In the Supreme Court of The Gambia
Civil Suit No. 5/2005

BETWEEN:

GAMBIA PRESS UNION
First Plaintiff

DEYDA HYDARA
Second Plaintiff

ALAGI YORRO JALLOW
Third Plaintiff

DEMBA ALI JAWO
Fourth Plaintiff

SWAEBOU CONATEH
Fifth Plaintiff

and

NATIONAL MEDIA COMMISSION
First Defendant

SECRETARY OF STATE FOR COMMUNICATION, INFORMATION AND TECHNOLOGY
Second Defendant

ATTORNEY GENERAL
Third Defendant

Written Comments Submitted by ARTICLE 19, Global Campaign For Free Expression and the Open Society Institute Justice Initiative regarding the

NATIONAL MEDIA COMMISSION ACT, 2002

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1. Introduction

This Brief assesses sections 8(b)-(e), 13, 15, 16, 29, 30, 33 and 34 of the National Media Commission Act, 2002, as amended by the National Media Commission (Amendment) Act, 2003 (Act) in light of international and constitutional guarantees of freedom of expression. These sections subject media practitioners and organisations in The Gambia to a system of registration, and content and practice regulation under the supervision of a body that lacks independence from Government. The analysis is based on a survey of international and comparative constitutional law and practice – including decisions and statements of international bodies and national appellate courts, as well as practice in national jurisdictions – relevant to the questions of media regulation presented by the Act.

It is our submission that these sections, and indeed the whole system of media regulation envisaged by the Act, breach international and constitutional guarantees of freedom of expression. They fail to implement constitutional guarantees designed to promote the impartiality, independence and professionalism of the media. They grant extensive regulatory powers to a National Media Commission that is clearly subject to government control. They impose a system of registration and licensing on both media practitioners and media organisations that places substantive restrictions on who may practise journalism and on the establishment of media outlets. They provide for harsh sanctions, including being banned from the practise of journalism for 12 months or from operating as a media outlet for 18 months, for breach of a code of conduct set by the Commission and Secretary of State. They require journalists to disclose their confidential sources of information whenever the Government alleges that the information was provided without authorisation. And they impose unacceptable restrictions on the content of what may be published or broadcast.

It is submitted that, taken as a whole, the regulatory system envisioned by the Act, and the impugned sections in particular, is unconstitutional as well as contrary to international law.

2. Brief Statement of Law

2.1 The Gambian Constitution

The 1997 Constitution of the Republic of The Gambia includes a number of provisions which are relevant to this application. Section 17(1) provides for the responsibility of the Government to respect and uphold the rights and freedoms guaranteed, as follows:

> The fundamental human rights and freedoms enshrined in this Chapter [Chapter IV: Protection of Fundamental Rights and Freedoms] shall be respected and upheld by all organs of the Executive and its agencies, the Legislature and, where applicable to them, by all natural and legal persons in The Gambia, and shall be enforceable by the Courts in accordance with this Constitution.

Section 25, part of Chapter IV, protects, among other things, the right to freedom of expression, providing, in part:

> (1) Every person shall have the right to -
>
> (a) freedom of speech and expression, which shall include freedom of the press and other media;
>
> …
>
> (4) The freedoms referred to in subsections (1) and (2) shall be exercised subject to the law of The Gambia in so far as that law imposes reasonable restrictions on the exercise of the rights and freedoms thereby conferred, which are necessary in a democratic society and are required in the interests of the sovereignty and integrity of The Gambia, national security, public order, decency or morality, or in relation to contempt of court.

Section 25 thus stipulates that freedom of expression and of the press are guaranteed, and that these rights may be restricted by law, but only where the restriction is reasonable and necessary in a democratic society. Furthermore, the only aims which a restriction may serve are those listed, namely national security (including the sovereignty and integrity of the country), public order, decency or morality, or the administration of justice (contempt of court).

More detailed and specific provisions relating to the media are found in sections 207-210, part of Chapter XIX of the Constitution, entitled The Media. These provide, in relevant part:

> 207(1) The freedom and independence of the press and other information media are hereby guaranteed.
>
> (2) An Act of the National Assembly may make provisions for the establishment of the press and other information media.
>
> (3) The press and other information media shall at all times be free to uphold the principles, provisions and objectives of this Constitution, and the responsibility and accountability of the Government to the people of The Gambia.
>
> 209 The provisions of sections 207 and 208 are subject to laws which are reasonably required in a democratic society in the interest of national security, public order, public morality and for the purpose of protecting the reputations, rights and freedoms of others.
>
> 210 An Act of the National Assembly shall within one year of the coming into force of this Constitution make provision for the establishment of a National Media Commission to establish a code of conduct for the media of mass communication and information and to

ensure the impartiality, independence and professionalism of the media which is necessary in a democratic society.

Both section 25 and section 207(1) of the Constitution explicitly guarantee media freedom and, to the extent that they differ, the relationship between them is not clear. The test for restrictions found in section 25(4) is a little bit different from that found at section 209. The former refers to laws that are reasonable and necessary in a democratic society, while the latter uses the phrase "reasonably required in a democratic society", but this is probably of little consequence. The lists of grounds for restricting this right also differ slightly. Section 207(1) guarantees not only the freedom but also the independence of the media, an important addition.

2.2 The National Media Commission Act

A National Media Commission Bill was first published in 1999. It was met with massive protests from within and outside The Gambia and was revised and reissued in 2001. It was passed into law by the National Assembly in 2002 and received Presidential assent the same year as the National Media Commission Act No.7 of 2002. The original Act was amended by the National Media Commission (Amendment) Act No. 13 of 2003.

The National Media Commission Act, 2002, as amended by the National Media Commission (Amendment) Act, 2003, provides, as its title suggests, for a National Media Commission. In terms of scope, it defines media as 'all forms of mass communication', while a media organisation is defined as 'an organisation engaged in transmitting news and information to the public and includes a media house, association, club and company engaged in the business of mass communication' (section 2). These would appear to be very broad definitions, encompassing the Internet and even NGOs and private bodies which engage in publication activities.

Part II of the Act establishes the National Media Commission as a body corporate, composed of eleven members. The Commission was inaugurated in 2003.

The main income of the Commission appears to be a direct appropriation by the National Assembly, although it may also receive other types of funding (section 10).

The Act lists generally a range of functions for the Commission at section 8, including:

- ensuring the impartiality, professionalism and independence of the media;
- maintaining a register of media practitioners and organisations – newspapers, magazines, journals and broadcasters – in accordance with the Constitution;
- providing for a code of conduct for media practitioners; and
- setting standards regarding the content and quality of media output and promoting the highest standards in the media.

Part VI of the Act, consisting of section 13, provides for registration of both media practitioners and media organisations, as well as for the allocation of licences to those who are registered. Registration lasts for one year and may be renewed. Failure to register constitutes an offence subject to a fine of not less that 5000 dalasis, and failure to pay the fine within 30 days will result in suspension of the licence and registration.

The Act, as amended, also provides for complaints regarding the media, including by any person aggrieved by anything published or broadcast, or done in respect of that person by a media practitioner or organisation (section 16). Section 29 provides that where a court is satisfied that anything published or broadcast is not in conformity with the code of conduct, or the conduct of a media practitioner is either not in accordance with the code of conduct or 'blameworthy', it may order one of a range of sanctions.

Section 15 of the Act provides for mandatory disclosure of confidential sources of information in certain contexts, and for the imposition of the section 29 penalties in case of a refusal to disclose. Section 33 of Act makes it an offence, punishable by a fine of not less than 5000 dalasis, to use derogatory or insulting language, while section 34 makes it a fine, with the same sanction, to publish material which is false in any material respect.

Pursuant to section 40, the Secretary of State is empowered to make regulations providing for a Code of Conduct for media practitioners and organisations, as well as for the fees to be paid for registration.

3. Freedom of Expression

This part of the brief describes the international standards relating to the guarantee of freedom of expression, as well as the constitutional and international law tests for restrictions on this fundamental right.

3.1 International Guarantees

Article 19 of the *Universal Declaration on Human Rights* (UDHR),[1] a United Nations General Assembly resolution, guarantees the right to freedom of expression in the following terms:

> Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

The UDHR is not directly binding on States but parts of it, including Article 19, are widely regarded as having acquired legal force as customary international law since its adoption in 1948.[2] States are under a duty, arising from the nature of treaty obligations and from customary international law, to bring their internal law into conformity with these obligations.[3]

The Gambia's international legal obligations to respect freedom of expression are also spelt out in Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR),[4] which The Gambia ratified in 1979. Article 19 of the ICCPR states:

> (1) Everyone shall have the right to hold opinions without interference.
> (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

Article 2(2) of the ICCPR requires States Parties, where they have not already done so, to "adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the present Covenant."

The Gambia is also a State Party to the *African Charter on Human and Peoples' Rights* (ACHPR),[5] which guarantees freedom of expression at Article 9. Article 1 of the ACHPR imposes an obligation on State Parties to recognize the rights contained in the Charter and to take positive steps to give effect to them.

Both the European *Convention for the Protection of Human Rights and Fundamental Freedoms* (the ECHR)[6] and the *American Convention on Human Rights* (ACHR)[7] also guarantee freedom

[1] UN General Assembly Resolution 217A(III), adopted 10 December 1948.
[2] See, for example, *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd Circuit).
[3] See I. Brownlie, *Principles of Public International Law*, 5th Ed. (Oxford: Oxford University Press, 1998), p. 35.
[4] UN General Assembly Resolution 2200A(XXI), 16 December 1966, in force 23 March 1976.
[5] Adopted 26 June 1981, in force 21 October 1986.
[6] E.T.S. No. 5, in force 3 September 1953.
[7] Adopted 22 November 1969, in force 18 July 1978.

of expression.[8] These treaties, and their interpretation by authoritative courts, are not formally legally binding on The Gambia, and the same is true of declarations and other authoritative statements adopted by international bodies, sometimes referred to as 'soft law'. However, given the fundamental importance of human rights, and the relatively brief guarantees the Constitution contains of these rights, it is of the utmost importance that courts in The Gambia take great care when elaborating the meaning of these rights in specific contexts.

Jurisprudence from international judicial bodies in other regions of the world and other non-binding standard-setting, such as authoritative international declarations and statements, illustrate the manner in which leading experts around the world have interpreted international and constitutional guarantees of freedom of expression. As such, they are good evidence of generally accepted understandings of the scope and nature of the guarantee of freedom of expression,[9] binding on all countries. Even if not formally binding, these documents provide valuable insight into possible interpretations of the scope of the Constitutional guarantee of freedom of expression.

It may be noted that common law courts, including the courts of The Gambia, frequently rely on the decisions of other common law courts as a means of interpreting both statute and the common law. These other decisions have no formal legal status in The Gambia, outside of some UK cases;[10] rather, they are relied on as an aid to interpretation and elaboration of the law. In the area of human rights, it is appropriate for common law courts also to take cognisance of accepted international standards, relying on them in an analogous manner to decisions by other national courts, namely as a source of inspiration rather than as binding law.

This has been affirmed by leading courts in countries around the world. For example, Lord Wilberforce, writing as a member of the Privy Council, has noted that international human rights law is a relevant guide to interpreting domestic constitutional provisions.[11] Similarly, the High Court of Australia has noted: "[I]nternational law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights."[12]

3.2 The Fundamental Nature of Freedom of Expression

The overriding importance of freedom of expression and of freedom of information as a human right has been widely recognized, both for its own sake and as an essential underpinning of democracy and a means of safeguarding other human rights. At its very first session, in 1946, the United Nations General Assembly declared:

> Freedom of expression is a fundamental human right and…the touchstone of all the freedoms to which the United Nations is consecrated.[13]

[8] Articles 10 and 13 respectively.
[9] Note 3, p. 12.
[10] As a result of the Law of England Application Act, Cap 5 Laws of the Gambia 1990.
[11] *Minister of Home Affairs v. Fisher*, (1980) A.C. 319, pp.328-9.
[12] *Mabo v. Queensland (No.2)*, (1992) 175 CLR 1, para.42.
[13] Resolution 59(1), 14 December 1946.

These views have been reiterated by all three regional judicial bodies dealing with human rights. The African Commission on Human and Peoples' Rights noted, in respect of Article 9 of the ACHPR:

> This Article reflects the fact that freedom of expression is a basic human right, vital to an individual's personal development, his political consciousness, and participation in the conduct of the public affairs of his country.[14]

The European Court of Human Rights (ECHR) has also recognized the key role of freedom of expression:

> [F]reedom 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…it is applicable not only to "information" or "ideas" that are favourably received…but also to those which offend, shock or disturb the State or any other sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society."[15]

Similarly, the Inter-American Court of Human Rights, in a case that challenged the constitutionality of a mandatory licensing system for journalists, discussed in more detail below, stated:

> Freedom of expression is a cornerstone upon which the very existence of a democratic society rests.[16]

These views have been reiterated by numerous national courts around the world. The Zimbabwean Supreme Court, for example, has stated:

> This Court has held that s.20(1) of the Constitution [guaranteeing freedom of expression] is to be given a benevolent and purposive interpretation. It has repeatedly declared the importance of freedom of expression to the Zimbabwean democracy…Furthermore, what has been emphasized is that freedom of expression has four broad special objectives to serve: (i) it helps an individual obtain self-fulfilment; (ii) it assists in the discovery of truth, and in promoting political and social participation; (iii) it strengthens the capacity of an individual to participate in decision-making; and, (iv) it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change.[17]

3.3 Restrictions on Freedom of Expression

3.3.1 The Three-Part Test

Every system of international and domestic rights recognizes that freedom of expression is not absolute. Some carefully drawn and limited restrictions on this right may be necessary to take into account the values of individual dignity and democracy. However, under international

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[14] *Media Rights Agenda and Constitutional Rights Project v. Nigeria*, 21 October 1998, Communication Nos. 105/93, 128/94, 130/94 and 152/96, para.52.
[15] *Handyside v. United Kingdom*, 7 December 1976, 1 EHRR 737, para.49.
[16] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No.5, para.70.
[17] *Chavanduka & Choto v. Minister of Home Affairs and Another*, Judgment No.S.C. 36/2000, 22 May 2000, p. 9.

human rights law, national laws that restrict freedom of expression must comply with the provisions of Article 19(3) of the ICCPR, which states:

> The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
> (a) For respect of the rights and reputations of others;
> (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Restrictions must meet a strict three-part test.[18] First, the restriction must be provided by law. Second, the restriction must pursue one of the legitimate aims listed in Article 19(3); this list is exclusive. Third, the restriction must be necessary to secure that aim. International jurisprudence makes it clear that this is a strict test, presenting a high standard that any restriction must overcome.[19]

National constitutions, like international law, normally permit restrictions on freedom of expression only if they meet a strict test. Like many constitutions, and like the test for restrictions under international law, the Constitution of the Republic of The Gambia permits only restrictions set out in law, and which pursue one of a limited list of aims. As noted above, the two guarantees of freedom of the media in the Constitution of The Gambia variously recognise the following legitimate aims: national security (including the sovereignty and integrity of the country), public order, decency or morality, the administration of justice (contempt of court), and the reputations, rights and freedoms of others. These aims are fully consistent with the list of legitimate aims recognised under international law, for example those listed in Article 19 of the ICCPR.

Similarly, the Constitution of The Gambia only allows restrictions which are either 'reasonable' and 'necessary in a democratic society', or which are 'reasonably required in a democratic society'.[20] This is clearly very similar to the necessity part of the test for restrictions under international law. In sum, the Constitution of The Gambia essentially prescribes the same three-part test for restrictions on freedom of expression as is found under international law and many other national constitutions.

3.3.2 Provided by Law

International law and most constitutions, including the Constitution of The Gambia, permit only those restrictions on fundamental rights that are set out in law. This implies not only that the restriction is based in law, but also that the relevant law meets certain standards of clarity and accessibility, sometimes referred to as the "void for vagueness" doctrine. The European Court of Human Rights has elaborated on the requirement of "prescribed by law" under the ECHR:

> [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 – if need be with appropriate advice

[18] This test has been affirmed by the UN Human Rights Committee. See *Mukong v. Cameroon*, 21 July 1994, Communication No.458/1991, para.9.7.
[19] See, for example, *Thorgeirson v. Iceland,* 25 June 1992, EHRR 843, para.63 (European Court of Human Rights).
[20] See, respectively, sections 25(4) and 209 of the Constitution of The Gambia.

> – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given situation may entail.[21]

Vague provisions are susceptible of wide interpretation by both authorities and those subject to the law. As a result, they are an invitation to abuse and authorities may seek to apply them in situations that bear no relationship to the original purpose of the law or to the legitimate aim sought to be achieved. Vague provisions also fail to provide sufficient notice of exactly what conduct is prohibited or prescribed. As a result, they exert an unacceptable "chilling effect" on freedom of expression as individuals stay well clear of the potential zone of application in order to avoid censure.

Courts in many jurisdictions have emphasised the chilling effects that vague and overbroad provisions have on freedom of expression. The US Supreme Court, for example, has cautioned:

> The constitutional guarantees of freedom of speech forbid the States to punish the use of words or language not within "narrowly limited classes of speech." … [Statutes] must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.[22]

The requirement of "provided by law" also prohibits laws that grant authorities excessively broad discretionary powers to limit expression. In *Re Ontario Film and Video Appreciation Society v. Ontario Board of Censors*, the Ontario High Court considered a law granting the Board of Censors power to censor any film it did not approve of. In striking down the law, the Court noted that the evils of vagueness extend to situations in which unfettered discretion is granted to public authorities responsible for enforcing the law:

> It is accepted that law cannot be vague, undefined, and totally discretionary; it must be ascertainable and understandable. Any limits placed on the freedom of expression cannot be left to the whim of an official; such limits must be articulated with some precision or they cannot be considered to be law.[23]

The UN Human Rights Committee, the body of 18 independent experts appointed under the ICCPR to monitor compliance with that treaty, has also expressed concern about excessive discretion, specifically in the context of broadcast licensing:

> 21. The Committee expresses its concern … about the functions of the National Communications Agency, which is attached to the Ministry of Justice and has wholly discretionary power to grant or deny licences to radio and television broadcasters.[24]

3.3.3 Legitimate Aim

The ICCPR provides a full list of the aims that may justify a restriction on freedom of expression. It is quite clear from both the wording of Article 19 of the ICCPR and the views of the UN

[21] *The Sunday Times v. United Kingdom*, 26 April 1979, 2 EHRR 24, para.49.
[22] *Gooding v. Wilson*, 405 U.S. 518 (1972), p. 522.
[23] (1983) 31 O.R. (2d) 583 (Ont. H.C.), p. 592.
[24] Concluding Observations on Kyrgyzstan's Inital Third Report, 24 July 2000, CCPR/CO/69/KGZ, para. 21.

Human Rights Committee that restrictions on freedom of expression that do not serve one of the legitimate aims listed in paragraph 19(3) are not valid.[25] This is also the position under the ECHR and the ACHR.[26] Many national constitutions, including the Constitution of The Gambia, mirror this approach, providing a full list of all aims that may justify a restriction on freedom of expression.[27]

It is not sufficient, to satisfy this second part of the test for restrictions on freedom of expression, that the restriction in question has a merely incidental effect on the legitimate aim. The restriction must be primarily directed at that aim, as the Indian Supreme Court has noted:

> So long as the possibility [of a restriction] being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly unconstitutional and void.[28]

In assessing the legitimate aim, courts go beyond the general aim the law serves and look at its specific objectives. As the Canadian Supreme Court has noted:

> Justification under s.1 requires more than the general goal of protection from harm common to all criminal legislation; it requires a specific purpose so pressing and substantial as to be capable of overriding the Charter's guarantees.[29]

In assessing whether a restriction on freedom of expression addresses a legitimate aim, regard must be had to both its purpose and its effect. Where the original purpose was to achieve an aim other than one of those listed, the restriction cannot be upheld:

> [B]oth purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation.[30]

3.3.4 Reasonably Required in a Democratic Society

Different constitutions and treaties use different terms to describe the third part of the test for restrictions on freedom of expression; treaties normally require the restrictions to be 'necessary' while national constitutions use a range of terms including 'reasonably justifiable in a democratic society', 'reasonably required in a democratic society' and various other related combinations. As noted above, the relevant provisions of the Constitution of The Gambia require restrictions either to be 'reasonable' and 'necessary in a democratic society', or to be 'reasonably required in a democratic society'.[31]

Whether a legal instrument requires restrictions to be "necessary" or "reasonably required in a democratic society", or posits some other standard, there is nonetheless a strong thread of commonality running through the jurisprudence regarding the interpretation of this requirement.

The European Court has noted that necessity involves an analysis of whether:

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[25] See *Mukong v. Cameroon,* note 18, para. 9.7.
[26] The African Charter takes a different approach, simply protecting freedom of expression, "within the law."
[27] See sections 25(4) and 209 of the Constitution of The Gambia.
[28] *Thappar v. State of Madras*, (1950) SCR 594, p.603.
[29] *R. v. Zundel*, (1992) 2 SCR 731, p.733.
[30] *R. v. Big M Drug Mart Ltd.*, (1985) 1 SCR 295, p.331 (Supreme Court of Canada).
[31] See, respectively, sections 25(4) and 209 of the Constitution of The Gambia.

> [There is a] "pressing social need" [whether] the inference at issue was "proportionate to the legitimate aim pursued" and whether the reasons adduced…to justify it are "relevant and sufficient."[32]

This presents a high standard to be overcome by the State seeking to justify the restriction, apparent from the following quotation, cited repeatedly by the European Court:

> Freedom of expression, as enshrined in Article 10, is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.[33]

This closely resembles tests developed by national courts. In 1986, for example, the Canadian Supreme Court set out what has come to be known as the "Oakes Test", accepted as the standard since that time:

> To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": *R. v. Big M Drug Mart Ltd., supra*, at p.352. The standard must be high…It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial…. Second…the party invoking [the limitation] must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": *R. v. Big M Drug Mart Ltd., supra*, at p.352…There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair, or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: *R. v. Big M Drug Mart Ltd., supra*, at p.352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance."[34]

This test has been followed in substance in a number of other jurisdictions, including Zimbabwe.[35]

Both approaches outlined above are similar. First, pursuant to the Oakes test, restrictions must be rationally connected to the objective they seek to promote, in the sense that they are carefully designed to achieve that objective and that they are not arbitrary or unfair. This is analogous to the international requirement of relevant reasons for a restriction. Second, the restriction must impair the right as little as possible. This is analogous to the international requirement of sufficient reasons for a restriction. Third, the restriction must be proportionate to the legitimate aim, a requirement also found in international law. The proportionality part of the test involves comparing two considerations, namely the likely effect of the restriction on freedom of expression and the importance of the goal or legitimate aim which is sought to be protected.

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[32] See *Lingens v. Austria*, 8 July 1986, EHRR 407, paras. 39-40.
[33] See, for example, *Thorgeirson v. Iceland*, note 19, para.63.
[34] *R. v. Oakes* (1986), 1 SCR 103, pp.138-139.
[35] See, for example, *Nyambirai v. National Social Security Authority and Anor* (1995), (9) BCLR 1221 (SC), p.1231.

4. Issues

The regulatory system for media practitioners and media organisations created by the contested sections of the National Media Commission Act represents a substantial limitation on freedom of expression. This Brief assesses that limitation in light of relevant international and comparative constitutional law, concluding that the provisions pertaining to the licensing system go beyond the scope of legitimate restrictions on freedom of expression permitted by the Constitution of The Gambia or by international law.

Specifically, this Brief addresses the following issues:

1. Does the National Media Commission Act implement section 210 of the Constitution?
2. Can the lack of independence of the National Media Commission, which has extensive regulatory powers, including over licensing, be justified as a legitimate restriction on freedom of expression?
3. Does the registration regime – for both media practitioners and media organisations – pursue a constitutionally recognised legitimate aim and is it reasonably required in a democratic society?
4. Is the code of conduct provided for by the Act consistent with that provided for under section 210 of the Constitution and can it, along with the harsh sanctions it provides for, be justified as a restriction on freedom of expression?
5. Is the obligation in section 15 of the Act for media practitioners and media organisations to divulge their confidential sources of information justified as a restriction on freedom of expression?
6. Is section 33 of the Act, prohibiting the use of derogatory language, a justifiable restriction on freedom of expression?
7. Is the prohibition on false publication found in section 34 of the Act provided by law, does it pursue a legitimate aim and is it reasonably required in a democratic society?

5. Section 210 Critique

Section 210 of the Constitution of the Republic of The Gambia provides for the establishment of a National Media Commission, with a mandate "to establish a code of conduct for the media of mass communication and information" and "to ensure the impartiality, independence and professionalism of the media".

This part of the brief argues that the National Media Commission Act fails to satisfy the Government's obligations pursuant to section 210 of the Constitution and that, as a result, the defendants cannot rely on section 210 as justification for the Act.

We note that the Government, in implementing section 210 of the Constitution, must do so in a manner which respects the right to freedom of expression and of the media, as guaranteed in sections 25 and 207. That is to say, section 210 does not give free rein to the Government to establish the Commission or to provide for a code of conduct in any way it pleases. Rather, section 210 must be interpreted and applied consistently with the other provisions of the Constitution. It is perfectly possible to do this but, as we argue below, we submit that the Government has failed and has, instead, established a Commission and code of conduct regime that breach the right to freedom of expression.

We also note, for the sake of clarity, that section 210 does not purport to establish new grounds for restricting the right to freedom of expression. In particular, it does not provide for professionalism to be an additional 'legitimate aim' upon which restrictions on freedom of expression may be justified. Rather, as is quite clear from the wording, promoting professionalism, and impartiality and independence, are duties for the National Media Commission.

It is submitted that the National Media Commission Act fails in important respects to meet the constitutional prescriptions of section 210. It may be noted that section 210 requires the National Assembly to pass an Act establishing the Commission within one year of the coming into force of the Constitution. It is clear that this obligation has not, formally, been honoured, but this may be regarded as a technical breach and it is not suggested that, on this basis alone, the National Media Commission Act fails to meet the constitutional requirements of section 210.

Two far more serious considerations are relevant here. First, section 210 refers to a "code of conduct for the media of mass communication and information". The Act, however, provides for a "Code of Conduct for media practitioners", as well as for the Commission to set standards for the media.

The distinction in this regard between media organisations and media practitioners is a very important one, both in itself and in terms of human rights implications. In both law and practice, systems of media regulation almost always carefully distinguish between rules which are applicable to media organisations and those which are applicable to individual media practitioners. Different rules are applied to these two sets of actors. In particular, very few democratic countries seek to impose a registration requirement, or code of conduct or other

professional rules, on media practitioners, whereas it is common, at least in the broadcast sector, to impose a licensing regime and to enforce codes of conduct.

The same distinction is found in human rights law. It is widely agreed that any attempt to impose a code of conduct or practice on media practitioners would breach the right to freedom of expression, whereas a code of conduct for media organisations may pass muster as a restriction on freedom of expression, depending on the circumstances. This point is elaborated in more detail below.

It is submitted that the proper interpretation of section 210 is that it mandates a code of conduct only for media organisations. In the first place, the language of section 210 clearly supports this conclusion. It refers to the media of mass communication, not to media practitioners. Secondly, there are obvious reasons to prefer an interpretation of the Constitution which is in accordance with international human rights norms, including the international legal obligation on The Gambia to respect these norms. As noted above, the Privy Council has held that international human rights law is a relevant guide to interpreting domestic constitutional provisions.[36]

The second respect in which it is submitted that the National Media Commission Act fails to meet the conditions of section 210 is that it fails to ensure "the impartiality, independence and professionalism" of the media. In particular, the Act signally fails to ensure the independence of the media. It is true that the Act does provide that this is one of the functions of the Commission.[37] However, it fails to provide for any concrete measures to this end. A number of possible measures readily come to mind. The Act could include a statement guaranteeing freedom of expression, and specifically media independence. The Act could make it a crime, or a matter of civil liability, to undermine the independence of a media outlet. The Commission could be given a range of powers in this area, for example to formally examine allegations of interference with independence, to publish the names of persons found to be guilty of this, to report to the National Assembly on this issue, and so on. In fact, the Act includes none of these measures or, indeed, any single measure to promote independence.

This may be contrasted with the measures ostensibly provided to promote the goal of professionalism. To this end, specifically, the Commission is tasked with setting standards (section 8(c)), any person who is aggrieved by any media output may bring a civil action under the Act, as may the Commission in case of a breach of the code of conduct (section 16), a range of penalties, some quite severe, are provided for breach of the code of conduct (section 29), the Commission may publish the name of any media practitioner or organisation which has been reprimanded (section 30), and various offences relating to content are established (sections 33 and 34). The Act even provides for detailed rules regarding assumption of liability by managers, partners and so on, and in case a practitioner and/or media organisation is unable to pay a fine (sections 35 to 37).

It is submitted that the real reason for the radical difference in the treatment these two constitutional objectives receive is that the Act is not designed to implement section 210 of the

[36] Note 11.
[37] Section 8(a).

Constitution. In fact, the Act is designed to control, or at least limit the independence of the media rather than to promote it.

The consequences of a failure of the Act to implement section 210 of the Constitution are twofold. First, the Government of The Gambia has failed to comply with its constitutional obligations. Second, the Government cannot hide behind section 210 when seeking to defend the National Media Commission Act, since that Act does not conform to the requirements of that section of the Constitution.

6. Independence of the National Media Commission

The National Media Commission Act provides for the appointment of the National Media Commission as a body corporate with 11 members. The original Act provided, at section 4, for these to be as follows:

- a judge of the high court appointed by the Chief Justice, who shall be the Chairperson;
- one representative of the youth;
- one representative each of the Gambia Press Union, the Gambia Teacher's Union, the Supreme Islamic Council, the Gambia Christian Council, the Women's Bureau, the National Assembly and the Gambia Bar Association;
- the Director General of the Gambia Radio and Television Services, or his or her nominee; and
- the Executive Secretary of the Commission (appointed by the Chairperson, in consultation with the Secretary of State).

A new section 4(1) and (1A) has made the following changes to the original appointments scheme:

- the representative of the Gambia Press Union has been replaced by a member of the Press;
- the representative of the Gambia Bar Association has been replaced by a member of that association, nominated by the General Legal Council;
- the Executive Secretary has been replaced by a member of the public; and

instead of appointing representatives, the various bodies, apart from the Chief Justice, now nominate one of their members, and the Secretary of State appoints them.

The term of office is three years, and members may be re-appointed for a second term (section 4(3)). Pursuant to section 9(1), the Chairperson appoints the Executive Secretary. The Act says very little else about appointments, tenure and so on.

6.1 The Need for Independence

It is well-established under international law that bodies which exercise regulatory powers over the media must be independent, in the sense that they are protected against political or commercial interference. This principle finds support in statements and decisions from a number of authoritative international and national bodies and courts. Many of these statements are directed at broadcasting and telecommunications. This is the case for a number of reasons. First, regulatory bodies governing journalists or the print media are relatively rare and, as a result, have attracted little judicial attention. Second, where such regulatory bodies have been considered, the focus has been on their overall invalidity, not their lack of independence. Finally, where bodies have made positive standard-setting statements on this issue, they have restricted them to broadcasting and telecommunications because they do not consider regulation of journalists or of the print media to be legitimate.

It is clear, however, that the same underlying principles apply. The reason that regulatory bodies for broadcasting need to be independent, as is clear from some of the statements below, is that otherwise there is a real risk of political interference in their work. Such interference breaches the right to freedom of expression, for example by allowing for politically biased decision-making

about matters such as licensing, application of a code of conduct, and so on. This risk applies with equal force to general media regulation as to specific regulation of the broadcast media.

Authoritative Statements

On a number of occasions in recent years, the Human Rights Committee has expressed concern about the lack of independence of regulatory authorities. In 1997, for example, the UN Human Rights Committee expressed concern about the licensing system for the press in Sudan:

> 18. The Committee is concerned at the system of licensing the press and other media, and the requirement to register the names and addresses of editors, journalists and printers. The Committee questions the independence of the National Press and Publication Council. Therefore:
>
> > Current laws and decrees should be revised so as to remove all disproportionate limitations on the media, which have the effect of jeopardizing freedom of expression itself.[38]

The Committee made a clear statement on the need for independent broadcast authorities in its Concluding Observations on Lebanon's Second Periodic Report, where it stated:

> 355. The Committee therefore recommends that the State party review and amend the Media Law of November 1994, as well as its implementing decree, with a view to bringing it into conformity with article 19 of the Covenant. It recommends that the State party establish an independent broadcasting licensing authority, with the power to examine broadcasting applications and to grant licences in accordance with reasonable and objective criteria.[39]

The UN Special Rapporteur on Freedom of Opinion and Expression has also stressed the need for independent regulation of broadcasting, stating:

> 15. The Special Rapporteur continues to receive allegations of bias in broadcasting which severely limits or seriously compromises the right to seek, receive and impart information. In this regard, the Special Rapporteur wishes to recall points made in previous reports.
>
> 16. There are several fundamental principles which, if promoted and respected, enhance the right to seek, receive and impart information. These principles are…laws governing the registration of media and the allocation of broadcasting frequencies must be clear and balanced; any regulatory mechanism, whether for electronic or print media, should be independent of all political parties and function at an arms-length relationship to Government….[40]

A Joint Declaration by the three specialised mandates for protection of freedom of expression – the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on

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[38] Concluding Observations on Sudan's Second Periodic Report, 19 November 1997, UN Doc. CCPR/C/79/Add.85, para. 18.

[39] Annual Report of the UN Human Rights Committee, 21 September 1997, UN Doc. A/52/40.

[40] Annual Report of the Special Rapporteur to the UN Commission on Human Rights, 29 January 1999, UN Doc. E/CN.4/1999/64. See also Annual Report of the Special Rapporteur to the UN Commission on Human Rights, 28 January 1998, UN Doc. E/CN.4/1998/40, para. 20, where the Special Rapporteur noted the need for independent regulatory frameworks for private broadcasters.

Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression – adopted in December 2003 – states:

> All public authorities which exercise formal regulatory powers over the media should be protected against interference, particularly of a political or economic nature, including by an appointments process for members which is transparent, allows for public input and is not controlled by any particular political party.[41]

The African Commission on Human and Peoples' Rights has recently adopted a *Declaration of Principles on Freedom of Expression in Africa*. Principle VII of this Declaration, entitled, "Regulatory Bodies for Broadcast and Telecommunications", echoes the same sentiment, stating:

> 1. Any public authority that exercises powers in the areas of broadcast or telecommunications regulation should be independent and adequately protected against interference, particularly of a political or economic nature.
> 2. The appointments process for members of a regulatory body should be open and transparent, involve the participation of civil society, and shall not be controlled by any particular political party.
> 3. Any public authority that exercises powers in the areas of broadcast or telecommunications should be formally accountable to the public through a multi-party body.[42]

The need for independent regulatory mechanisms for broadcasting finds strong support in a recommendation adopted recently by the Committee of Ministers of the Council of Europe, *Recommendation on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector*.[43] The Recommendation includes a set of Guidelines regarding broadcast regulatory bodies; the first three sections are of particular relevance here:

> 1. Member States should ensure the establishment and unimpeded functioning of regulatory authorities for the broadcasting sector by devising an appropriate legislative framework for this purpose. The rules and procedures governing or affecting the functioning of regulatory authorities should clearly affirm and protect their independence.
> 2. The duties and powers of regulatory authorities for the broadcasting sector, as well as the ways of making them accountable, the procedures for appointment of their members and the means of their funding should be clearly defined in law.
> 3. The rules governing regulatory authorities for the broadcasting sector, especially their membership, are a key element of their independence. Therefore, they should be defined so as to protect them against any interference, in particular by political forces or economic interests.

The Inter-American *Declaration of Principles on Freedom of Expression*, recently adopted by the Inter-American Commission on Human Rights, reiterates the need for independent regulation of broadcasting:

> 13. …the concession of radio and television broadcast frequencies, among others, with the intent to put pressure on and punish or reward and provide privileges to social communicators and communications media because of the opinions they express threaten

[41] Adopted 18 December 2003.
[42] Adopted at the 32nd Ordinary Session, in Banjul, The Gambia, from 17th to 23rd October 2002.
[43] Recommendation (2000) 23, adopted 20 December 2000.

> freedom of expression, and must be explicitly prohibited by law. The means of communication have the right to carry out their role in an independent manner….[44]

ARTICLE 19 has adopted a set of principles, drawn from international law and practice relating to broadcasting, entitled, *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation*.[45] Principle 10 reads, in part, as follows:

> All public bodies which exercise powers in the areas of broadcast and/or telecommunications regulation, including bodies which receive complaints from the public, should be protected against interference, particularly of a political or commercial nature. The legal status of these bodies should be clearly defined in law.

As noted above, although these statements are directed at broadcasting and telecommunications, the same underlying principles clearly apply to licensing of journalists or the print media.

Court Decisions

The African Commission on Human and Peoples' Rights has decided a case challenging, among other things, a law establishing a licensing system and registration board for the print media. Although the Commission noted that registration itself was not necessarily contrary to the guarantee of freedom of expression, it was concerned that the licensing body was not independent of government and had broad discretionary powers to refuse registration.[46]

International statements have been echoed by a number of national courts. *Athukorale and Others v. Attorney-General* involved a challenge before the Supreme Court of Sri Lanka to a Broadcasting Bill. One of the key issues was the lack of independence of the Broadcasting Authority. The Court held that the Bill was unconstitutional, among other things because the Broadcasting Authority was insufficiently independent, stating:

> While a regulatory authority is, for the reasons explained, necessary, it is imperative that such an authority should be independent…. The airways/frequencies, as we have seen, are universally regarded as public property. In this area, a government is a trustee for the public: its right and duty is to provide an independent statutory authority to safeguard the interests of the People in the exercise of their fundamental rights: No more and no less. Otherwise the freedoms of thought and speech, including the right to information, will be placed in jeopardy.[47]

The Broadcasting Authority in that case was made up of five members appointed by the Minister and six *ex officio* members, five of whom were secretaries to ministries or their representatives. The Minister also had various additional powers, including to remove members. The Sri Lankan Supreme Court noted:

> Having regard to the composition of the Board of Directors of the Authority, the lack of security of tenure in office either of the Chairman or of the appointed members, and having regard to the power of the Minister to give directions which the Authority is obliged to follow, the Authority…lacks the independence required of a body entrusted with the regulation of the

[44] Adopted at the 108th regular session, October 2000.
[45] (London: 2002).
[46] Note 14, para. 55.
[47] Supreme Court of Sri Lanka, 5 May 1997, S.D. No. 1/97-15/97, p. 22.

> electronic media which, it is acknowledged on all hands, is the most potent means of influencing thought.[48]

The Constitutional Courts of both Germany and Italy have stressed the need for broadcast regulators to be independent of Government. As far back as 1974, the Italian Constitutional Court held that radio and television should be under parliamentary, not executive, control to ensure independence.[49] Similarly, the German Constitutional Court held unconstitutional the establishment of a government-controlled national broadcaster as contrary to the guarantee of freedom of expression.[50] Later on, the same Court held that licensing criteria should be set out in the law, not left up to the licensing body, even if it were independent, so as to ensure fair and equal access to broadcasting.[51] The need to confine the discretion of the licensing body was further developed in later cases.[52]

In *New Patriotic Party v. Ghana Broadcasting Corp.*, the key issue was equitable access of political parties to the State broadcaster. However, the Supreme Court of Ghana noted that one role of the independent broadcast regulator was, "to breathe the air of independence into the state media to ensure that they are insulated from Governmental control."[53]

6.2 Application of these Standards to the Commission

Ideally, a body such as the Commission, responsible for the regulation of an important sector like the media, ought to have its independence expressly guaranteed in the Constitution. This is the case, for example, in South Africa[54] and Ghana.[55]

A clear statement of the means by which independence should be guaranteed in practice are found in Principle 10 of *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation*, as follows:

> Their [regulatory bodies'] institutional autonomy and independence should be guaranteed and protected by law, including in the following ways:
>
> - specifically and explicitly in the legislation which establishes the body and, if possible, also in the constitution;
> - by a clear legislative statement of overall broadcast policy, as well as of the powers and responsibilities of the regulatory body;
> - through the rules relating to membership;
> - by formal accountability to the public through a multi-party body; and
> - in funding arrangements.[56]

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[48] *Ibid.*, p. 23.
[49] Decision 225/1974 [1974] *Guir. cost.* 1775. The material in this Brief on French, German and Italian constitutional decisions is drawn from Barendt, E., *Broadcasting Law: A Comparative Survey* (1995, Clarendon Press, Oxford).
[50] *First Television* case, 12 BverfGE 205 (1961).
[51] *Third Television* case, 57 BverfGE 295 (1981).
[52] See *Fourth Television* case, 73 BverfGE 118 (1986) and *Sixth Television* case, 83 BverfGE 238 (1991).
[53] 30 November 1993, Writ No. 1/93, p. 13.
[54] See section 192 of the 1996 Constitution.
[55] See Section 172 of the 1992 Constitution.
[56] Note 45.

We will assess the National Media Commission Act in relationship to each of these conditions in turn.

There is no explicit guarantee in the Gambian National Media Commission Act of the independence of the Commission from commercial and/or political interference in the discharge of its functions. This may be contrasted with Ghana, for example, where the law specifically provides that the Commission shall be independent.[57]

The Act also fails to set out clearly the policies which are to guide the Commission in its work. This is an important way of constraining the discretion of the Commission in its activities, and of ensuring that it promotes broadcast policy, rather than, for example, particular political interests.[58]

The most important means of promoting independence is through the rules relating to membership. There are two key ways of doing this, one of which is to provide for different sectors of society to be represented on the Commission, the approach ostensibly chosen in the Act. However, the Act is seriously flawed in this respect, inasmuch as the Government in fact exercises a lot of direct control over the members.

Of the 11 members, 4 come from sources which are either governmental, government-controlled or official in nature, namely the Chief Justice, the National Assembly, the Director-General of the Radio and Television service and the Women's Bureau. Another 3 – a youth, a member of the press and a member of the public – are appointed by the Secretary of State, largely in his discretion. Furthermore, all but one of the members, the one appointed by the Chief Justice, are formally appointed by the Secretary of State, who could presumably use this power to block individual nominees.

The changes introduced by the 2003 amendments seriously exacerbated the situation. The original Act provided for representatives of the Gambia Press Union and the Bar Association, but the two bodies complained about the unconstitutionality of the Act and refused to participate in the system of appointments. The Gambia Press Union was of the opinion that if it subjected itself to the system set up under the Act, this would undermine its right to freedom of expression, as well as its constitutional challenge to that Act. Furthermore, in the original Act, nominees were appointed directly by the various bodies; now the Secretary of States formally appoints, implying discretion to refuse.

There are other serious flaws with the process of appointments under the Act. It does not provide that the appointments process be open and there is no possibility for wider public participation in the process. There is no requirement of expertise for members and no rules of incompatibility prohibiting certain categories of persons from being appointed as members. This effectively gives the leaders of the various groups wide latitude to nominate whoever best suits their whims.

South Africa presents a commendable example of an independent regulator with respect to the appointments process for members of the Independent Communications Authority of South

[57] National Media Commission Act, 1993, section 3.
[58] See the German cases noted above, notes 50-52.

Africa (ICASA).[59] The President exercises final power of appointment, but on the recommendation of the National Assembly, which in turn is required to allow for public participation in the nomination process; to ensure that the selection process is open and transparent; and to publish a shortlist of candidates prior to appointment. Members must represent a broad cross-section of the population of South Africa and individuals must be committed to fairness, freedom of expression and openness. Members must also be suitably qualified persons with experience and expertise in various relevant fields, such as broadcasting or telecommunications policy, engineering, marketing, journalism or law. Government employees, Parliamentarians, local legislators, employees or political party office holders or officers of movements/organizations of a political party nature, as well as certain ex-convicts, may not be members. There are strict rules on conflict of interest. The law also sets out clearly the narrow circumstances and procedure under which members can be removed from office.

None of these conditions is provided for in the Gambian Act. As a result, the process of appointments to the Commission fails to ensure the independence of this key media regulator.

In terms of accountability, the Commission appears to be directly accountable to the Secretary of State, rather than the National Assembly. The Act does not clearly set out the lines of accountability of the Commission, but it must submit audited accounts and other financial documents to the Secretary of State, who is only required to lay them before the National Assembly. This suggests that accountability is to the Secretary of State.

The funding of the Commission would appear to come mainly from monies appropriated to it by the National Assembly, although it may also receive funds from other sources. The Act fails to set any rules relating to such funding, although it is at least provided by a multi-party body.

In sum, it is submitted that the Act fails in very important ways to ensure the independence of the Commission. Given the extensive powers of the Commission over media practitioners and organisations, this is in clear breach of the right to freedom of expression as guaranteed by the Constitution.

6.3 Decision Making Processes

A key function of the Commission is the licensing of media practitioners and organisations. International standards require that decision making process about the overall granting of licences should be open and participatory. The *Declaration of Principles on Freedom of Expression in Africa* states, in this regard:

> The broadcast regulatory system shall encourage private and community broadcasting in accordance with the following principles:
>
> …
>
> - licensing processes shall be fair and transparent, and shall seek to promote diversity in broadcasting;…[60]

[59] See the Independent Broadcasting Authority Act, No. 153 of 1993, as amended.
[60] Note 42.

Open, fair decision-making processes are necessary to prevent corruption and bias by the Commission, and as a further safeguard for its independence.

The Act fails to provide for a transparent procedure for the various decision-making processes performed by the Commission. Once again, this may be contrasted with South Africa, where ICASA is subject to strict procedural rules, for example in relation licensing.[61]

[61] *Ibid.*, section 41.

7. Registration Regime

Section 13 of the Act sets out the registration regime for both media practitioners and media organisations. It prohibits anyone who is not registered from engaging in the dissemination of information and sets out time limits for registration. Individuals are required to register as practitioners and organisations are required both to register and to submit the names of all practitioners 'registered' with them. No details are provided as to what constitutes registration, what information must be submitted, whether registration can be refused and so on. However, pursuant to section 40 of the Act, the Secretary of State may make regulations regarding "the qualification and fees to be paid" for registration. This implies that substantive conditions, or 'qualifications', may be placed on registration.

The one exception to the duty to register is in favour of media practitioners employed by the Government, who are exempt from the duty to register. It would appear, however, that Government media outlets are required to register. Registration is valid for one year and may be renewed. Section 13 provides for the Commission to issue a licence to practitioners and organisations who have registered. It is not clear whether the Commission has the discretion to refuse to licence an individual or entity that has registered, but it would appear that it does not. Failure to register is an offence, subject to a fine of not less than 5000 dalasis. Failure to pay this fine will result in suspension of the registration and licence for 12 months for a practitioner and 18 months for an organisation.

This part of the brief argues that the registration system both fails to pursue a legitimate aim and cannot be justified as reasonably required in a democratic society. As such, it represents a breach of the right to freedom of expression.

We note at the outset that a system of registration is in no way necessary for implementation of the regime of standard-setting and complaints associated with the code of conduct. It is perfectly possible to apply a code either to individual media practitioners or to media organisations without additionally requiring them to register. In the absence of a registration regime, whether or not the individual or organisation in question was included within the ambit of the code becomes an initial question in relation to any complaint or *suo moto* enforcement of the code. Imposition of a registration system simply poses this question *ante*, as it were, and it would still need to be answered in any borderline case in which an individual or organisation alleged to be required to register had not, in fact, registered. The registration scheme established by the Act is thus not necessary to implement section 210 of the Constitution and cannot, as a result, claim the protection of that section.

As has been stressed from the outset, there is a great deal of difference between the registration/licensing of individuals and of organisations. It is well established under international law that mandatory registration/licensing of individuals is illegitimate and we also submit that the registration scheme established by the Act is unconstitutional. As noted above, it is our contention that section 210 of the Constitution applies to media organisations, not to media practitioners, and that registration of either practitioners or organisations is, in any case, unnecessary for implementation of section 210.

A registration/licensing requirement for media practitioners and organisations is clearly a restriction on freedom of expression. It poses a barrier to the practise of journalism and to the establishment of media organisations. The size of that barrier in the present case remains unclear, as the conditions for registration are not spelt out in the Act, but there is clearly a barrier. The registration/licensing scheme established by the Act must therefore be justified in accordance with the test for such restrictions under the Constitution. We will not argue that the registration scheme fails the provided by law part of the test for restrictions on freedom of expression, although it is possible to raise objections on that score.

7.1 Legitimate Aim

We submit that the registration scheme envisaged by section 13 of the Act serves none of the legitimate aims for restricting freedom of expression recognised by the Constitution. It might be suggested that registration is required to promote professionalism. Setting aside for the moment the problems with this contention – it is far from clear how registration would promote professionalism – there are two key problems with this as a goal. First, as has been noted above, promotion of professionalism is not, on its own, one of the legitimate aims listed in either the ICCPR or the Constitution of The Gambia.[62] The only legitimate aim to which promoting professionalism might relate is "protecting the reputations, rights and freedoms of others."[63] It may be noted that the rights of others already find protection in a number of restrictions on freedom of expression under Gambian law, including defamation law and constitutional guarantees of privacy. Furthermore, as noted above, in order to be justified, the aim of a restriction must have more than an incidental link to one of the enumerated legitimate aims. Promoting professionalism comprises far more than promoting the rights of others, and so the latter can at best be seen as an incidental goal of the contested provisions.

Second, and more serious, the system as envisaged goes far beyond what would be required simply to promote professionalism. To achieve this end, there is, in particular, no need for registration at all, no need to require practitioners and organisations to have their registration renewed annually, no need to vest what appears to be virtually unfettered discretion in the Secretary of State and Commission to set the conditions for registration, and no need to provide for highly intrusive sanctions for a failure to register, which include being banned from practising the profession or from operating for long periods of time.[64] In all these respects, the system may be contrasted with the self-regulatory system of the Gambia Press Union, which has the potential effectively to promote high professional standards among its members.

Taken as a whole, it is hard to avoid the conclusion that the real purpose of the registration system established by the Act is to provide the Government with a measure of control over the media and to prevent, or at least limit critical reporting. As a result, we submit that the registration system imposed by section 13 of the Act does not serve a legitimate aim as required by the Constitution of The Gambia and under international law.

[62] See the part of the Brief entitled Section 210 Critique.
[63] Section 209 of the Constitution.
[64] 12 months for practitioners and 18 months for organisations.

7.2 Reasonably Required in a Democratic Society

It is submitted that registration of media practitioners can never be justified as reasonably required in a democratic society and that any registration system that affords discretion to refuse registration, that is unduly onerous or that is excessively wide in scope, cannot be justified for media organisations.

7.2.1 Media Practitioners

A number of authoritative statements by international bodies, and by international and national courts, as well as the practice in other countries, clearly establish that the mandatory registration/licensing of media practitioners is contrary to the guarantee of freedom of expression.

Authoritative Statements

The Joint Declaration by the three specialised mandates for protection of freedom of expression, noted above, is very clear on the matter of registration and licensing of journalists, stating:

> - Individual journalists should not be required to be licensed or to register.
> - There should be no legal restrictions on who may practise journalism.[65]

Principle X of the *Declaration of Principles on Freedom of Expression in Africa*, entitled "Promoting Professionalism", states:

> 1. Media practitioners shall be free to organise themselves into unions and associations.
> 2. The right to express oneself through the media by practising journalism shall not be subject to undue legal restrictions.[66]

Within Europe, a *Declaration on the Freedom of Expression and Information* was adopted by the Committee of Ministers of the Council of Europe in 1982. Principle II states, in part, that the Member States:

> Declare that in the field of information and mass media the seek to achieve the following objectives:
> …
> b) absence of censorship or any arbitrary controls or constraints on participants in the information process….

Finally, the *Inter-American Declaration of Principles on Freedom of Expression* states, at Principle 6:

> Every person has the right to communicate his/her views by any means and in any form. Compulsory membership or the requirements of a university degree for the practice of journalism constitute unlawful restrictions of freedom of expression. Journalistic activities must be guided by ethical conduct, which should in no case be imposed by the State.[67]

[65] Note 41.
[66] Note 42.
[67] Approved by the Inter-American Commission on Human Rights during its 108 regular session, October 2000.

Authoritative statements have thus been made both globally and within the context of all three regional human rights systems clearly ruling out the licensing of individual media practitioners as an illegitimate restriction on the right to freedom of expression.

Court Decisions

The leading international decision dealing directly and comprehensively with the issue of mandatory registration/licensing of journalists is an advisory opinion decided by the Inter-American Court of Human Rights in 1985, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*.[68]

The case, which was referred to the Court by Costa Rica, addressed issues similar to those under consideration here. The law being assessed in that case required anyone who wished to practise journalism to belong to a professional association and imposed certain substantive conditions on membership.

The question considered by the Court was whether the ends sought to be achieved by the legislation "fall within those authorized by the [American Convention on Human Rights], that is, whether they are 'necessary to ensure: a) respect for the rights or reputations of others; or b) the protection of national security, public order, or public health or morals.'"[69]

The stated aims of the Costa Rican law – similar to the situation pertaining under the Gambian Act – included protecting the general welfare of society and promoting ethics and public accountability. The Costa Rican law also sought to promote general social welfare by guaranteeing the publication of objective and truthful information as required by codes of professional responsibility and ethics. The Court held that these were not legitimate aims for restricting freedom of expression, that the means employed were excessively restrictive and that the system was not, as a result, a justifiable restriction on freedom of expression.

Due to the similarity between this case and the one currently before this Court, it is worth quoting extensively from the decision of the Inter-American Court of Human Rights:

> 67. [Both general welfare and public order] can be used as much to affirm the rights of the individual against the exercise of governmental power as to justify the imposition of limitations on the exercise of those rights in the name of collective interests. In this respect, the Court wishes to emphasize that "public order" or "general welfare" may under no circumstances be invoked as a means of denying a right guaranteed by the Convention or to impair or deprive it of its true content. Those concepts, when they are invoked as a ground for limiting human rights, must be subjected to an interpretation that is strictly limited to the "just demands" of a "democratic" society, which takes account of the need to balance the competing interests involved and the need to preserve the object and purpose of the Convention.
>
> 71. …[J]ournalism is the primary and principal manifestation of freedom of expression and thought. For that reason, because it is linked with freedom of expression, which is an inherent right of each individual, journalism cannot be equated to a profession that is merely granting a service to the public through the application of some knowledge or training acquired in a university or through those who are enrolled in a certain professional "collegio."

[68] Note 16.
[69] *Ibid.*, para. 59.

> 72, The argument that a law on the compulsory licensing of journalists does not differ from similar legislation applicable to other professions does not take into account the basic problem that is presented with respect to the compatibility between such a law and the Convention. The problem results from the fact that Article 13 expressly protects freedom "to seek, receive, and impart information and ideas of all kinds... either orally, in writing, in print...." The profession of journalism -the thing journalists do- involves, precisely, the seeking, receiving and imparting of information. The practice of journalism consequently requires a person to engage in activities that define or embrace the freedom of expression which the Convention guarantees.
>
> 73. This is not true of the practice of law or medicine, for example. Unlike journalism, the practice of law and medicine -that is to say, the things that lawyers or physicians do- is not an activity specifically guaranteed by the Convention….
>
> 77. The argument that licensing is a way to guarantee society objective and truthful information by means of codes of professional responsibility and ethics, is based on considerations of general welfare. But, in truth, as has been shown, general welfare requires the greatest possible amount of information, and it is the full exercise of the right of expression that benefits this general welfare. In principle, it would be a contradiction to invoke a restriction to freedom of expression as a means of guaranteeing it. Such an approach would ignore the primary and fundamental character of that right, which belongs to each and every individual as well as the public at large. A system that controls the right of expression in the name of a supposed guarantee of the correctness and truthfulness of the information that society receives can be the source of great abuse and, ultimately, violates the right to information that this same society has….
>
> 81. It follows from what has been said that a law licensing journalists, which does not allow those who are not members of the "colegio" to practice journalism and limits access to the "colegio" to university graduates who have specialized in certain fields, is not compatible with the Convention. Such a law would contain restrictions to freedom of expression that are not authorized by Article 13(2) of the Convention and would consequently be in violation not only the right of each individual to seek and impart information and ideas through any means of his choice, but also the right of the public at large to receive information without any interference.[70]

The Court thus concluded that reasons which may justify licensing of other professions do not apply to journalists, because this would effectively deprive those who are not licensed of the right to exercise their freedom of expression.

National courts have also held that licensing of journalists is a breach of the right to freedom of expression. An attempt to establish a statutory body to regulate journalists was struck down by the High Court of Zambia in a decision released in August 1997.[71] On 17 June 1995, the Information Minister, Keli Walubita, announced that the Cabinet had given him 60 days to draft legislation to establish a statutory Media Association of Zambia (MAZ). Individuals would be required to register with MAZ before they could work as journalists. The Press Association of Zambia (PAZA) filed an application for judicial review, claiming that the fact that they had not been consulted was a breach of the rules of natural justice and that the proposed legislation was, in any case, unconstitutional. The Court issued a stay on any further action to establish a media body pending its decision.

[70] *Ibid.*
[71] *Kasoma v. Attorney General*, 22 August 1997, 95/HP/29/59.

In its 1997 decision in that case, the High Court held that the "principles of procedural fairness demand that the Applicants be given adequate notice of the impending decision and be heard or allowed to make representation on its own behalf to defend its interest." The Court therefore ordered the Government, should it decide to reintroduce the bill, to consult with the applicants.

Importantly, the Court also stressed that statutory licensing of journalists, as proposed in the legislation, would breach the rights to freedom of expression and association:

> Exercise of [the power of Ministers pursuant to the Constitution to draft legislation] is not unfettered. They must be exercised within the framework of the Constitution…. [I]t cannot seriously be argued that the creation of the Media Association or any other regulatory body by the Government would be in furtherance of the ideals embodied in the Constitution, vis-à-vis freedom of expression and association.

The decision is particularly noteworthy for its extremely wide application. In effect, the Court ruled that any statutory attempt to license journalists would breach the right to freedom of expression, regardless of the form that attempt took. In this respect, it reflects the decision of the Inter-American Court of Human Rights.

The Practice in Other Countries

Very few democratic countries impose licensing on journalists. A survey of some countries in Africa shows that none of the following has a statutory licensing or registration system for journalists: Botswana, Ghana, Malawi, Namibia, Nigeria, Senegal, South Africa, Swaziland, Tanzania and Zambia. This is also the case in most of Europe, North America, Latin America and Asia.

Other democratic countries rely on a range of less intrusive measures than mandatory licensing of journalists to promote the goals of protecting the rights of others and promoting professional journalism. These include criminal and civil restrictions on the content of what may be published, and voluntary codes of ethics developed by professional associations. For a serious breach of the latter, a journalist can ultimately be expelled from the association, but this does not deprive the individual of the right to work as a journalist.

A further concern with the registration/licensing system for media practitioners is that it does not apply to individuals working for the Government. Preferential treatment for Government media is controversial, and there would appear to be no warrant whatsoever for exempting individuals who happen to work for the Government from the registration requirement.

7.2.2 Media Organisations

The situation regarding registration of media organisations is more complicated than for media practitioners. Purely technical registration systems have in some cases held to be consistent with the guarantee of freedom of expression, although it is questionable whether they serve any legitimate aim and they are not, strictly speaking, necessary. However, registration schemes can breach the right to freedom of expression, for example where they allow for discretion to refuse registration, where they impose excessively onerous conditions on the media or where they are

applied to an unduly wide range of media outlets. As for media practitioners, there is a wealth of international standard-setting support for these propositions.

Authoritative Statements

Within the UN, the Human Rights Committee has on several occasions made it clear that registration/licensing systems for either the press or journalists which afford discretion to refuse licences breach the guarantee of freedom of expression. In 1999, for example, the Committee noted, in respect of Lesotho's regular report:

> 23. The Committee is concerned that the relevant authority under the Printing and Publishing Act has unfettered discretionary power to grant or to refuse registration to a newspaper, in contravention of article 19 of the Covenant.[72]

The same year, the Committee expressed concern about the newspaper licensing laws in Cambodia:

> 18. The Committee is concerned at … the Press Laws which impose license requirements ….[73]

In 2002, the Committee expressed concern about restrictions on the exercise of the profession of journalism in Yemen:

> 21. The Committee expresses its concern about some restrictions under Yemeni legislation on freedom of the press and about the difficulties encountered by journalists in the exercise of their profession particularly when criticisms of the authorities are expressed (art. 19 of the Covenant).
>
> The State party must ensure respect for the provisions of article 19 of the Covenant.[74]

The Joint Declaration by the three specialised mandates for protecting freedom of expression, noted above, states:

> Imposing special registration requirements on the print media is unnecessary and may be abused and should be avoided. Registration systems which allow for discretion to refuse registration, which impose substantive conditions on the print media or which are overseen by bodies which are not independent of government are particularly problematical.[75]

Within Africa, the *Windhoek Declaration on Promoting an Independent and Pluralistic African Press*, adopted in 1991 at a UNESCO-sponsored conference, states that an independent press is essential to the development and maintenance of democracy in a nation. "Independent" in this context means:

> [A] press independent from governmental, political or economic control, or from control of materials and infrastructure essential for the production and dissemination of newspapers, magazines and periodicals.[76]

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[72] Concluding Observations on Lesotho's Initial Report, 8 April 1999, CCPR/C/79/Add.106, para. 23.
[73] Concluding Observations on Cambodia's Initial Report, 27 July 1999, CCPR/C/79/Add.108, para. 18.
[74] Concluding Observations on Yemen's Third Report, 2 July 2002, CCPR/CO/75/YEM, para. 21.
[75] Note 41.
[76] Adopted 3 May 1991 under the auspices of UNESCO.

The *Declaration of Principles on Freedom of Expression in Africa* states, in Principle VIII, Print Media:

> 1. Any registration system for the print media shall not impose substantive restrictions on the right to freedom of expression.[77]

In some countries, a prohibition against licensing of the media has even been enshrined in the constitution. The 1992 Constitution of the Republic of Ghana, for example, states:

> 162(3) There shall be no impediments to the establishment of private press or media; and in particular, there shall be no law requiring any person to obtain a license as a prerequisite to the establishment or operation of a newspaper, journal or other media for mass communication or information.

Court Decisions

The UN Human Rights Committee has, in the context of a contentious case, also expressed concern about laws requiring the registration of newspapers which either impose substantive conditions as a pre-requisite for such registration or which impose excessively onerous registration requirements on newspapers. In a case from Belarus, the Committee considered a law requiring a newspaper with a circulation of just 200 copies to register. The Committee was sceptical of the State's claim that these measures were necessary to protect public order or the rights of others, stating:

> In the absence of any explanation justifying the registration requirements and the measures taken, it is the view of the Committee that these cannot be deemed necessary for the protection of public order (*ordre public*) or for respect of the rights or reputations of others. The Committee therefore finds that article 19, paragraph 2, has been violated in the present case.[78]

The Committee also held that the registration requirements in that case were excessively onerous for a publication with a circulation of just 200 copies.[79]

The African Commission on Human and Peoples' Rights has similarly decided cases involving registration of newspapers. A case from Nigeria involved a legal requirement for newspapers to register, with discretion on the part of the authorities to refuse registration. The Commission stated:

> Of more concern is the total discretion and finality of the decision of the registration board, which effectively gives the government the power to prohibit publication of any newspapers or magazines they choose. This invites censorship and seriously endangers the rights of the public to receive information, protected by Article 9.1. There has thus been a violation of Article 9.1.[80]

These international decisions find resonance in a number of national court decisions, including from Africa. For example, the Supreme Court of Senegal annulled a joint order of the Ministry of

[77] Note 42.
[78] *Laptsevich v. Belarus*, 20 March 2000, Communication Nº 780/1997, para. 8.5.
[79] *Ibid.*, para. 8.1.
[80] *Media Rights Agenda and Others v. Nigeria*, note 14, paras. 55 and 57.

the Interior and the Ministry of Communication which prohibited the circulation, distribution and sale of the newspaper, *Closed Letter*. The Ministries had issued the order in the mistaken belief that *Closed Letter* was a foreign publication, when in fact the owner was Senegalese. In annulling the order, the Supreme Court stated:

> Each person has the right to express and circulate freely his opinions by the spoken word, the pen and the image…This right is limited by the prescriptions of the laws and rules, as well as by respect for the honour of others. No provision of the law of 29/7/1881 [from the French press law] foresees the possibility of an administrative prohibition of a newspaper or national document. Such a prohibition can only occur within the framework of the provisions…of the law…relating to a state of emergency and a state of siege. But it has been established in the case in point that the order was not made on the basis of these provisions.[81]

The Supreme Court of South West Africa set aside a ruling of the Cabinet that *The Namibian* should pay R20,000 as a deposit for registration as a newspaper. In reaching its decision, the Court took into account the fact that the Cabinet had based its decision on irrelevant matters, in particular the fact that the newspaper's editor had previously written articles critical of Cabinet members. The Chairman of the Cabinet had admitted in an affidavit that the editors' past activities had "naturally" been taken into account since the Cabinet believed that attacks upon it would lower the status of the Cabinet and its members, and possibly endanger State security.[82]

The registration regime provided for in the National Media Commission Act is skeletal, leaving it up to the Secretary of State and the Commission to elaborate in full. It is thus difficult to assess whether or not it will be used to impose substantive conditions on media organisations or whether it allows for discretion to refuse registration. Two points are relevant here. First, as drafted, the Act would appear to allow for both of these possibilities. Certainly they are nowhere ruled out. Second, the Act specifically refers, at section 40(1), for regulations by the Secretary of State regarding the "qualification and fees" for registration. This implies that substantive conditions may be placed on who may register and that there will, as a result, be discretion to refuse registration.

It is also impossible to assess from the Act what will be required of media organisations to register, and whether or not this will be unduly onerous. It is submitted, however, that the short duration of registration – just one year – both places an unnecessary, and hence constitutionally suspect, burden on newspapers and allows for possible abuse of the system, for example where a media organisation is perceived to be unreasonably critical of government.

Finally, the definition of media organisation in the Act includes all organisations "engaged in transmitting news and information to the public", including a "media house, association, club and company".[83] This would appear to be very broad and encompass small-scale publications, Internet websites, occasional NGO publications and so on. As such, it is submitted that it

[81] *Abdourahmane Cisse*, Judgment No.1 of 6 February 1974, Supreme Court of Senegal.
[82] *Free Press of Namibia (Pty) Ltd. v. Cabinet for the Interim Government of South West Africa*, 1987 (1) SA 614, Supreme Court of South West Africa, Judgment of 9 November 1986.
[83] Section 2.

breaches the rule that a requirement of registration should not be imposed on small-scale or occasional publishers.

7.2.3 Sanctions

A serious problem with the registration regime, for both media practitioners and media outlets, is the harsh sanctions that may be imposed for a failure to register. Such failure initially attracts a fine of at least 5000 dalasis but a failure to pay this fine within 30 days will result in suspension for 12 months for a practitioner and for 18 months for an organisation.

It is well established that excessive sanctions on their own, even where some sanction is warranted, breach the right to freedom of expression.[84]

One of the early cases decided by the European Court of Human Rights considered the legitimacy of an order depriving an individual of the right to practise journalism, as part of an ongoing sentence in a criminal case. The individual in question, de Becker, had been convicted in Belgium of collaborating with the German authorities and sentenced to life imprisonment. The sentence of imprisonment was later commuted and de Becker released. However, de Becker's punishment carried with it a prohibition on participating in any way in the publication of a newspaper. The European Commission of Human Rights held that this was a breach of his right to freedom of expression and referred the case to the Court. By the time the Court heard the case, Belgium had amended the law so that de Becker's right to freedom of expression was no longer restricted and the case was struck off the list.[85] However, the case is widely understood as standing for the proposition that depriving individuals of the right to practise journalism, even as part of a criminal sanction, it is not a justifiable restriction on freedom of expression. Depriving an individual of this right as part of a sanction for non-registration would, *a fortiori*, represent a breach.

Similarly, imposing an 18-month ban on a newspaper for failure to register and to pay the resulting fine promptly is an extremely harsh sanction which can hardly be justified as necessary to achieve the desired result, namely to promote orderly registration. Indeed, effectively to suspend a newspaper for such a long period of time will normally result in its total disappearance and it may be noted that the term of the sanction significantly exceeds the period of registration (18 months compared to 12 months).

It is, therefore, submitted that these sanctions breach the constitutional guarantee of freedom of expression.

[84] See *Tolstoy Miloslavsky v. United Kingdom*, 13 July 1995, Application No. 18139/91 (European Court of Human Rights).
[85] *De Becker v. Belgium*, 23 March 1962, Application No. 214/56.

8. The Code of Conduct

The National Media Commission Act requires the Commission to "provide for a Code of Conduct for media practitioners, and set standards with regard to the content and quality of materials for publication or broadcast by the media".[86] Pursuant to section 16, any person who is aggrieved by anything published, broadcast or done in respect of them may bring a civil action against the responsible media practitioner or organisation. The Commission may also bring an action against a practitioner or organisation for non-compliance with the code of conduct.

Section 29 provides for a range of sanctions for a publication, broadcast or action which is not in accordance with the code of conduct, or where the conduct of a media practitioner is 'blameworthy'. Possible sanctions include:

- a reprimand;
- publication of an apology or correction;
- a fine, penalty and/or damages;
- suspension or revocation of the registration and licence, or closing down of a media organisation; or
- such other sanctions as the court may see fit.

The Commission may also publish or broadcast the name of any media practitioner or organisation whom it has reprimanded. We note, however, that although the 2002 Act originally gave the Commission the power to issue reprimands, this was revoked in the 2003 amendments.

This part of the brief argues that the code of conduct regime, as provided for in the Act, is unconstitutional inasmuch as it relates to media practitioners, because it fails to require public consultation and because it provides for unduly harsh sanctions. Furthermore, the Act provides for unduly vague grounds for liability for media practitioners and organisations.

The development of a code of conduct is directly provided for by section 210 of the Constitution although, as we have already suggested, we are of the view that this applies only to media organisations and not to practitioners as individuals. In our view, an effective self-regulation mechanism is the most appropriate system for promoting professionalism in the print media sector. It is noteworthy that a Code of Conduct has recently been adopted by the Gambian Press Union for its members, demonstrating that it is quite capable of self-regulation.

We submit that the code of conduct regime provided by for the National Media Commission Act fails to pass constitutional muster in relation to the guarantees of freedom of expression under the necessity part of the test for restrictions. We note that this part of the test requires restrictions to be carefully tailored to achieve a constitutionally legitimate aim and, in particular, not to go beyond what is necessary for that purpose.

Assuming that the aim of such a code is to promote professionalism and thereby to protect the rights and reputations of others, a constitutionally legitimate aim, it is clear that there is no need to apply it directly to media practitioners to achieve this aim. Media content can only affect rights

[86] Section 8(c).

or reputations when it is published or broadcast by a specific media organisation. Providing for the responsibility of these organisations for their output is, therefore, an entirely adequate means to protect rights and reputations. There is no need to go further, and also impose liability on individuals. As noted above, democratic countries, including many African countries, do not require individuals to register; these same countries do not impose codes of conduct on individual journalists.

For media outlets, we submit that a mandatory code of conduct cannot be legitimate if it is not developed in close consultation with the affected media and other stakeholders. Such codes inevitably deal with a range of subjective issues, such as undue intrusion into grief, the public interest, excessive violence and good taste. If the standards set out in a code do not take into account the working reality of the media, as well as the interests of other stakeholders, then they will be unreasonable and, ultimately, their application will unduly restrict the free flow of information and ideas.

The *Declaration of Principles on Freedom of Expression in Africa*, for example, clearly establishes this point:

> A public complaints system for print or broadcasting should be available in accordance with the following principles:
>
> - complaints shall be determined in accordance with established rules and codes of conduct agreed between all stakeholders;…[87]

Similarly, *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation*, states:

> Any content rules should be developed in close consultation with broadcasters and other interested parties, and should be finalised only after public consultation.[88]

Another problem with the code of conduct is the very harsh sanctions that may be applied for breach of its provisions. These include revocation of the registration and licence, as well as fines and damages, and closing down a media outlet. As noted above, unduly harsh sanctions, of themselves, represent a breach of the right to freedom of expression. This is a particular problem in relation to the print media, where harsh sanctions are not warranted. The Joint Declaration by the three specialised mandates for protecting freedom of expression, noted above, states:

> Content rules for the print media that provide for quasi-criminal penalties, such as fines or suspension, are particularly problematical.[89]

In those countries which do provide for mandatory codes of conduct for the print media, the sanctions are often limited to warnings and an obligation to print a statement by the regulator. In Ghana, for example, the regulator may order publication of a correction and apology, order

[87] Note 42, Principle IX(1).
[88] Note 45, Principle 23.3.
[89] Note 41.

publication of a reminder, or direct the media outlet to discipline a journalist.[90] The harsh sanctions found in the Gambian Act are not available to it.

As has already been noted, revoking the right to work as a journalist is a breach of the right to freedom of expression. Closing down a media outlet is the most severe sanction imaginable, and this could be legitimate, if ever, only in the most extreme circumstances. Such a sanction can never be legitimate simply for breach of a code of conduct, which would normally include the subjective issues noted above. Furthermore, as the experience in countries around the world has shown, such sanctions are not necessary to ensure the effective implementation of a code of conduct. If developed in consultation with them, most media organisations will strive to meet the standards set out in a code as a way of promoting professionalism and of improving the quality of their work. Normally, a warning is sufficient to highlight the appropriate boundaries. In a few cases, publication of a statement may be necessary. More intrusive sanctions are simply not needed.

Finally, the Act provides not only for sanctions for breach of the code of conduct, but also, in relation to practitioners, for any conduct which is 'blameworthy'. Indeed, anyone who is 'aggrieved' by anything published, broadcast or done in respect of them may bring a civil action.[91]

The first part of the test for restrictions on freedom of expression – the requirement that such restrictions be provided by law – means that only clear, precise restrictions may be legitimate. Vague, subjective terms like 'blameworthy' and 'aggrieved' can never be a legitimate basis for restricting freedom of expression, particularly when such severe sanctions are envisaged.

[90] National Media Commission Act, 1993, section 15(1).

[91] It is not clear what the basis for liability in such an action might be, but there is nothing in the Act to specifically suggest that it is restricted to a breach of the code of conduct. Section 16(3), on the other hand, clearly restricts the power of the Commission to bring cases to allegations of breach of the code of conduct.

9. Protection of Sources

Section 15 of the National Media Commission Act provides that whenever the Government or any of its departments or agencies alleges in an action that information was provided to a media practitioner or organisation either without authorisation or in contravention of the Official Secrets Act, then the court shall require the media practitioner or organisation to disclose the source of the information. If the media practitioner or organisation fails to comply with this order within the period specified by the court, then the court may apply one of the sanctions provided for in section 29, outline above but including fines and license suspension or revocation.

International jurisprudence and comparative law and practice establishes a strong right for journalists to protect confidential sources of information, a right which has been endorsed in authoritative statements by a number of intergovernmental bodies, including the Council of Europe, the Organization for Security and Cooperation in Europe (OSCE) and the European Parliament.[92] Numerous courts have affirmed that the right to protect the confidentiality of sources is an inherent part of the right to freedom of expression, necessary to ensure that information of public interest – such as information about crimes, corruption and wrongdoing in public and private life – reaches the public domain. The rationale for this right is that if journalists cannot guarantee the confidentiality of sources, in many instances the sources will not provide them with the information in the first place and it will, as a result, never come to light.

So strong is the need to protect their sources, that many journalists are bound by professional codes of ethics from revealing them. For example, the Declaration of Principles on the Conduct of Journalists of the International Federation of Journalists, of which the Gambia Press Union is a member, states, at Article 9:

> The journalist shall observe professional secrecy regarding the source of information obtained in confidence.

In Sweden, journalists are actually criminally liable for breaching a confidentiality agreement with a source except in limited and exceptional circumstances.[93]

Restrictions on this right risk endangering the watchdog role of the media in a democratic society and could seriously impede the free flow of information; they therefore need to be narrowly construed, have a clear legitimate aim and meet stringent tests of necessity in a democratic society. This part of the brief will examine whether section 15 of the Gambian National Media Commission Act is in accordance with these standards.

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[92] Council of Europe *Resolution on Journalistic Freedoms and Human Rights*. DH-MM (95) 4 of the 4th European Ministerial Conference on Mass Media Policy of the Council of Europe adopted in December 1994; *Resolution of the European Parliament on Confidentiality of Journalists' Sources and the Right of Civil Servants to Disclose Information*, adopted in 1993, A3-0434/93, reported in the Official Journal of the European Communities on 18 January 1994, No. C 44/34; and Concluding Document of its 1986 Vienna Meeting of the Organization for Security and Cooperation in Europe.

[93] Swedish Freedom of the Press Act of 1766 as amended, Chapter 3 On the Right to Anonymity.

9.1 Provided By Law

Any limitation on the right of media practitioners and media organisations to protect source confidentiality restricts freedom of expression and, as with other such restrictions, must be provided by law in clear and unambiguous fashion. Section 15(a) establishes that a court shall order the disclosure of the source of any information which the Government alleges was provided "without authorization". The law fails to stipulate what constitutes authorization and, particularly in the absence of a well-defined right of access to information, this notion is vague and open to a broad variety of interpretations. This is particularly true since the section presumably applies to information provided orally – as well as to documents – which is, of course, not subject to classification or other indications of authorization.

9.2 International Standards

International standards on the right to protect confidential sources are reflected in the *Declaration on Principles on Freedom of Expression in Africa*,[94] Principle XV of which establishes:

> Media practitioners shall not be required to reveal confidential sources of information or to disclose other material held for journalistic purposes except in accordance with the following principles:
> - the identity of the source is necessary for the investigation or prosecution of a serious crime, or the defence of a person accused of a criminal offence;
> - the information or similar information leading to the same result cannot be obtained elsewhere;
> - the public interest in disclosure outweighs the harm to freedom of expression; and
> - disclosure has been ordered by a court, after a full hearing.

The grounds for compelling journalists to disclose confidential sources are well established in the law and practice of a number of European countries and in the jurisprudence of the European Court of Human Rights. In essence, international standards allow fro restrictions on journalists' right to protect confidential sources only for purposes of prosecuting serious criminal offences or to uphold the right of a person accused of a criminal offence to defend him- or herself.

Moreover, as the following review will show, even this legitimate aim is often overridden by the overall public interest in protecting the right to withhold the identity of confidential sources in order to protect media freedom and to ensure that information of public importance enters the public domain.

The leading international case relating to protection of sources is *Goodwin v. United Kingdom*, in which the European Court of Human Rights ruled that an attempt to force a journalist to reveal his source for a news story violated Article 10 of the European Convention on Human Rights. This landmark decision concerned a journalist, Mr. Goodwin, who in 1989 attempted to publish a story based on confidential information he has received from a reliable source, concerning the financial difficulties of a particular company. The information was derived from the company's confidential financial plan, and was presumably provided in breach of an employment obligation. Fearing a loss of confidence on the part of the company's creditors, suppliers and customers, the company obtained an injunction restraining publication and an order under section 10 of the UK Contempt of Court Act

[94] Note 42.

1981 for disclosure of the anonymous source "in the interests of justice", on the basis that the company wished to take legal action against the source.

The disclosure order was upheld by the UK Court of Appeal and the House of Lords. Before the European Court, Mr. Goodwin and the Commission argued that under the ECHR, a journalist may only be forced to reveal his sources in "exceptional" circumstances where "vital" public or individual interests were at stake. Noting that an injunction preventing publication was already in place, Mr. Goodwin and the Commission argued that there were no exceptional circumstances to warrant mandatory source disclosure.

In the Government's view, the information at issue did not possess a public interest content which justified interference with the rights of a private company and, despite the injunction, the company remained at risk of damage due to the possibility of dissemination of the information to the business community. The Government also argued that a journalist's privilege does not extend to the protection of a source that has conducted itself in bad faith, or at least irresponsibly, in order to allow him to pass on such information with impunity.

In finding for the applicant, the Court emphasised the importance of safeguarding press freedom generally and of protecting journalists' confidential sources in particular:

> Protection of journalistic sources is one of the basic conditions for press freedom.... Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest.[95]

The Court found no such "overriding" public interest in this case. The injunction against publication, which applied to all national newspapers and relevant journals, largely secured the company's interest in source disclosure, namely to prevent dissemination of the confidential information. In so far as the disclosure order would merely reinforce the injunction, the additional restriction on free expression was not justified. The Court was of the view that the company's interest in acting against the source was insufficient to outweigh the vital public interest in protecting the applicant's confidential source.

9.3 National Law

Europe

The *Goodwin* judgment reflects national law and practice throughout Europe, where journalists are afforded strong protections in law and, in practice, courts rarely compel journalists to identify confidential sources. Even in the context of an ongoing criminal investigation, journalists retain strong rights to protect confidential sources and courts respect this right in the interests of protecting media freedom.

[95] *Goodwin v. United Kingdom*, 27 March 1996, Application No. 17488/90 at para 39.

In Sweden, the Freedom of the Press Act, which has constitutional status, provides, at Chapter 3, Article 1, for protection of journalists sources, subject to limited exceptions. Under Swedish law, courts may order source disclosure in criminal cases where the information is needed to protect State security or where freedom of the press (including libel) is not the central issue and disclosure is justified by an overriding public or private interest.[96] The interest of an accused person in obtaining information relevant to establishing his or her innocence and the interest of the police in obtaining evidence about crime are examples of such overriding interests.

The Swedish Freedom of the Press Act closely regulates executive action in this area as well and government officials are prohibited from even making enquiries regarding media sources, except where this is explicitly allowed by the Act.[97] Generally, this is only where the authorities have reasonable grounds to believe that the source has committed treason, espionage or a similar crime, listed in Chapter 7, Article 3 of the Act.

In France, the 1993 amendments to the Code of Criminal Procedure brought legislation into line with accepted practice whereby very few courts or investigative *magistrats* ever actually required journalists to disclose their sources. Furthermore, in the few instances where disclosure was ordered, courts refrained from imposing sanctions if the journalist in question refused to comply. Under the 1993 law, any journalist who appears as a witness concerning information gathered by him in the course of his journalistic activity has an absolute right to refuse to disclose its source.

Similarly, in Austria, Article 31 of the Media Act 1981 provides strong protection for the confidentiality of journalists' sources. Publishers, editors, journalists and other employees of a media enterprise who are called as witnesses before a court or administrative authority have the right to refuse to answer questions referring to the author, contributor or source of information, or to the contents of information disclosed to them regarding their professional activities.

In Germany, the press laws of most *Lander* (states) include a provision granting journalists a right to refuse to divulge the identity of their confidential sources, often providing an absolute right.[98] German federal law reinforces this standard in the Civil Procedure Code (Section 383) and the Criminal Procedure Code (Section 53), which authorise journalists to refuse to testify concerning the content or source of information given in confidence. The Federal Constitutional Court (FCC) has affirmed that the general right to refuse to give evidence about the sources and content of information given in confidence is essential to enable the press to fulfil its public functions. However, in rare instances, this right may be overridden by other pressing considerations, such as law enforcement.[99]

Decisions in European courts subsequent to the ECHR in judgment in *Goodwin* tend to recognise even stronger protection for this right. In Norway, Supreme Court jurisprudence has confirmed that journalists should not be compelled to testify, even in criminal cases. The *Edderkopp* case[100] involved an investigation into whether information had been leaked illegally from the intelligence

[96] Freedom of the Press Act, note 93, Chapter 3, Article 3(5).
[97] *Ibid.*, Chapter 3, Articles 4 and 5.
[98] See for example North Rhine Westphalia Press Law, 24 May 1966.
[99] The *Speigel* case, 20 FCC 162 (1966).
[100] Retstidende 1992, p. 39.

agency to journalists who had written a book which discussed links between the Labour Party and the intelligence agency. The Supreme Court ruled that the authors had a right to protect their sources and noted: "In some cases ... the more important the violated interest is, the more important it will be to protect the sources."

The Supreme Court of the Netherlands has established that a court action to identify who had leaked information from the Government to a journalist was not a sufficient ground for compelling a journalist to disclose a confidential source. The 1996 case, *Van den Biggelaar et al. v. Dohmen and Langenberg*,[101] involved journalists who had published an article on corruption in a daily regional newspaper. They refused to reveal their sources in a civil hearing, despite a claim by the plaintiff that the information, obtained during the course of a criminal investigation, had been illegally leaked by either the police or the prosecutor's office. The plaintiff further claimed the article interfered with his right to private life. The Court noted a number of relevant factors, including that the leaked information related to a criminal investigation into official corruption and had already been made public, and that the plaintiff had sued the newspaper for compensation. The Court relied on *Goodwin* to hold that the plaintiff's interest, which was for purposes of suing the State and any officials involved for financial compensation and to prevent further leaks, was insufficient to outweigh the public interest in the protection of journalists' sources.

The United Kingdom

Section 10 of the UK Contempt of Court Act 1981 offers statutory protection to all writers who do not wish to divulge confidential sources:

> No court may require a person to disclose, nor is the person guilty of contempt of court for refusing to disclose the source information contained in the publication for which he is responsible, unless it is established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.

Three points may be noted. First, the Court must determine whether disclosure is sought for one of the four specified grounds. An order to disclose for other reasons, for example, to protect public health, is not allowed. Second, the Court must determine whether the information is really "necessary". "[P]roof that revelation is merely 'convenient' or 'expedient' [is insufficient]. The name must be 'really needed'."[102] The Court must weigh the importance of the specified ground against the "journalist's undertaking of confidence."[103] Third, the court retains the discretion to refuse to order disclosure even when the conditions for an exception are met.[104]

Nigeria

The High Court of Lagos State ruled that the Senate of the National Assembly had exceeded its authority in summoning a journalist to disclose the confidential sources for an article he had written. In concluding that the summons had interfered with the journalist's right to freedom of expression as guaranteed by the Constitution, the Court stated:

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[101] *A.H.W. en J.H.A. Van den Biggelaar en Van den Biggelar Verenigde Bedrijven BV v J.H.J.P.M. Dohmen en H.J. Langenberg*, Judgment of 10 May 1996, NJ 1996/578.

[102] Robertson, G., & Nicol, A., *Media Law; The Rights of Journalists & Broadcasters* (1990) {NEED MORE – PUBILSHER AND CITY}, at 155.

[103] See ARTICLE 19, *Press Law and Practice* (London, 1993), p. 187. See also Robertson, *et al.*, note 102, p. 155.

[104] Robertson, *et al.*, note 102, p. 158.

> It is a matter of common knowledge that those who express their opinions, or impart ideas and information through the medium of a newspaper or any other medium for the dissemination of information enjoy by customary law and convention a degree of confidentiality. How else is a disseminator of information to operate if those who supply him with such information are not assured of protection from identification and/or disclosure?[105]

In another case, after the editor of *Sunday Punch* published an article accusing the Nigerian National Assembly of monumental fraud, a committee appointed by the National Assembly to investigate the allegations demanded that the editor reveal the confidential source of his information. He refused and the High Court of Ikeja declined to compel him to reveal his source. It reasoned that the powers granted to the investigating committee did not include the power to require a journalist to disclose a confidential source except in grave and exceptional circumstances such as when State security was threatened. It concluded that no such exceptional circumstances existed in the instant case. The Court further observed that if journalists were compelled to disclose their sources of information, their sources would dry up. Wrongdoers would no longer be exposed. A legislative investigation must comply with the Constitution and it would be wrong for a court simply to assume that every legislative investigation is justified by a public need that outweighs the rights of the press.[106]

9.4 Section 15 of the National Media Commission Act

It would appear that the aim of section 15 of the Act is to enhance prosecution of public employees as well as others who breach the Official Secrets Act. The 1922 Official Secrets Act criminalizes various offences of disclosing and acquiring classified documents.

It is submitted, however, that section 15 fails to incorporate the safeguards and limitations on the mandatory disclosure of confidential sources as required and that, as a result, it is not reasonably required in a democratic society.

A particular problem with section 15 is that it is actuated simply by a government allegation. As such, it removes from the courts any oversight role in determining whether or not government allegations that information was provided "without authorization" or "in contravention of the Official Secrets Act" are well founded. Instead, it expressly requires the court to respond to government allegations by ordering media practitioners or organizations to disclose sources and to sanction those who refuse to do so. This puts the media at the mercy of unsubstantiated government allegations that information was improperly or illegally provided, even where a journalist has endeavoured in good faith to ensure that the information in question is not subject to a regime of secrecy. This provision gives the executive largely unfettered discretion to force disclosure of sources. It is the precise opposite of the standards noted above, which require restrictions on mandatory disclosure of sources, and limit mandatory disclosure to cases ordered by the courts, 'after a full hearing'.[107] As a result, section 15 is in clear violation of the freedom of expression guarantees in the Constitution of The Gambia and under international law.

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[105] *Tony Momoh v. Senate of the National Assembly*, [1981] 1 NCLR 105.
[106] *Innocent Adikwu and Others v. Federal House of Representatives of the National Assembly*, [1982] 3 NCLR 394.
[107] Principle XV of the *Declaration on Principles on Freedom of Expression in Africa*. Note 42.

Section 15 is also disproportionate in a number of other respects. As the jurisprudence reviewed above clearly demonstrates, mandatory source disclosure can be legitimate only if it can be shown that the identity of the source is absolutely essential to the defence or prosecution of the serious crime, and if there is no other way of obtaining the information which is less likely to interfere with freedom of expression. The court should also be required to weigh the necessity of ordering disclosure of the name of the source in the particular case against the overall impact of this on the right to freedom of expression and information, including the likely long-term impact on the flow of information to the media. By failing to impose these limits on mandatory source disclosure, section 15 of the Act violates international and constitutional standards on freedom of expression and media freedom.

Furthermore, section 210 of the Constitution seeks to promote professionalism in the media. An aspect of professionalism, as illustrated by the quote from the Declaration of Principles on the Conduct of Journalists of the International Federation of Journalists, is protection of source confidentiality. Instead of providing for an extremely broad obligation to *disclose* sources, the Act should establish the right of journalist to *protect* their confidential sources of information, and allow only very limited restrictions on this right, in line with the standards noted above. Section 15 therefore not only breaches the constitutional right to freedom of expression; it also runs counter to the very aims which, constitutionally, the National Media Commission Act is supposed to promote.

10. Defamation Provisions

Section 33 of the Media Commission Act prohibits media practitioners or organisations from using any "language, caricature, cartoon or depiction which is derogatory, contemptuous or insulting". Breach of this section is subject to a fine of not less than 5000 dalasis, as well as such compensation as the court may determine to be adequate to redress the harm done.

Section 33 is a species of libel or defamation law and it is formulated in a manner that is similar to the traditional definition of defamation as statements "'lowering the plaintiff in the estimation of right-thinking people generally,' 'injuring the plaintiff's reputation by exposing him to hatred, contempt or ridicule' or 'tending to make the plaintiff be shunned and avoided.'"[108] The common law of libel is directly applicable in The Gambia by virtue of the Law of England Application Act.[109] The Gambian Criminal Code also defines criminal libel in similar terms as, "injury to the reputation of any person by exposing such person to hatred, contempt or ridicule."[110]

10.1 Provided by Law

In general, section 33, in conjunction with the large body of common law applying to defamation, meets the conditions of this part of the test. However, the reference to 'authorities' in subsections (1) and (3) is undefined and, therefore, unclear. The dubious merits of protecting the reputation of 'authorities' is dealt with below but, as it stands, the term may be construed to include an open-ended range of entities, including government officials and agencies, public institutions, certain private groups (as in 'religious authorities') and even prominent individuals. It fails, as a result, to give adequate notice of what is proscribed.

It is, therefore, submitted that this reference in section 33 is unacceptably vague and does not meet the constitutional and international requirements for restrictions on freedom of expression.

10.2 Legitimate aim

It seems clear that the aim of section 33 is to protect reputations, a constitutionally legitimate aim. However, this part of the test requires both the purpose and the effect of the restriction to serve a legitimate aim. It is submitted that, by including the reference to authorities in this section, the authors' real purpose was to shield officials from criticism, which is not a constitutionally legitimate aim.

Furthermore, the effect of the section is also likely to be to shield officials from criticism. It provides a basis for a range of officials to bring cases against media practitioners or organisations simply for insulting or degrading them, or for expressing contempt towards them. In many instances, this would include perfectly legitimate political commentary. For example, almost all cartoons or caricatures involving politicians and other public figures are, by definition, somewhat derogatory or demeaning, and would therefore be punishable under this section.

[108] Robertson and Nicol, *Media Law* (London, Penguin Books, 1992), p. 46.
[109] Note 10.
[110] Bensouda, *The Law and Media in the Gambia* (Accra, Media Foundation for West Africa, 1998), p. 9.

National courts in an increasing number of jurisdictions have held that public bodies, including State-owned corporations and even political parties, may not sue for damage to reputation because of the importance of free criticism of their activities. In *Derbyshire County Council v. Times Newspapers Ltd.*, for example, the House of Lords ruled that the common law does not allow a local authority to maintain an action for damages for libel. As an elected body, it "should be open to uninhibited public criticism. The threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech."[111]

The Supreme Court of India followed *Derbyshire*'s lead in *Rajgopal v. State of Tamil Nadu*, finding that "the Government, local authority and other organs and institutions exercising governmental power" cannot bring a defamation suit.[112] A similar position has historically been taken in the United States.[113] The UN Human Rights Committee has also made it clear that public bodies should not be protected by defamation laws, for example stating in its 1999 observations on Mexico's fourth periodic report that it "deplores the existence of the offence of 'defamation of the state,'" and calling for its abolition.[114]

The rationale for restricting the ability of public bodies to sue is threefold. First, criticism of these bodies is vital to the success of a democracy and defamation suits inhibit free debate about vital matters of public concern. *Derbyshire* emphasised this point when distinguishing the plaintiff county council from private corporations.[115] Second, defamation laws are designed to protect reputation. Courts have held that public bodies should not be entitled to sue in defamation because any reputation they might have would belong to the public as a whole. As the *Derbyshire* court noted, "it is difficult to say the local authority as such has any reputation of its own."[116] Finally, public bodies normally have ample means to defend themselves from harsh criticism by other means, for example by responding directly to any allegations. Allowing public bodies to sue is, therefore, an inappropriate use of taxpayers money, one which may well be open to abuse by governments intolerant of criticism.[117]

Courts have applied the *Derbyshire* rationale to public bodies that are not elected. State-owned corporations, for example, have failed to win standing in at least two important cases. In *Die Spoorbond v. South African Railways*, a South African court ruled that the national railway could not sue for defamation. The court acknowledged that corporations can sue for defamation but could recall no instances of the Crown suing for injury to its reputation, stating: "Had such a right existed, one would have expected to find reports of cases in which it had been claimed."[118] About 50 years later, the Supreme Court of Zimbabwe ruled that the State-run Post and

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[111] [1993] 1 All ER 1011, p. 1017.
[112] (1994) 6 Supreme Court Cases 632, p. 650.
113 *City of Chicago v. Tribune Co.*, 307 Ill 595 (1923) (Supreme Court of Illinois). The court in that case ruled that a city could not sue a newspaper for defamation, stating, "no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence." See p. 601.
[114] U.N. International Covenant on Civil and Political Rights, *Concluding Observations of the Human Rights Committee: Mexico*, U.N. Document CCPR/C/79/Add. 109, 27 July 1999, para.14.
[115] Note 111, p. 1017.
[116] *Ibid.*, p. 1020.
[117] *Die Spoorbond and Anor. v. South African Railways* [1946] AD 999, pp. 1012-1013.
[118] *Ibid.*, p. 1008.

Telecommunications Corporation could not sue in defamation. Relying on *Die Spoorbond*, it found that while some "artificial persons" may sue for defamation, organs of the State may not. It denied the right to sue to "those artificial persons which are part of the governance of the country,"[119] as determined by the body's degree of organisational and financial autonomy, whether it provides essential public services and the effect of stifling criticism of it.[120]

10.3 Reasonably Required in a Democratic Society

The fundamental importance of unhindered public debate in a democracy requires that defamation laws be carefully and narrowly designed so that they do not impose a disproportionate burden on free expression. In order to reach a correct balance, international and national courts have interpreted, and frequently modified, traditional standards of defamation, narrowing the scope of the wrong and introducing or expanding the defences.

10.3.1 Overbreadth

As it stands, section 33 is extremely broadly worded. It includes statements of fact, whether true or false, as well as opinions. It applies to any statement that is 'derogatory, contemptuous or insulting', regardless of whether or not the reputation of the plaintiff has actually been lowered, traditionally a crucial element in a defamation case. It would thus apply to statements which, while negative, did not actually harm the reputation of the plaintiff, for example because they contained sentiments which were already widely held. It thus goes far beyond what is necessary to protect a legitimately held reputation.

It is quite clear that the guarantee of freedom of expression does not allow statements to be sanctioned merely because they are harsh or offensive, precisely the sorts of statements that section 33 prohibits. The European Court has decided a number of cases in which the challenged statement or depiction was alleged to have been presented in a particularly insulting or derogatory form. As a matter of general principle, the Court has maintained that freedom of expression "protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed."[121] Journalists, in particular, must enjoy a choice of forms and styles of expression that should not be second-guessed by courts and other authorities. In an often quoted passage, the European Court has noted:

> [F]reedom of expression is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any section of the community. … [J]ournalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation.[122]

Furthermore, Gambian legislation already includes both civil and criminal defamation laws that make available a range of remedies, including damage awards, to individuals that have been defamed. It may be noted that, as amended, section 33 involves no explicit enforcement role for the National Media Commission and adds nothing to the existing powers of the judiciary in the

[119] *Posts and Telecommunications Corporation v. Modus Publications (Private) Ltd.*, (1997), Judgment No S.C. 199/97, p. 9.
[120] *Ibid.,* pp. 14-15.
[121] *Oberschlick v. Austria*, 23 May 1991, Application No. 11662/85, 19 EHRR 389, para. 57.
[122] *Prager and Oberschlick v. Austria*, 26 April 1995, Application No. 15974/90, 21 EHRR 1, para.38.

area of defamation law. So in terms of both substance and application, section 33 appears to be completely redundant.

10.3.2 Statements of Fact

Under the common law of libel, proof of the truth of published material (also known as justification) is a complete defence for statements of fact. Section 33 fails to provide for a defence of truth, leaving open the possibility that journalists may be punished for true statements – whether or not they deal with a matter of public interest – deemed to be derogatory or insulting. Protection of undeserved reputations is arbitrary and cannot be considered a legitimate justification for restricting media freedom.

While defendants should always have the option of proving truth as a defence, courts have held that, in some cases, truth is too stringent a standard for statements of fact. Evidence rules are strict and journalists have a right not to reveal their sources.[123] As the House of Lords has noted:

> Quite often the facts which would justify a defamatory publication are known to be true, but admissible evidence capable of proving those facts is not available. This may prevent the publication of matters which it is very desirable to make public.[124]

Courts around the world have held that a strict requirement of truth in relation to statements of fact is too onerous. A leading case in this area is *New York Times Co. v. Sullivan*, decided by the U.S. Supreme Court in 1964. The plaintiff, a police commissioner, alleged that an advertisement in the *New York Times*, accusing the police of excessive violence, damaged his reputation. Although the advertisement did contain some factual errors, Justice Brennan held that a requirement that the defendant prove truth breached the First Amendment guarantee of free speech, noting:

> Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so.[125]

As "erroneous statement is inevitable in free debate,"[126] the court ruled that a public official could only recover damages if he or she could prove "the statement was made with 'actual malice' – that is, with knowledge that it was false or with reckless disregard for whether it was false or not."[127] The fact that the plaintiff may have suffered "injury to official reputation" did not justify "repressing speech that would otherwise be free."[128] The test is significant not only because it replaces the 'truth' standard with one of 'actual malice' but also because it places a double burden of proof on the plaintiff, who has to show both that the statement was false and that it was made with malice. Although *Sullivan* is restricted in application to public officials,

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[123] See *Goodwin v. United Kingdom*, 27 March 1996, 22 EHRR 123.
[124] *Derbyshire*, note 111, p. 1018.
[125] *New York Times Co. v. Sullivan*, 376 US 254, 279 (1964), p. 279.
[126] *Ibid.*, p. 271.
[127] *Ibid.*, pp. 279-80.
[128] *Ibid.*, p. 272.

subsequent cases have extended it to candidates for public office[129] and public figures who do not hold official or government positions.[130]

In *Rajagopal*, decided by the Supreme Court of India, a key issue was whether public officials could prevent the publication of a biography, written by a prisoner but sought to be published by a weekly magazine, which they claimed defamed them. The Court discussed a number of leading authorities, holding:

> In the case of public officials ... the remedy of action for damages is simply not available with respect to their acts and conduct relevant to the discharge of their official duties. This is so even where the publication is based upon facts and statements which are not true, unless the official established that the publications was made (by the defendant) with reckless disregard for truth.[131]

Rajagopal follows Sullivan closely, using the constitutional guarantee of freedom of expression to apply essentially the same standard of reckless disregard for the truth, to place the onus of proof of recklessness upon the plaintiff and to extend this test to cases brought by public officials.

In *Lange v. Atkinson*, the New Zealand Court of Appeal relied on qualified privilege to protect certain categories of false and defamatory statements. The wider public had an interest in information concerning the functioning of government so statements conveying such information, even if published generally, were protected by qualified privilege.[132] Significantly, the Court held that the traditional approach, whereby qualified privilege could only be defeated by malice, still applied to such cases, retaining the traditional rule under which the plaintiff bears the onus of proving malice. The Court did not elaborate in detail on the scope of the protection, but noted that it applied to everything which was "properly a matter of public concern."[133]

In *National Media Ltd v. Bogoshi*, the South African Supreme Court of Appeal adopted a form of reasonableness defence for statements of fact. The Court based its conclusion on an analysis of defamation law, holding that the categories of defences were not closed[134] and that "stereotyped defences", including qualified privilege, did not provide adequate protection for freedom of the press.[135] The Court rejected what it termed strict liability for defamation, noting, "nothing can be more chilling than the prospect of being mulcted in damages for even the slightest error."[136] Instead, "publication in the press of false defamatory allegations of fact will not be regarded as unlawful if, upon a consideration of all the circumstances of the case, it is found to have been reasonable to publish the particular facts in the particular way and at the particular time."[137]

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[129] *Monitor Patriot Co. v. Roy* (1971) 401 US 265.
[130] *Curtis Publishing Co. v. Butts* (1967) 388 US 130.
[131] Note 112, p. 650.
[132] *Lange v. Atkinson*, (1998) 4 BHRC 573, p. 613.
[133] *Ibid.*, p. 613-5.
[134] They did not constitute a "*numerus clausus*," 1998 (4) SA 1196, p. 1204. The Court did go on to note that its conclusions were consistent with the Constitution. *Ibid.*, p. 1218.
[135] *Ibid.*, p. 1209.
[136] *Ibid.*, p. 1210.
[137] *Ibid.*, p. 1212.

The UK House of Lords has also opted for what might be termed a reasonableness defence, albeit within the confines of the traditional qualified privilege rule. It held that a statement published in the media might meet the duty-interest requirements of qualified privilege, depending on all the circumstances, setting out a list of some 10 factors to be taken into account. In such cases, the media outlet would be protected unless it was actuated by malice in publishing the statement.[138]

10.3.3 Opinions

In many countries, the vast majority of defamation suits, particularly involving public figures, relate to statements of fact. Claims based on opinions, however, continue to threaten free public debate and, over the past fifteen years, the European Court of Human Rights has decided a number of such cases. In *Lingens v. Austria*, Bruno Kreisky, a retiring Chancellor, sued in defamation for articles condemning his political links with a former Nazi and which described Kreisky's behaviour as "base opportunism" and "immoral". Lingens was convicted on the basis that he had failed to prove his statements were true, as required under Austrian law. The European Court distinguished between facts and "value-judgments" or opinions, holding that defendants could not be required to prove the truth of the latter, as this presents them with an impossible task.[139] It is often difficult to determine whether a statement is a fact or an opinion, but the Court has tended to classify statements as the latter, thereby providing enhanced protection for freedom of expression.

The European Court also held that, in relation to value-judgments, a greater degree of criticism is permissible regarding politicians than private individuals. One reason for this is that a politician "knowingly lays himself open to close scrutiny of his every word and deed". In addition, political debate rests "at the very core of the concept of a democratic society." While not sacrificing all right to protect their reputations, politicians must accept that courts will consider the value of political debate when ruling in a defamation suit.[140]

In 1992, the European Court, ruling on a case from Iceland, expanded this higher standard of tolerance to matters of public interest not involving politicians. The applicant, Thorgeirson, was convicted of defaming unspecified police officers after he published two highly-critical articles about police brutality. The government argued such defamatory expression should not be protected because it did not relate to the democratic political process. The Court, however, observed "there is no warrant in its case-law for distinguishing … between political discussion and discussion of other matters of public concern."[141] Were it otherwise, the press would be unable to "play its vital role of 'public watchdog'."[142]

The Zimbabwean Supreme Court recently modified the test for fair comment to enhance protection for freedom of expression. It had previously laid out a five-part test for fair comment, under which an allegation must be: 1) a comment or opinion; 2) fair, that is with some foundation; 3) based on true facts; 4) on a matter of public interest; and 5) based on facts stated

[138] *Reynolds v. Times Newspapers*, [1999] 4 All E.R. 609.
[139] 8 July 1986, Application No. 9815/82, 8 EHRR 407, para. 46.
[140] *Ibid.*, para. 42.
[141] *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, 14 EHRR 843, para. 64.
[142] *Ibid.*, para. 63.

clearly in the publication.[143] In *Moyse v. Mujuru*, the Supreme Court found the fifth requirement to be too limiting, and expanded the defence to include facts generally known to readers even if not stated in the publication.[144]

10.4 The Chilling Effects of Section 33

It is submitted that section 33 fails to pass constitutional muster on a number of grounds. Instead of prohibiting public bodies from bringing defamation actions, now widely seen as necessary to bring defamation laws into line with guarantees of freedom of expression, it provides explicit protection for 'authorities'. It also signally fails to meet the condition that it be reasonably required in a democratic society, as outline above.

Section 33 also fails to meet the requirements of the reasonably required in a democratic society part of the test for restrictions on freedom of expression on several grounds. It is seriously overbroad, not even requiring that the reputation of the plaintiff be lowered by the impugned statements. To the extent that it is legitimate, it duplicates existing defamation provisions, and hence is unnecessary.

It is also seriously deficient in failing to provide for any of the defences that ought to be available to those charged with defamation. Instead, it establishes a strict liability regime which does not even recognise a defence of truth. It does not recognise the expanded qualified privilege, or reasonableness defence recognised in an increasing number of common law jurisdictions and it fails to provide the extended protection for opinions now recognised to be necessary in defamation law.

[143] *Moyse and Anor. v. Mujuru* (1998), Judgment No S.C. 153/98, pp. 11-13.
[144] *Ibid.*, p. 15.

11. False Publication

Section 34 of the Act makes it an offence, subject to a fine of not less that 5000 dalasis, for any media practitioner or organisation which, "wilfully, negligently or recklessly or having reason to believe that a report is false, publishes or broadcasts any information or news which is false in any material particular". The fact that the practitioner or organisation did not know that the information was false is not a defence, unless "it is proved that adequate measures were taken to verify the accuracy of the information or news."

Section 34 sanctions publication of false news without any reference to specific harms and irrespective of any malicious intent. It also provides for a limited defence of due diligence (reasonable publication), as well as open-ended sanctions and damage awards.

This part of the brief argues that section 34 fails to meet the test for restrictions on freedom of expression under international and constitutional law because it does not meet the standard of provided by law, because it does not serve a legitimate aim and because it is not "reasonably required in a democratic society."

11.1 Provided by Law

The first part of the test for restrictions on freedom of expression requires such restrictions to be provided by law. While section 34 of the challenged Act is formally a law, it nevertheless fails to meet the substantive elements of this requirement: that the law be clear and accessible, and sufficiently precise so that it does not grant undue discretion to those charged with applying it.[145] The reference in section 34 to all news reports that are "false in any material particular" is vague and prone to abusive application. It could be argued that the inclusion of the "material particular" element would ensure that only publications that contain major, rather than negligible, inaccuracies may be sanctioned. But this is outweighed by the fact that the notion of "falsity" is inherently controversial and incapable of objective assessment.

The jurisprudence of the Canadian Supreme Court, which considered the constitutionality of a false news provision in *R. v. Zundel*, is instructive on this point. At issue in that case were charges arising from the publication of a booklet claiming that the Holocaust was a myth perpetrated by a world-wide Jewish conspiracy. At the time, it was a criminal offence for an individual wilfully to publish "a statement, tale or news which he knows is false and that causes or is likely to cause injury or mischief to a public interest".[146] The Court struck this provision down as contrary to the constitutional guarantee of freedom of expression. In doing so, the Court noted the profound lack of clarity inherent in the very idea of truth, particularly as it relates to matters of general historical or political concern. Indeed, it pointed to past abuse of the false news provision to illustrate this point:

> [O]ne of the cases relied upon in support of the proposition that the section deals only with statements of fact and not with expressions of opinion, *R. v. Hoaglin*, *supra*, demonstrates just how slippery the distinction may be. If the expression at issue in that case, in which a disaffected American settler in Alberta had printed posters which stated "Americans not

[145] See section 3.3.2.
[146] Criminal Code, RSC 1985, c. C-46, Section 181.

> wanted in Canada; investigate before buying land or taking homesteads in this country" is an example of a "false statement of fact" falling within the prohibition, one shudders to consider what other comments might be so construed.[147]

The Zimbabwean Supreme Court, in a landmark 2000 case involving a similar challenge to a false news law, reached essentially the same conclusion on the vagueness of "falsity:"

> The use of the word "false" is wide enough to embrace a statement, rumour or report which is merely incorrect or inaccurate, as well as a blatant lie; and actual knowledge of such condition is not an element of liability; negligence is criminalised. Failure by the person accused to show, on balance of probabilities, that any or reasonable measures to verify the accuracy of the publication were taken, suffices to incur liability even if the statement, rumour or report that was published was simply inaccurate.[148]

Prohibiting false statements also fails to take into account the fact that language is used in a variety of complex and subtle ways and that it is simply not possible to divide statements cleanly into categories of fact and opinion. Rhetorical devices, figures of speech, comedy, metaphor and sarcasm are all examples of superficially false statements which may either be substantially "correct" or be expressions of opinion. As the US Supreme Court has noted, "to use loose language or undefined slogans that are part of the conventional give-and-take in our economic and political controversies – like 'unfair' or 'fascist' – is not to falsify facts."[149]

False news prosecutions, almost by definition, involve the publication of controversial material and there is a danger that the accepted view may be conflated as the right, or correct, view. As the Canadian Supreme Court noted in *Zundel*:

> The reality is that when the matter is one on which the majority of the public has settled views, opinions may, for all practical purposes, be treated as an expression of a "false fact".[150]

The "falsity" element of a section 34 offence is unacceptably vague and therefore capable of exerting a significant chilling effect on freedom of expression. For these reasons, it is submitted that section 34 contravenes the requirement that restrictions on fundamental rights not be excessively vague.

11.2 Legitimate Aim

As noted above, it is clear from both international and constitutional guarantees of freedom of expression that restrictions on this right which do not serve one of the legitimate aims listed are not valid. Section 34 is not linked to any particular harm, unlike the historical common law derivation of the offence (see next section) and false news provisions found in other jurisdictions,

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[147] *R. v Zundel* [1992] 2 SCR 731, p. 768-9. *Hoaglin* is at (1907) 12 CCC 226.

[148] *Chavunduka & Choto v. Minister of Home Affairs & Attorney General*, 22 May 2000, Judgment No. S.C. 36/2000, Civil Application No. 156/99, p. 8. This case resulted in the Court striking down the false news provisions of the Zimbabwean Law and Order (Maintenance) Act. It should be noted that the challenged Gambian Act, like the Zimbabwean law, sanctions not only malicious, but also negligent, falsities; and burdens the defendant with proving his/her diligence in checking the accuracy of the impugned statements.

[149] *Letter Carriers*, 418 US 264 (1974), pp. 284-6.

[150] Note 147, p. 749.

which typically impose liability only where a report, in addition to being false, is likely to disturb the peace or undermine some other public interest.[151]

The purpose of section 34 appears to be simply to prevent the publication of false reports *per se*. It is submitted that this purpose cannot justify such an intrusive interference with freedom of the press.

The government may claim that section 34 has the implicit purpose of protecting public order or some similar, generally defined State interest. It is submitted that this argument cannot pass constitutional muster since, even if a threat to public order or similar interest were an explicit element of the false news offence, protection of those limited interests would not be compelling enough to override the public interest in a free and unhindered marketplace of ideas.

11.2.1 History and Purpose

The High Court of Enugu, Nigeria, has stressed the importance of the history and purpose of a law in assessing its constitutional legitimacy:

> [I]n order to determine whether a law is reasonably justifiable in a democratic society or not the history of that law and the surrounding circumstances in which that law came into our statute book, the underlying object of that law and the mischief or evil it was aimed at preventing must of necessity be considered.[152]

The origins of false news provisions date back to the Statute of Westminster in 1275, which established the offence of *Scandalum Magnatum*, providing that:

> … from henceforth none be so hardy to tell or publish any false news or tales, whereby discord or occasion of discord or slander may grow between the king and his people or the great men of the realm.[153]

The purpose of *Scandalum Magnatum* seems to have been mainly to promote peaceful means of redress in a context characterised by constant threats to public order. Holdsworth notes that the purpose of these statutes was, "not so much to guard the reputation of the magnates, as to safeguard the peace of the kingdom," adding, "this was no vain fear at a time when the offended great one was only too ready to resort to arms to redress a fancied injury."[154] At the time, information was scarce and hard to verify, and false rumours could all too easily lead to violence, for example in the form of public duels or even insurrection. According to the Supreme Court of Canada, "the aim of the statute was to prevent false statements which, in a society dominated by extremely powerful landowners, could threaten the security of the state."[155]

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[151] For example, the false news provisions struck down by the Zimbabwean Supreme Court in *Chavunduka* sanctioned false statements that were "likely to cause fear, alarm or despondency among the public … or [were] likely to disturb the public peace." Law and Order (Maintenance) Act, Chapter 11.07, section 50. Indeed, as the title of the Zimbabwean law suggests, the challenged provision was part of a public order piece of legislation, rather than a media law.

[152] *The State v. The Ivory Trumpet Publishing Co.* [1984] 5 NCLR 736, p. 750.

[153] Scott, F., "Publishing False News" (1952) 30 *Canadian Bar Review* 37, pp. 38-9.

[154] *A History of English Law, v. III, 5th Ed.* (London, Methuen & Co., 1942), p. 409.

[155] *R. v. Keegstra* [1990] 2 SCR 697, p. 722.

It is clear that the social conditions which were originally used to justify the prohibition on publishing false news no longer pertain. Indeed, these conditions would appear to have disappeared long ago – Holdsworth refers to "a thin stream of these cases" from the sixteenth century onwards.[156] The provision was formerly abolished in the United Kingdom in 1888, by which time it had long been obsolete.[157] In Canada, the provision was applied on only 3 occasions – only once successfully, in 1907 – before the Supreme Court struck it down in 1992. In 1951 Scott observed, "The dangerous effects of false or inflammatory publications in a tense world suggest that the legal rules limiting freedom of communication need re-examination".[158]

11.2.2 Banning False Statements

It is clear that prohibiting false statements, even those made irresponsibly, is not in itself a legitimate aim under international or constitutional provisions guaranteeing freedom of expression. The list of aims which may justify restrictions is exclusive and does not extend to promoting truth simply for its own sake.

Indeed, courts around the world have consistently held that false statements are positively protected by guarantees of freedom of expression. The reasons for this are captured poetically in the following quotation by James Madison:

> Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It has accordingly been decided by the practice of the States, that it is better to leave a few of its noxious branches to their luxuriant growth than, by pruning them away, to injure the vigour of those yielding the proper fruits.[159]

In holding that false statements were covered by the constitutional guarantee of freedom of expression, the Canadian Supreme Court stated:

> Applying the broad, purposive interpretation of the freedom of expression guaranteed by s. 2(b) [of the Canadian Charter of Rights and Freedoms] hitherto adhered to by this Court, I cannot accede to the argument that those who publish deliberate falsehoods are for that reason alone precluded from claiming the benefit of the constitutional guarantees of free speech.[160]

In *Hector v. Attorney-General of Antigua and Barbuda*,[161] the Judicial Committee of the Privy Council held that a false news provision breached the constitutional guarantee of freedom of expression. An editor of a newspaper had been charged under a provision prohibiting the printing or distribution of any false statement "likely to cause fear or alarm in or to the public, or to disturb the public peace, or to undermine public confidence in the conduct of public affairs."[162] It is implicit in this decision that false news is protected by the constitutional guarantee of freedom of expression.

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[156] Note 154, p. 409.
[157] *Ibid.*, p. 410.
[158] Note 153, p. 38.
[159] *Near v. Minnesota*, 283 US 697 (1931), p. 718.
[160] Zundel, note 147, p. 733.
[161] [1990] 2 AC 312 (PC), p. 318.
[162] Public Order Act 1972, No. 9 of 1972, Section 33B.

This is supported by a decision of the Indian Supreme Court in a case involving a certificate for the release of a film. The Court held:

> The different views are allowed to be expressed by proponents and opponents not because they are correct or valid, but because there is freedom in this country for expressing even differing views on any issue.[163]

11.2.3 False News and Public Order

We turn now to the question whether an implied legislative purpose of protecting public order would be a legitimate aim for suppressing false news. Although it is not impossible that false news may in certain cases have a tendency to increase the chances of public disorder, this is hardly likely to be its primary, or even a significant outcome. There is simply no logical connection between the presentation of false information, on the one hand, and public disorder, on the other.

This is also exemplified by the fact that there have been no cases in recent memory of any significant disorders caused primarily by false news reports. On the other hand, extreme opinions and even true statements are at least as likely as false facts to result in public disorder, and yet these are not prohibited.

The Zimbabwean Supreme Court relied on similar arguments in reaching its *Chavunduka* holding that false news laws serve no legitimate purpose. The Zimbabwean court ruled that the challenged provisions did not pursue a legislative objective of sufficient importance to warrant overriding a constitutionally protected right and noted that that was the first time the provision had been applied in the twenty years of Zimbabwean independence. In addition, the Court pointed out, various other means of securing public order were available to the State – including provisions in other statutes and in common law – which were quite adequate to the task.[164] The proper response to false statements was political action, for example by publicly refuting the claims.

It is, therefore, submitted that section 34 is not properly directed at a legitimate aim, either in its purpose or in its effect.

11.3 Reasonably Required in a Democratic Society

We submit that section 34 fails constitutional scrutiny on the grounds of vagueness and the lack of a legitimate aim. Furthermore, even if these contentions are rejected, we submit that section 34 is not reasonably required or necessary in a democratic society, in particular because it casts an overbroad shadow over free expression that is disproportionate to any limited public interest benefits it may have.

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[163] *Rangarajan v. Jagjivan Ram and Ors.* [1990] LRC (Const) 412, p. 426.

[164] This is also the case in Gambian legislation. For example, the sedition provisions of the Gambian Criminal Code make it a crime, among other things, "to raise discontent or dissatisfaction amongst the inhabitants of The Gambia." Criminal Code, section 51(1)(d).

11.3.1 Chilling Effect

What is often referred to as the "chilling effect" must be taken into account when assessing the impact of section 34 on freedom of expression. The "chilling effect" refers to the fact that restrictions of this nature affect expression well beyond the actual scope of the prohibition. Citizens will be deterred from publishing anything they could not prove to be true in a court of law, taking into account the strict rules governing admissibility of evidence.

Both the Privy Council, in *Hector*, and the Canadian Supreme Court, in *Zundel*, specifically noted the chilling effect of false news provisions as a reason for holding them unconstitutional. In *Hector*, the Privy Council stated:

> [I]t was submitted that it was unobjectionable to penalise false statements made without taking due care to verify their accuracy.... [I]t would on any view be a grave impediment to the freedom of the press if those who print, or a fortiori those who distribute, matter reflecting critically on the conduct of public authorities could only do so with impunity if they could first verify the accuracy of all statements of fact on which the criticism was based.[165]

The Canadian Supreme Court expounded at some length on the chilling effect of false news provisions:

> The danger is magnified because the prohibition affects not only those caught and prosecuted, but those who may refrain from saying what they would like to because of the fear that they will be caught. Thus worthy minority groups or individuals may be inhibited from saying what they desire to say for fear that they might be prosecuted. Should an activist be prevented from saying "the rainforest of British Columbia is being destroyed" because she fears criminal prosecution for spreading "false news" in the event that scientists conclude and a jury accepts that the statement is false and that it is likely to cause mischief to the British Columbia forest industry?[166]

A number of courts have adverted to the chilling effect of a requirement to prove truth for purposes of civil defamation law. In a case involving statements held in the national court to be false and defamatory, the European Commission of Human Rights stated:

> [F]reedom of the press would be extremely limited if it were considered to apply only to information which could be proved to be true. The working conditions of journalists and editors would be seriously impaired if they were limited to publishing such information.[167]

The House of Lords, holding that a local authority did not have a right to sue for damages for defamation, noted:

> The threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech. … What has been described as 'the chilling effect' … is very important. Quite often the facts which would justify a defamatory publication are know to be true, but admissible evidence capable of proving those facts is not available.[168]

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[165] Note 161.
[166] *Zundel*, note 147, p. 772.
[167] *Tromsø and Stensås v. Norway*, 9 July 1998, Application No. 21980/93, para. 80.
[168] *Derbyshire County Council v. Times Newspapers Ltd* [1993] 1 All ER 1011 (HL), pp. 1017-1018. Similarly, the US Supreme Court has stated: "Allowance of the defense of truth … does not mean that only false speech will be deterred. … Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is

The chilling effect of false news provisions becomes even more serious when, as is often the case in reporting on sensitive matters of public interest, journalists have relied on confidential sources which they do not wish to reveal, thereby inhibiting their ability to defend themselves against allegations of false publication. As noted above, protection of the confidentiality of sources is both a matter of professional ethics and guaranteed under international law.[169]

It may be noted that a defence of reasonable publication, as provided for in section 34(2), mitigates these concerns only slightly and to this extent may provide a false sense of security. The onus of proving that "adequate measures were taken to verify the accuracy" of news reports is on the defendant and so the chilling effect introduced by the threat of damages and costs associated with them still applies. Proof of reasonableness also poses an unacceptable burden on journalists, particularly where they have relied on confidential sources. It is clear from the quote from the Privy Council above that their Lordships were not impressed with this argument.

To summarise, it is widely agreed that freedom of expression is a fundamental human right and that the chilling effect of a requirement of proof of truth is significant.

The Chilling Effect of Section 34

Section 34 includes almost all the elements highlighted by the international jurisprudence described above as being capable of exerting a significant chilling effect on free expression. To summarize, section 34 (a) does not require a specific harm to a public interest; (b) sanctions not only malicious falsehoods, but also simple negligence; (c) provides for only a limited defence, placing the burden of proof on the defendant; and (d) allows for open-ended sanctions and damage awards. The cumulative chilling effect of all these substantive and procedural flaws is significant.

The inclusion of false reporting by negligence in this offence is particularly problematic. It suffices to contrast that with the provision in *Zundel*, which required actual knowledge of falsity rather than simple failure to take due care. Despite this, the Supreme Court of Canada comprehensively ruled that the provision was unconstitutional.

The establishment of a minimum penalty of "not less than five thousand dalasis" is also disproportionate and incompatible with respect for freedom of expression, particularly since media practitioners risk liability under this section even in the absence of malicious intent. Even the minimum penalty is quite significant compared to the average income of Gambian journalists.

11.3.2 The Practice in Other Democratic Countries

It is significant that practically no other democratic country has, or applies, false news provisions of the kind defined in section 34. In *Zundel*, the Canadian Supreme Court noted:

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believed to be true and even though it is, in fact, true, because of doubt whether it can be proved in court or fear of the expense of having to do so." *New York Times v. Sullivan*, 376 US 254, 279 (1964), pp. 278-9.

[169] See part 9 of this brief.

> [I]t is significant that the Crown could point to no other free and democratic country which finds it necessary to have a law such as s. 181 [prohibiting false news] on its criminal books.[170]

False news provisions are either non-existent or effectively defunct in many jurisdictions, including Australia, France, the Netherlands, the United Kingdom and the United States. As noted above, they have been held to be unconstitutional in Canada, Antigua and Barbuda and Zimbabwe.

In a number of other jurisdictions, false news provisions exist but are very limited in scope. Section 171G of the Indian Penal Code,[171] for example, makes it an offence to knowingly publish false news in relation to the character or conduct of a candidate with the intent of affecting the result of an election. Section 226(b) of the Danish Criminal Code prohibits false rumours, but only where these incite to racial hatred, as a species of hate speech.[172]

In view of all of the above, it is submitted that section 34 does not meet the requirements of the proportionality part of the test for restrictions on freedom of expression. As the Supreme Court of Zimbabwe so aptly put it, section 34, like its erstwhile Zimbabwean counterpart, has "the effect of overriding the most precious of all the protected freedoms, resting as it does at the very core of a democratic society – it fails for want of proportionality between its potential reach on the one hand and the 'evil' to which it is claimed to be directed on the other."[173]

[170] Note 147, p. 766.
[171] Act No. XLV of 1860.
[172] Cited in *Zundel*, note 147, pp. 812-3.
[173] *Chavunduka*, note 148, pp. 10-11.