows that the absolute sufficiency is unattainable, the need to avoid excessive rigidity and to keep pace with changing circumstances means that many laws are inevitably couched in terms which, to a greater or lesser extent, are vague”.\textsuperscript{120} Further, the level of precision required in domestic legislation depends on the content of the instrument, the field it is designed to cover and the number of addresses.\textsuperscript{121}

In this present case, Turtonian government was sufficiently precise, as one could easily understand the meaning of “civil unrest”, “hatred” and “damage the national unity” in IA.\textsuperscript{122}

In conclusion, Respondent submits that Peaps’ prosecution under the IA was prescribed by law. Peaps could reasonably foresee that knowingly or recklessly communicating false information to the public would constitute an offense. Moreover, Peaps desecrated the right to anonymity when he created and published the post on his misleading “XYZ News12” account

\textsuperscript{119}The Sunday Times v the United Kingdom (No 1) App no 6538/74 (ECtHR, 26 April 1979) [49]

\textsuperscript{120}Olsson v Sweden (No 1) App no 10465/83 (ECtHR, 24 March 1988) [61] (a); Müller and Others v Switzerland App no 10737/84 (ECtHR, 24 May 1988) [29]

\textsuperscript{121}Metropolitan Church of Bessarabia and Others v Moldova App no 45701/99 (ECtHR, 13 December 2001) [109]

\textsuperscript{122} Compromis, para 11.1
on Scoops, without any affiliation to the popular and well-respected news network, XYZ News.\textsuperscript{123}

2. IA pursues a legitimate aim

Restrictions may be justified in the interests of the protection of public order and social benefit.\textsuperscript{124} In accordance with their domestic and international legal obligations and duties, State actors should take care to ensure that they disseminate reliable and trustworthy information, including the matters of public interest, such as security.\textsuperscript{125}

In this present case, True Religion, a religious extremist group, is highly regarded as a terrorist organization.\textsuperscript{126} Considering the history of political scandals and civil unrest in Turtonia, any information that relates to a terrorist group has the possibility to terrify the society via the media. Furthermore, Peaps used the media to destroy the credibility of Kola and create a hysteria against the Aquarian immigrants with the intent to incite civil unrest.

Therefore, Respondent emphasizes that the prosecution of Peaps pursues the legitimate aim of protecting public order, including the social benefit of citizens.

\textsuperscript{123} Compromis, paras 6-8

\textsuperscript{124} ICCPR Article 19 (3b)

\textsuperscript{125} Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda (The UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and ACHR Special Rapporteur on Freedom of Expression and Access to Information, 3 March 2017) FOM.GAL/3/17 [2] (d)

\textsuperscript{126} Compromis, para 3.2
3. IA is necessary in a democratic society

Interference is necessary in a democratic society if it a) corresponds to a pressing social need and b) the restrictions are proportional.

\[ a) \quad IA \text{ corresponds with the pressing social need} \]

Necessity must meet the requirement of pressing social need.\(^\text{127}\) The practice of ECtHR let the margin of appreciation as State authorities’ responsibility, because they are better at appraising the pressing social need and gauging the necessity of a limitation on fundamental rights.\(^\text{128}\)

The revolution of information has transformed the landscape of journalism. The raising questions are who is considered a journalist and what is journalism in our age when all citizens can publish freely across different platforms of communications.\(^\text{129}\) As it stated in the UN General Comment No 34, “anyone, who engage in forms of self-publication (…) on the Internet or elsewhere, is part of the wide range of actors of journalism.”\(^\text{130}\) Moreover, following the IACtHR judgement, “the profession of journalism – the thing journalists do – involves, precisely, the seeking, receiving and imparting of information (…) consequently

\(^\text{127}\)Rubins v Latvia App no 79040/12 (ECtHR, 1 June 2015) [76]; Karttunen v Finland App no 1685/10 (ECtHR, 10 May 2011) [19]; Observer and Guardian v the United Kingdom App no 13585/88 (ECtHR, 26 November 1991) [59]; Lingens v Austria App no 9815/82 (ECtHR, 8 July 1986) [39]

\(^\text{128}\)S. and Marper v the United Kingdom App nos 30562/04 and 30566/04 (ECtHR, 4 December 2008) [102]; Chassagnou and Others v France App nos 25088/94, 28331/95 and 28443/95 (ECtHR, 29 April 1999) [113]


\(^\text{130}\)UNHRC ‘General Comment No 34: Article 19 (Freedoms of Opinions and Expression)’ (12 September 2011) UN Doc CCPR/C/GC/34 [44]
requires a person to engage in activities that define or embrace the FoE which the Convention guarantees."

Another major contemporary challenge is the growing prevalence of disinformation ("fake news"), which could pose a real harm to the modern trustworthy media and the core values of a democratic society. According to the adopted joint declaration, the general prohibitions on the dissemination of information are incompatible with international standards for restrictions on freedom of expression and should be abolished.132

Peaps, a Turton Power member utilized the immigrant influx and the threat of terrorist group, True Religion, to create fake news regarding Kola. The content of the post is fictitious and untrue, the negligent author even misspelled the name of the terrorist group leader,133 who had been responsible for the death of twelve people in the Aquarian terror attack.134

Respondent submits that the situation in Turtonia meets the necessity requirement since the social unrest, hatred and violence pose a threat to the citizens’ health.135 Further, there is a connection between the post of Peaps and the civil unrest of Turtonian citizens. Peaps used lurid, seductive language in his post with a tasteless and manipulated image, which led the people to the streets. In addition, the words of the post were displayed on the signs during the largest demonstration against Kola. The upset civilians took revenge on two innocent

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132 Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda (The UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and ACHPR Special Rapporteur on Freedom of Expression and Access to Information, 3 March 2017) FOM.GAL/3/17 para 2 (a)

133 Compromis, paras 3.2 and 8.3

134 Compromis, para 3.1; Clarifications, para 5

135 Compromis, para 9.5
immigrants that led to a tragedy.\textsuperscript{136} Hence, the restriction should be considered a response to the pressing social need to safeguard public safety.

\textit{b) The restriction was proportionate}

Respondent submits that Peaps’ prosecution under the IA was proportionate. The requirement of proportionality means that legislator could not go further than necessary to achieve the protective function,\textsuperscript{137} and must have a fair balance between the general interest of the community and the interest of individuals.\textsuperscript{138} Furthermore, civil law rules on liability for false and defamatory statements are legitimate only if defendants are given a full opportunity and fail to prove the truth of those statements, and also benefit from other defences.\textsuperscript{139}

The fine imposed on Peaps under IA was proportionate. The 100,000 USD fine that was sentenced on Peaps is remarkably lower in comparison to the maximum penalty given in Section 1(b) of the IA. The post went viral on Scoops, the most popular social media platform in Turtonia,\textsuperscript{140} reaching a large amount of people. Considering those facts, smaller amount of fine would not have been enough to prevent the future abusers.

Respondent submits that the restrictions respond to a pressing social need and Peaps’ post is related to the violent events breaking out after its disclosure. Therefore, the restrictions were necessary and proportionate.

\textsuperscript{136} Compromis, para 9.5

\textsuperscript{137} UNHRC ‘General Comment No 34: Article 19 ( Freedoms of Opinions and Expression)’ (12 September 2011) UN Doc CCPR/C/GC/34 [34]

\textsuperscript{138} Özgür Gündem v Turkey App no 23144/93 (ECtHR, 16 March 2000) [43]

\textsuperscript{139} Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda (The UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and ACHPR Special Rapporteur on Freedom of Expression and Access to Information, 3 March 2017) FOM.GAL/3/17 [2] (b)

\textsuperscript{140} Compromis, para 5.1
4. TURTONIA’S PROSECUTION OF SCOOPS UNDER THE IA DOES NOT VIOLATE ITS RIGHT TO FREEDOM OF EXPRESSION

Prosecution of Scoops under the IA interferes with Scoops’ and its users FoE, however, it is a justified interference, as it passes the three-part cumulative test.

1. Interference is prescribed by law

Turtonia’s prosecution of Scoops under the IA was prescribed by law since the provisions of the IA are accessible, sufficiently precise and foreseeable.\textsuperscript{141}

Firstly, the prosecution is based on the IA that is a national legal act passed by the Turton government.\textsuperscript{142} As the ECtHR has pointed out in several cases, such prosecution is regarded as „prescribed by law”.\textsuperscript{143}

Secondly, Respondent acknowledges that the IA uses vague terms such as “information knows to be false”, “public hatred” or “expeditiously remove”.\textsuperscript{144} However, law must be able to keep pace with changing circumstances\textsuperscript{145} therefore many laws are necessarily couched in

\textsuperscript{141} UNHRC ‘General Comment No 34: Article 19 (Freedoms of Opinions and Expression)’ (12 September 2011) UN Doc CCPR/C/GC/34 [25]; The Sunday Times v the United Kingdom App no 6538/74 (ECtHR, 26 April 1979)

\textsuperscript{142} Compromis, para 11.1


\textsuperscript{144} Compromis, para 11.2 1

\textsuperscript{145} RTBF v Belgium App no 50084/06 (ECtHR, 29 March 2011) [103]; Feldek v Slovakia App no 29032/95 (ECtHR, 12 July 2001) [56]
term that are vague. To underline this statement, Respondent submits that very similar expressions are used in other Acts all around the world. In addition, by carrying on a professional activity, it can be expected to take special care in assessing the risk of unlawful content that such activity entails. Scoops as the most popular social media platform had a profit of USD 100 million last year. Thus, Scoops should have been familiar with the legislation and case-law, and could also have sought legal advice.

Therefore, the provisions of the IA unambiguously establish that FoE may be limited and have been prepared with sufficient precision. Hence, it was foreseeable that a media publisher running a social media platform for an economic purpose could be held liable under domestic law for storing clearly unlawful content.

146 Lindon, Otchakovsky-Laurens and July v France App nos 21279/02 and 36448/02 (ECtHR, 22 October 2007) [41]; Centro Europa 7 S.R.L. and Di Stefano v Italy App no 38433/09 (ECtHR, June 2012) [141]; Delfi AS v Estonia App no 64569/09 (ECtHR, 16 June 2015) [121]

147 Counter-Terrorism Act 2008 of the United Kingdom part 1 s 6 (2) (b); Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178/1, art 14. 1 (a); Digital Millenium Copyright Act of 1998 of the United Stated [512] (c) (1) (A) (iii); Act on Computer Crime of Thailand, BE 2550 (2007) s 14

148 Delfi AS v Estonia App no 64569/09 (ECtHR, 16 June 2015) [122]; Lindon, Otchakovsky-Laurens and July v France App no 21279/02 and 36448/02 (ECtHR, 22 October 2007) [41]; Cantoni v France App no 45/1995/551/637 (ECtHR, 15 November 1996) [35]; Chaufy and Others v France App no 64915/01 (ECtHR, 29 June 2004) [43]-[45]

149 Compromis, para 5.1

150 Delfi AS v Estonia App no 64569/09 (ECtHR 16 June 2015) [129]


152 Verein gegen Tierfabriken Schweiz (VgT) v Switzerland App no 24699/94 (ECtHR, 28 June 2001) [52]; Amann v Switzerland App no 27798/95 (ECtHR, 16 February 2000) [50]; Gawęda v Poland App no 26229/95 (ECtHR, 14 March 2002) [22]; Maestri v Italy App no 39748/98 (ECtHR, 17 February 2004) [20]

153 Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary App no 22947/13 (ECtHR, 2 February 2016) [51]
2. **Interference pursues a legitimate aim**

Respondent submits that the interference pursues a legitimate aim, namely the respect of the rights or reputations of others. 154

3. **Interference is necessary in a democratic society**

Interference is necessary in a democratic society if it a) corresponds to a pressing social need and b) it is proportionate to the legitimate aim pursued. 155

   a)  *The interference corresponds to a pressing social need*

As highlighted above 156 the elements that impose liability on intermediaries, Respondent submits that Scoops is an active intermediary since i) runs on a commercial basis, 157 ii) exercises a substantial degree of control over its content 158 and iii) obtains knowledge of its manifestly unlawful nature. 159

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154 ICCPR Article 19 3 (a)

155 *Lingens v Austria* App no 9815/82 (ECtHR, 8 July 1986) [39]-[40]; *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [131]; *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* App no 22947/13 (ECtHR, 2 February 2016) [54]; *Hertel v Switzerland* App no 59/1997/843/1049 (ECtHR, 25 August 1998) [46]; *Steel and Morris v the United Kingdom* App no 68416/01 (ECtHR, 15 February 2005) [87]; *Zana v Turkey* App no 18954/91 (ECtHR, 25 November 1997) [51]; *Mr. Vladimir Velichkin v Belarus*, Communication No 1022/2001, UN Doc CCPR/C/85/D/1022/2001 (2005) [7.3]; UNHRC ‘General Comment No 34: Article 19 ( Freedoms of Opinions and Expression) ’ (12 September 2011) UN Doc CCPR/C/GC/34 [22], [33]-[34]
i) The nature of its user content

Respondent submits that the post must be considered defamatory as it damaged Kola’s reputation and the author did not take reasonable steps to ensure the accuracy of the publication. Moreover, the fabricated content amounted to fake news since it was designed solely to deceive, harm and influence politics. In conclusion, the establishment of its unlawful nature did not require any linguistic or legal analysis since the remarks were on its face manifestly unlawful.

ii) Measures taken by the intermediary

In accordance with the EECD, the IA specifies that once an intermediary becomes aware of the infringing material and removes it expeditiously, it cannot be held liable. After obtaining knowledge on the illegal content, Scoops has taken it down, however the action was taken only 50 hours after the submission of the complaint.

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162 Delfi AS v Estonia App no 64569/09 (ECtHR, 16 June 2015) [117]


164 Compromis, para 11.2

165 Compromis, para 9.3
In other cases, after having notified, the unlawful content was removed sooner. Further, in the case of *Pihl v Sweden* where the infringing comment was taken down the day after the request had been submitted, the ECtHR stated that “had the comment been more severe nature, the association could have been found responsible for not removing it sooner”. In another case, it was stated that given the gravity of the remarks, “reasonable time” would equate to “immediately.”

The manifestly illegal content having 145,000 views in a small country as Turtonia caused harassment, death threats, forceful demonstrations and led to a racist attack. In addition, in light of the above-mentioned case-law and some regulations require removal within 24 hours, Respondent submits that the removal 50 hours after the submission cannot be considered expeditious removal.

Spreading of “fake news” on social media is a worldwide phenomenon that could harm individual reputations, roil politics and consumers are also likely to believe false stories that do not fit their ideological preferences.

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166 *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [18]-[19]; *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* App no 22947/13 (ECtHR, 2 February 2016) [15]; *Pihl v Sweden* App no 74742/14 (ECtHR, 9 March 2017) [37]

167 *Pihl v Sweden* App no 74742/14 (ECtHR, 9 March 2017) [37]

168 *Pihl v Sweden* App no 74742/14 (ECtHR, 9 March 2017) [36]

169 *Pritchard v Van Nes* [2016] BCSC 686 [109]

170 Compromis, paras 1.1, 9.2, 9.4, 9.5


Recently, intermediaries like Facebook and Google have been taking steps to fight against fake news.\textsuperscript{176} For example, Facebook is working with fact-checking organizations\textsuperscript{177} and the flag false articles as “disputed by third party fact-checkers”, show fewer potentially false articles in users’ news feeds, and help users avoid accidentally sharing false articles by notifying them that a story is “disputed by third parties” before they share it.\textsuperscript{178} Further, on Twitter, the blue verified badge lets people know that an account of public interest is authentic.\textsuperscript{179}

Even if the distribution of false information was a well-known phenomenon in Turtonia,\textsuperscript{180} Scoops did nothing to root it out on its platform. Additionally, as the Scoops CEO


\textsuperscript{179}‘About verified accounts’ (Twitter) <https://support.twitter.com/groups/31-twitter-basics/topics/111-features/articles/119135-about-verified-accounts> accessed: 22 November 2017

\textsuperscript{180}Compromis, paras 5.1-5.3, 11.1
admitted,\textsuperscript{181} the “influencer score” created an incentive for posters to share, among others, the latest gossips.

In summary, Respondent states that Scoops knowingly communicated false information as even after obtaining knowledge of the manifestly unlawful content, it failed to remove false information expeditiously.

\hspace{1cm} \textit{b) The interference is proportionate to the legitimate aim pursued}

As stated above,\textsuperscript{182} the interference must be the least intrusive instrument among those that might achieve their protective function.\textsuperscript{183}

In violation of the IA, Scoops was sentenced to a fine equivalent of 100,000 USD.\textsuperscript{184} Respondent submits that the fine was proportionate for the following reasons:

\hspace{1cm} a) The fine reflected the size of the company\textsuperscript{185} and its economic capacity,\textsuperscript{186}

\hspace{1cm} b) The amount of the fine would not affect Scoops operation radically,\textsuperscript{187}

\textsuperscript{181} Compromis, para 5.3

\textsuperscript{182} Arguments, 2. 3


\textsuperscript{184} Compromis, para 13.1 2

\textsuperscript{185} Arguments, 2.3

\textsuperscript{186} Compromis, para 5.1

\textsuperscript{187} Delfi AS v Estonia App no 64569/09 (ECtHR, 16 June 2015) [161]
c) The Court took the international practice\textsuperscript{188} into consideration, moreover, it applied less severe consequences.\textsuperscript{189}
IX. **PRAYER FOR RELIEF**

For the foregoing reasons, the Federal Republic of Turtonia respectfully requests this Honourable Court to adjudge and declare the following:

1. Turtonia’s prosecution against Peaps under the IA did not violate his right to Freedom of Expression according to Article 19 of ICCPR.

2. Turtonia’s prosecution against Scoops under the IA did not violate its’ right to Freedom of Expression according to Article 19 of ICCPR.

3. Turtonia’s prosecution against Peaps under the ODPA did not violate his right to Freedom of Expression according to Article 19 of ICCPR.

4. Turtonia’s prosecution against Scoops under the ODPA did not violate its’ right to Freedom of Expression according to Article 19 of ICCPR.

On behalf of Federal Republic of Turtonia,

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Agents for the Respondent