In the Supreme Court of Zimbabwe

B E T W E E N:

MARK CHAVUNDUKA AND RAY CHOTO

Plaintiff

and

REPUBLIC OF ZIMBABWE

Defendant

WRITTEN COMMENTS SUBMITTED BY ARTICLE 19,THE INTERNATIONAL CENTRE AGAINST CENSORSHIP

FALSE NEWS AS A RESTRICTION ON FREEDOM OF EXPRESSION

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Introduction

This brief assesses the false news provision at Section 50 of the Zimbabwean Law and Order (Maintenance) Act in light of international and constitutional guarantees of freedom of expression. The analysis is based on a survey of international and comparative constitutional law – including decisions of international bodies and national appellate courts – relevant to the issue of false news. False news provisions do not exist, have been struck down or have fallen into disuse in most established democracies. In other countries, such provisions are of very limited scope and pose little threat to freedom of expression. Where false news provisions continue to be applied, their use is primarily to stifle political debate or criticism of government.

It is submitted that false news provisions are inconsistent with guarantees of freedom of expression. This is highlighted by cases, detailed in this brief, in which the highest courts of appeal have struck them down as unconstitutional. These provisions have also repeatedly been criticised by various UN bodies and mechanisms responsible for protecting and promoting human rights. In addition, general international and comparative constitutional analysis indicates that false news provisions cannot be regarded as "reasonably justifiable" restrictions on freedom of expression for purposes of safeguarding legitimate social interests.

Brief Statement of Facts and Law

In its 10-16 January 1999 issue, *The Standard* published an article entitled, "Senior Army Officers Arrested" about a coup attempt in which 23 members of the Zimbabwe National Army were alleged to have been arrested. Mismanagement of the economy and involvement in the war in the Democratic Republic of the Congo were cited as reasons for the attempt. The article cited "highly-placed sources within the military" as sources, noting that comment from the acting minister of defence was unavailable at the time of going to press. The article also noted general dissatisfaction within the army about the war, claiming morale was low and that some soldiers had refused to participate in the DRC conflict, in defiance of orders.

On 12 January 1999, Mark Chavunduka, an editor at *The Standard*, was arrested and released only on 21 January, despite court orders, for example on 14 January, to release him. On, 19 January, the author of the story, Ray Choto, handed himself over to civilian police seeking his arrest. For purposes of the present application, the salient point is that both were charged with contravening Section 50(2)(a) of the Law and Order (Maintenance) Act (Law).[1] Section 50 states:

> (1) In this section–
> "statement" includes any writing, printing, picture, painting, drawing or other similar representation.

[1] Chapter 11.07.

(2) Any person who makes, publishes or reproduces any false statement, rumour or report which–

(a) is likely to cause fear, alarm or despondency among the public or any section of the public; or

(b) is likely to disturb the public peace;

shall be guilty of an offence and liable to imprisonment for a period not exceeding seven years, unless he satisfies the court that before making, publishing or reproducing, as the case may be, the statement, rumour or report he took reasonable measures to verify the accuracy thereof.

Chavunduka and Choto have applied to the Supreme Court for a determination, under Section 24 of the Constitution of Zimbabwe, whether Section 50(2) of the Law was contrary to Section 20(1) of the Constitution. Section 20 guarantees freedom of expression in the following terms:

(1) Except with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence.

(2) Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) to the extent that the law in question makes provision–

(a) in the interests of defence, public safety, public order, the economic interests of the State, public morality or public health;

(b) for the purpose of–

(i) protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings;

(ii) preventing the disclosure of information received in confidence;

(iii) maintaining the authority and independence of the courts or tribunals or Parliament;

(iv) regulating the technical administration, technical operation or general efficiency of telephony, telegraphy, posts, wireless broadcasting or television or creating or regulating any monopoly in these fields;

(v) in the case of correspondence, preventing the unlawful dispatch therewith of any other matter; or

(c) that imposes restrictions upon public officers;

except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

This brief addresses issues raised by that application for constitutional review.

Freedom of Expression and Human Rights

International Guarantees

Article 19 of the *Universal Declaration of Human Rights*, binding on all States as a matter of customary international law, proclaims the right to freedom of expression in the following terms:

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

Zimbabwe'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), to which Zimbabwe became a party in 1991. Article 19 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.

Zimbabwe is also a party to the *African Charter on Human and Peoples' Rights*, which guarantees freedom of expression at Article 9. Both the European *Convention for the Protection of Human Rights and Fundamental Freedoms* and the *American Convention on Human Rights* also guarantee freedom of expression.[2]

The Fundamental Nature of Freedom of Expression

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

> Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.[3]

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 African Convention:

> 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.[4]

The European Court of Human Rights (ECHR) has also recognised 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".[5]

Similarly, the Inter-American Court of Human Rights stated:

> Freedom of expression is a cornerstone upon which the very existence of a democratic society rests.[6]

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[2] At Articles 10 and 13 respectively.
[3] Resolution 59(1), 14 December 1946.
[4] Decision on Communications 105/93, 130/94, 128/94 and 152/96, para. 52.
[5] *Handyside v. United Kingdom*, 7 December 1976, 1 EHRR 737, para. 49.
[6] *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.

These views have been reiterated by numerous national courts around the world, including the Zimbabwean Supreme Court:

> The profound role of this protected right, as one of the fundamental freedoms, has been underlined by this Court in several decisions. The most recent is *Retrofit (Pvt) Ltd v. Posts and Telecommunications Corporation and Anor supra* in which … freedom of expression is characterised as one universally recognised as a core value of society.[7]

Restrictions on Freedom of Expression

International Standards

Freedom of expression is not, however, absolute. Every system of international and domestic rights recognises carefully drawn and limited restrictions on freedom of expression to take into account the values of individual dignity and democracy. Under international human rights law, national laws which restrict freedom of expression must comply with the provisions of Article 19(3) of the ICCPR:

> 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 or 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.[8] First, the interference must be provided for by law. The law must be accessible and "formulated with sufficient precision to enable the citizen to regulate his conduct."[9] Second, the interference must pursue one of the legitimate aims listed in Article 19(3); this list is exclusive. Third, the interference must be necessary to secure that aim, in the sense that it serves a pressing social need, that the reasons given to justify it are relevant and sufficient and that the interference is proportionate to the legitimate aim pursued.[10] International jurisprudence makes it clear that this is a strict test, presenting a high standard which any interference must overcome. This is apparent from the following quotation, cited repeatedly by the ECHR:

> 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.[11]

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[7] *United Parties v. Minister of Justice, Legal and Parliamentary Affairs & Ors* [1997] 2 ZLR 254. The reference is to *Retrofit* [1996] 4 LRC 489, pp. 499-501.

[8] This test has been affirmed by the UN Human Rights Committee. See, *Mukong v. Cameroon*, views adopted 21 July 1994, No. 458/1991, para. 9.7. The same test is applied by the ECHR. See *The Sunday Times v. United Kingdom*, 26 April 1979, No. 30, 2 EHRR 245, paras. 45.

[9] *The Sunday Times*, *op cit.*, para. 49.

[10] See *Lingens v. Austria*, 8 July 1986, 8 EHRR 407, paras. 39-40 (ECHR).

[11] See, for example, *Thorgeirson v. Iceland*, 25 June 1992, 14 EHRR 843, para. 63 (ECHR).

National Standards

National constitutions commonly require that any restrictions on freedom of expression must be justified as "reasonably justifiable in a democratic society".[12] National courts have elaborated a test for assessing whether a restrictions is reasonably justifiable. In 1986, the Canadian Supreme Court set out what has come to be known as the "Oakes Test", the accepted 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".[13]

In addition, the Canadian constitution permits only restrictions that are "prescribed by law".[14] This test has been followed in substance in a number of other jurisdictions, including Zimbabwe.[15] The similarity between this test and the test under international law may be noted. Both require that any restrictions are set out clearly in law, that they pursue objectives or aims of sufficient importance to warrant limiting a fundamental right and that they meet a test of necessity and proportionality.

Issues Addressed

The prohibition on publishing false news found at Section 50 of the Law represents a substantial limitation on freedom of expression. This brief assesses that limitation in light of relevant international and comparative constitutional law, concluding that Section 50 goes beyond the scope of legitimate restrictions on freedom of expression.

Specifically, this brief addresses the following issues:

1. Does Section 50 meet the requirement that restrictions on freedom of expression be "provided for by law"? In particular, is it excessively vague?
2. Does Section 50 serve one of the legitimate aims which may justify a restriction on freedom of expression under international law or the Constitution? Is there a

[12] Constitution of Zimbabwe, s. 20(2).
[13] *R. v. Oakes* [1986] 1 SCR 103, p. 138-9.
[14] Section 1 of the *Canadian Charter of Rights and Freedoms*.
[15] See, for example, *Nyambirai v. National Social Security Authority and Anor*, 1995 (9) BCLR 1221 (SC), p. 1231.

sufficiently proximate connection between Section 50 and this legitimate aim?
3. Is Section 50 sufficiently rationally connected to or carefully designed to achieve the legitimate aim?
4. Does Section 50 impair the right to freedom of expression as little as possible?
5. Is the harm to freedom of expression from Section 50 proportionate to the objective sought to be achieved?

Defamation Law

Civil defamation law, generally accepted as a legitimate form of restriction on freedom of expression, is the only other significant branch of the law which involves considerations of truth or falsity. Defamation law differs fundamentally from false news provisions. It relates only to a statement made about a specific living individual, rather than false statements generally. This means both that the likelihood of harm is far more apparent and that direct evidence of truth is far more likely to be readily available. The Canadian Supreme Court distinguished the two areas of law, noting that, "the difficulties posed by [the requirement of truth] are arguably much less daunting in defamation than under s. 181 of the Criminal Code [dealing with false news]".[16] In any case, strict requirements of truth for defamation law have been rejected as inappropriate in many jurisdictions.[17] In addition, proof of truth is not relevant to criminal defamation law so it applies only in the context of civil remedies.

For these reasons, this brief will not address the question of the appropriate role of truth or falsity in defamation law. To do so would be to invite confusion and would not assist in any way in determining the legitimacy of false news provisions.

Specific Issues

Provided for by Law

International and Comparative Standards

International law and most constitutions permit only restrictions on fundamental rights that are provided for by law.[18] This implies not only that the restriction is based on a legal provision, but also that the law meet certain standards of clarity and accessibility, sometimes referred to as the "void for vagueness" doctrine. The ECHR has elaborated on the requirement of "prescribed by law" under the European Convention on Human Rights:

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[16] *R. v Zundel* [1992] 2 SCR 731, p. 757.
[17] For example, in Australia (see *Lange v. Australian Broadcasting Corporation* (1997) 71 ALJR 818 (HC)), India (see *Rajagopal & Anor v. State of Tamil Nadu* [1994] 6 SCC 632 (SC)), New Zealand (see *Lange v. Atkinson and Anor* (1998) 4 BHRC 573 (CA)), South Africa (see *National Media Ltd. and Ors v. Bogoshi*, 1998(4) SA 1196 (SCA)), the United States (see *New York Times v. Sullivan*, 376 US 254 (1964)) and Zambia (see *Sata v. Post Newspapers Ltd. and Anor (No. 2)* [1995] 2 LRC 61 (HC)).
[18] In the Zimbabwean Constitution, the term is "under the authority of any law", s. 20(2).

> [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 – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.[19]

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 which bear no relation 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. As a result, they exert an unacceptable chilling effect on freedom of expression as citizens steer well clear of the potential zone of application to avoid censure.[20]

This requirement also applies to laws which grant authorities excessively broad discretionary powers to limit expression. In *Re Ontario Film & 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.[21]

The Canadian Supreme Court has had the opportunity to consider the constitutionality of a false news provision, in *R. v. Zundel*. 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 to wilfully 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".[22] 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 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.[23]

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[19] *The Sunday Times*, *op cit.*, para. 49.
[20] The problem of chilling effect is elaborated in further detail below, under Issue 3.
[21] (1983) 41 OR (2d) 583 (Ont. HC), p. 592.
[22] Criminal Code, RSC 1985, c. C-46, Section 181.
[23] *Op. cit.*, p. 768-9. *Hoaglin* is at (1907) 12 CCC 226. It may be noted that the Court relied primarily on overbreadth rather than vagueness in striking down the false news provision, specifically stating that it preferred to deal with the matter on the merits. *Op cit.*, p. 760.

Application of These Standards to Section 50

Section 50 is open to criticism for vagueness on several counts including the very notion of falsity and the phrase "fear, alarm or despondency". There is nothing in the law to guide citizens as to what standards apply to these phrases.

Prohibiting false statements 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."[24]

False news prosecutions, almost by definition, involve the publication of controversial material. Certainly this is so where, as in Zimbabwe, they are conditioned upon the arousal of fear, alarm or despondency among the public. In such cases the line between facts and opinions becomes particularly cloudy. Indeed, there is a danger that the accepted view may be confused with 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".[25]

The problem of vagueness is exacerbated by the frequently illegitimate use of false news provisions to hinder expression critical of the authorities. For example, in a recent case from Malaysia, a Member of Parliament and Deputy Secretary-General of the opposition Democratic Action Party (DAP) was convicted under section 8A(1) of the Printing Presses and Publications Act, 1984, of maliciously publishing false news and sentenced to 18 months imprisonment, which he is currently serving. The false news in question was his statement that a minor, allegedly the victim of a rape, had been imprisoned. The minor had been detained by the police and subsequently placed in protective custody by a court order. Despite this, the Malaysian courts consistently held that it was false to say she had been imprisoned. It is perhaps significant that the alleged perpetrator of the rape was a former Chief Minister of the State of Melaka while the accused was an opposition politician.[26]

In another recent case, from Cameroon, the renowned journalist Pius Njawe was imprisoned for intentionally spreading false news causing harm to public authority or national cohesion for writing that the President had had a heart attack.[27] He based this conclusion on the fact that the President had withdrawn early from a football game, only returning briefly at the end to hand out the trophies, and on information from confidential sources. Njawe was unable to prove truth of his statements to the satisfaction of the Court, in part due to a refusal to reveal his sources. The Court of

[24] *Letter Carriers*, 418 US 264 (1974), pp. 284-6.
[25] *Op cit.*, p. 749.
[26] The case can be found at 1998 MLJ Lexis 193, 1998-3 MLJ 14.
[27] Contrary to ss. 74 and 113 of the Criminal Code. See Case No. 389, 14 April 1998.

Appeal inferred that the President was healthy from the fact that he was able to hand out the trophies and from letters he had written accrediting foreign missions. The Court held that the requisite of harm from Njawe's statements was met by the prejudice they might cause to foreign investment. Njawe went to jail and was released on a Presidential order of clemency only in October 1998.

Also of concern is the very vague nature of "fear, alarm or despondency". These are inherently subjective, emotional phenomena. As a result, they potentially include a significant proportion of all published material. Almost anything that is newsworthy is likely to cause some degree of fear, alarm or despondency. A report of a bus accident which mistakenly reported that 49 instead of 50 people had been killed, for example, might be considered to fall foul of this provision. It is perhaps significant that truth or falsity has no bearing on this question, true reports being equally likely to arouse such emotions. The breadth of this phrase becomes clear if one considers what the result would be if newspaper editors vetoed all material that might arouse these emotions.

Several key elements of a Section 50 offence are unacceptably vague; cumulatively this is highly problematical. Section 50 is potentially applicable to a very wide range of published work and effectively allocates a wide discretion to authorities in deciding when and where to prosecute. It is also difficult for citizens to know with any degree of certainty whether they are conforming to its requirements. Were this provision to be actively applied, it would exert a significant chilling effect on freedom of expression. For these reasons, it is submitted that Section 50 contravenes the constitutional requirement that restrictions on fundamental rights not be excessively vague.

Legitimate Aim

International Standards

It is quite clear from both the wording of Article 19 of the ICCPR and the views of the UN Human Rights Committee that restrictions on freedom of expression which do not serve one of the legitimate aims listed in paragraph 19(3) are not valid.[28] From among these, only national security or public order (*ordre public*) might be posited as legitimate aims of false news provisions.

Section 20 of the Constitution of Zimbabwe additionally lists public safety and the economic interests of the State as legitimate aims which may justify restrictions on freedom of expression. The former presumably falls largely, if not entirely, within the ambit of public order. The latter – the economic interests of the State – is not, under international law, considered a legitimate ground for restricting expression. It is, therefore, incumbent upon Zimbabwean courts to construe it narrowly, so as to minimise any potential breach by Zimbabwe of her international obligations. Lord Wilberforce, writing as a member of the Privy Council, noted the relevance of international human rights law when construing constitutional clauses.[29] The High Court

[28] See *Mukong*, *op cit.*, para. 9.7.
[29] *Minister of Home Affairs v. Fisher* [1980] AC 319, p. 328-9.

of Australia has noted that "international 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."[30]

It is not sufficient, to satisfy this part of the test, for restrictions on freedom of expression to merely incidentally effect one of the legitimate aims listed. The measure in question 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.[31]

In assessing whether a restriction on freedom of expression addresses a legitimate aim, regard must be had to both the purpose and the effect of the restriction. Where the original purpose was to achieve an aim other than one of those listed in the ICCPR and/or constitution, the restriction cannot be upheld. As the Canadian Supreme Court has noted:

> [B]oth purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation.[32]

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.[33]

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.[34]

Section 50 has in substance modernised the original provision only by substituting "fear, alarm or despondency" for "discord, or occasion of discord or slander" and "public or any section of the public" for "the King and his People, or the Great Men of the Realm".

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

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[30] *Mabo v. Queensland* (No. 2), (1992) 175 CLR 1, para. 42.
[31] *Thappar v. State of Madras* [1950] SCR 594, p. 603.
[32] *R. v. Big M Drug Mart Ltd* [1985] 1 SCR 295, p. 331.
[33] *The State v. The Ivory Trumpet Publishing Co.* [1984] 5 NCLR 736, p. 750.
[34] Scott, F., "Publishing False News" (1952) 30 *Canadian Bar Review* 37, pp. 38-9.

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."[35] 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."[36]

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.[37] The provision was formerly abolished in the United Kingdom 1888, by which time it had long been obsolete.[38] 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".[39]

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.[40]

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.[41]

In *Hector v. Attorney-General of Antigua and Barbuda*, the Judicial Committee of the

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[35] *A History of English Law, v. III, 5th Ed.* (London, Methuen & Co., 1942), p. 409.
[36] *R. v. Keegstra* [1990] 2 SCR 697, p. 722.
[37] *Op cit.*, p. 409.
[38] *Ibid.*, p. 410.
[39] *Op cit.*, p. 38.
[40] *Near v. Minnesota*, 283 US 697 (1931), pp. 718.
[41] Zundel, *op cit.*, p. 733.

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".[42] It is implicit in this decision that false news is protected by the constitutional guarantee of freedom of expression.

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.[43]

Fear, Alarm and Despondency

Although it is not impossible that false news which causes fear, alarm or despondency may in certain cases have a tendency to increase the chances of public disorder or to harm economic interests, this is hardly likely to be its primary, or even a significant outcome. There is simply no logical connection between fear, alarm or despondency, on the one hand, and disorder or harm to the economy, on the other. This is exemplified by the facts of this case, where, in the significant period since its publication, the article in question does not appear to have given rise to any public order or economic problems. On the other hand, extreme opinions and even true statements are at least as likely as false facts to cause fear, alarm or despondency and yet these are not prohibited.

It is, therefore, submitted that Section 50 prohibiting false news is not properly directed at a legitimate aim, either in its purpose or in its effect.

Rational Connection

A fourth requirement for restrictions on freedom of expression is that they be rationally connected to the legitimate 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. It is submitted that Section 50 is not rationally connected to the aim of maintaining public order inasmuch as there are ways of achieving this goal which are far less harmful to freedom of expression. This is reflected in the experience of other countries, in the views of international bodies established to promote and protect human rights, in other laws protecting public order and in legislative developments in Zimbabwe itself.

The Situation in Other Jurisdictions

It is significant that many other democratic countries either do not have or do not apply false news provisions. In *Zundel*, the Canadian Supreme Court noted:

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[42] Public Order Act 1972, No. 9 of 1972, Section 33B.
[43] *Rangarajan v. Jagjivan Ram and Ors.* [1990] LRC (Const) 412, p. 426.

> [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.[44]

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 and Antigua and Barbuda.

In a number of other jurisdictions, false news provisions exist but are very limited in scope. Section 171G of the Indian Penal Code,[45] 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.[46]

Section 118(1)(b) of the South African Defence Act[47] prohibits the disclosure of any "statement, comment or rumour" relating to a member or activity of the South African Defence Force or the forces of a foreign country calculated to "prejudice or embarrass the Government in its foreign relations or to alarm or depress members of the public". Although formally not a false news provision, it has been applied to false statements. The last case under the provision appears to be the 1981 case of *S. v. DuPlessis*,[48] where a conviction was quashed on appeal as the document had not been published. An earlier prosecution illustrates the limited scope of the provision; it was unsuccessful as the comments related to the Reserve Units of the Police Force and not the army.[49] This provision has not yet been considered under the new South African constitution.

In Germany, there are no false news provisions relating directly to public order. Section 109d of the Criminal Code prohibits the wilful spreading of false statements of fact likely to disturb the functioning of the army, while Section 100a prohibits spreading false facts which endanger relations with other States or the security of the Republic. Both are very limited in scope. In addition, any such prohibitions are subject to the constitutional guarantee of freedom of opinion and the specific principles flowing therefrom. For example, the *Böll Case* involved a claim for damages for a violation of honour from a false or grossly distorted quotation. The Constitutional Court held that freedom of opinion protects facts unless they cannot contribute to the formation of an opinion; this means that only verifiably or patently false facts are not protected. In addition, any prohibitions on false statements should not have the effect of inhibiting processes by which public opinion is formed.[50]

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[44] *Op cit.*, p. 766.
[45] Act No. XLV of 1860.
[46] Cited in *Zundel*, *op cit.*, p. 812-3.
[47] Act 44 of 1957.
[48] 1981(3) SA 382 (A).
[49] *Minster van Verdediging v. John Meinert (Edms) Bpk en 'n Ander* 1976 (4) SA 113 (SWA).
[50] 54 BverfGE 208 (1980). See Kommers, D., *The Constitutional Jurisprudence of the Federal Republic of Germany, 2nd Ed.* (1997, Durham, Duke University Press), pp. 420-22 and "Constitutional Aspects of False News Provisions in German Law", prepared for ARTICLE 19 by C. Droege, Max-Planck Institute (on file with ARTICLE 19).

Article 656 of the Italian Criminal Code prohibits the publication of false news which disturbs public order. This provision has been upheld on three occasions by the Constitutional Court but its scope of application – already far more finely tuned to a legitimate aim than the Section 50 of the Law and Order (Maintenance) Act – has been progressively narrowed and the last successful prosecution appears to have been in 1968.[51] The Supreme Criminal Court held in 1955 that it is not applicable to cases of mistake[52] and in 1974 that the threshold for showing a threat to public order is high.[53]

Courts in a number of countries have, however, refused to strike down false news provisions as contrary to constitutional guarantees of freedom of expression. For example, in *Public Prosecutor v. Pung Chen Choon*, the Malaysian Supreme Court upheld a false news provision which prohibits the malicious publication of false news. However, it is of some significance that the constitutional test did not include a requirement of reasonable justification:

> [T]he Indian Constitution requires that the restrictions, even if within the limits prescribed, must be 'reasonable' ... but with regard to Malaysia ... the scope of the court's inquiry is limited to the question of whether the impugned law comes within the orbit of the permitted restrictions.[54]

Clearly the Zimbabwean Constitution bears more relation to the Indian than the Malaysian Constitution.

The High Court of St. Vincent and the Grenadines also upheld a false news provision similar to Section 50 of the Zimbabwean Law and Order (Maintenance) Act. In that case, the Court concluded, without giving substantive reasons, that although the law was wide, it was not overbroad and it did serve to protect security of the person. It is submitted, with respect, that this decision pays too little deference to the chilling effect of these provisions and the importance of freedom of expression.[55]

Statements by UN Bodies

Statements by UN bodies concerned with human rights also suggest that false news provisions are inconsistent with the guarantee of freedom of expression. The UN Human Rights Committee, established by the *International Covenant on Civil and Political Rights* (ICCPR),[56] is the body officially responsible for supervising State compliance with their obligations under the ICCPR, including Article 19 guaranteeing the right to freedom of expression. It is composed of 18 independent experts representing all the regions of the world.

The Committee monitors State compliance with the ICCPR, *inter alia*, by providing comments on the regular reports States are obliged to submit to it. On at least four occasions in recent years, the Committee has expressed concern in these comments at

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[51] Cassazione sez, 6, 2 March 1967, in *Cassazione Penale Massimario Annuale* 1968, 1099, m. 1709.
[52] Cassazione, 15 October 1955, in *Giustizia Penale* 1956, II, 462.
[53] Cassazione sez, 4, 5 November 1974, in *Giustizia Penale* 1975, II, 475.
[54] [1994]2 LRC 236, p. 244.
[55] *Richards v. Attorney General of St. Vincent and the Grenadines* [1991] LRC (Const) 311. See also, *The Republic v. Tommy Thompson Books Ltd*, 18 March 1997, No. 1/96, Supreme Court of Ghana.
[56] General Assembly Resolution 2200A(XXI) of 16 December 1966, in force 23 March 1976.

the presence of false news provisions in national law. In 1995, the Committee noted, in respect of Tunisia, its "concern that those sections of the Press Code dealing with defamation, insult and false information unduly limit the exercise of freedom of opinion and expression".[57] Article 49 of the Tunisian Press Code provides for up to three years imprisonment for the bad faith publication of false news which has or is likely to disrupt public order. In his annual report to the UN Commission on Human Rights, the Special Rapporteur on freedom of expression and opinion, Abid Hussain, noted with concern the case of Mr. Ksila, a Tunisian who had been charged with spreading false news.[58]

In 1990, the constitutionality of Section 299(1) of the Mauritian Criminal Code, which makes it an offence, punishable by possible imprisonment of up to one year, to publish false news of a nature to disturb public peace or order, was upheld in *R. v. Boodhoo and anor*.[59] In that case, Section 299 was distinguished from the law at issue in *Hector*, as the former provides for a defence of reasonableness. Despite this, in 1996 the Human Rights Committee expressed concern at the criminal prohibition on the dissemination of false news in Mauritius.[60]

In 1998, the Committee criticised both Uruguay and Armenia for false news provisions.[61] The Uruguayan provision, Article 19 of the Press Law, prohibits the knowing circulation of false facts causing a grave disruption of public peace or grave damage to the economic interests of the State. Breach of this provision can attract a prison sentence of up to two years. The Armenian provision, Article 6 of the Law on Press and other Mass Media, prohibits the publication of false and unverified news reports. Breach may lead to a three-month suspension of the media outlet's operations.

It may be noted that in all these cases, apart from Armenia, the provision in question was conditional upon actual public disorder or at least a risk thereof. To this extent, these provisions are all more limited and finely adapted to a legitimate aim than Section 50 in Zimbabwe.

Other Considerations

Existing legal rules are sufficient to maintain public order, without prohibiting the publication of false news. As the Canadian Supreme Court noted in *Zundel*:

> Other provisions, such as s. 319(2) of the Criminal Code, deal with hate propaganda more fairly and more effectively. Still other provisions seem to deal adequately with matters of sedition and state security.[62]

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[57] *Annual General Assembly Report of the Human Rights Committee*, UN Doc. A/50/40, 3 October 1995, para. 89.
[58] *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1998/40, para. 99.
[59] 1990 MR 191.
[60] *Annual General Assembly Report of the Human Rights Committee*, UN Doc. A/51/40, 16 September 1996, para. 154.
[61] See, respectively, *Concluding Observations of the Human Rights Committee: Uruguay*, UN Doc. CCPR/C/79/Add.90, 4 August 1998, para. 10 and *Concluding Observations of the Human Rights Committee: Armenia*, UN Doc. CCPR/C/79/Add.100, 19 November 1998, para. 20.
[62] *Op cit.*, p. 765.

In most common law countries, a host of legal rules adequately protect public order. In Zimbabwe, for example, the Law and Order (Maintenance) Act alone includes a number of provisions restricting expression for reasons of public order. In addition to the prohibition on false news, the Act allows the President to prohibit publications and prohibits a range of types of statements. These include statements encouraging violence, inciting strikes in essential services, undermining police officers, the President or any other public officer, causing disaffection among the police or making subversive statements, defined very broadly.

Statute law prohibiting treason, terrorism and incitement to crime is found in most common law countries. In addition, common law principles still widely applicable require allegiance to the government[63] and prohibit incitement to crime[64] and seditious libel.[65] It is fairly clear that this barrage of rules should be quite sufficient to maintain order without requiring resort to vague provisions such as the prohibition on false news.

That prohibiting false news is superfluous to the maintenance of public order is also supported by recent legal developments in Zimbabwe. A new law dealing with public order, the Public Order and Security Bill, 1998, has been published by the Government of Zimbabwe. It is much shorter than the existing law and includes no prohibition on false news.

Where false allegations are made, the government can substantially mitigate any potentially negative effect by simply refuting them and providing appropriate evidence to the contrary. In *Die Spoorbond v. South African Railways*, the South African Court of Appeal, holding that South African Railways, as a State enterprise, could not sue in defamation, noted:

> The normal means by which the Crown protects itself against attacks upon its management of the country's affairs is political action and not litigation, and it would, I think, be unfortunate if that practice were altered.[66]

The ECHR has stated:

> [T]he dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to unjustified attacks and criticisms.[67]

The same reasoning applies to criminal charges for publishing false news. In the present case, the authorities presumably have ample means at their disposal to refute any false allegations of this sort. Where the government can take steps itself to protect the legitimate aim in question, a general prohibition must fail the rational connection part of the test for restrictions.

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[63] See *Joyce v. Director of Public Prosecutions* [1946] AC 347 (HL).
[64] See *R v. Most* (1881) 7 QBD 244. In most jurisdictions, the common law in this area has been supplemented by statutory prohibitions.
[65] See, for example, *R v. Chief Metropolitan Stipendiary Magistrate, Ex parte Choudhury* [1991] 1 QB 429, 452-3.
[66] [1946] SA 999 (AD), pp. 1012-3.
[67] *Castells v. Spain*, 23 April 1992, 14 EHRR 445, para. 46.

For these reasons, it is submitted that Section 50 does not pursue a legitimate aim under international law or the Zimbabwean Constitution.

Overbreadth

Perhaps the most serious problem with Section 50 prohibiting the publication of false news is its massive overbreadth. Even when restrictions are otherwise legitimate, the Oakes test requires them to impair the right to freedom of expression as little as possible. In essence, this requirement places an obligation on the State, when pursuing legitimate aims, to have due regard to constitutional rights by tailoring restrictions as narrowly as possible. The US Supreme Court has emphasised the problem of overbreadth:

> Even though the Government's purpose be legitimate and substantial, that purpose cannot be pursued by means that stifle fundamental personal liberties when the end can be more narrowly achieved.[68]

In *Zundel*, the Canadian Supreme Court focused particularly on the overbreadth of the false news provision in question:

> Assuming a rational link between the objective of social harmony and s. 181 of the Criminal Code, the breadth of the section is such that it goes much further than necessary to achieve that aim.... The territory covered by this prohibition can only be described as vast.... These examples illustrate s. 181's fatal flaw - its overbreadth.[69]

While the Privy Council, in *Hector*, did not specifically refer to this aspect of the provision, it is implicit in the quotation above, noting that it would be "a grave impediment to the freedom of the press" if one could publish only after having verified the accuracy of all statements of fact.[70]

General Principles Relating to Overbreadth and Public Order

Although there are only a few cases specifically considering false news provisions, the question of overbreadth in relation to public order and national security restrictions on freedom of expression has been examined extensively. It is possible to draw a number of general principles from that body of jurisprudence which apply equally to false news provisions as to other sorts of public order restrictions.

A number of courts have stressed that fundamentally, stability and order depend on open democratic debate as a way of solving social problems so that to apply public order restrictions too broadly in fact threatens stability. For example, a case from South West Africa involved a Cabinet decision to impose a high registration fee on a newspaper on the basis that the editor had written articles tending to endanger State security. The Supreme Court set aside the decision, noting:

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[68] *Shelton v. Tucker*, 364 US 479 (1960), p. 488.
[69] *Op cit.*, pp. 768-72.
[70] *Op cit.*, p. 318.

> Because people (or a section thereof) may hold their government in contempt does not mean that a situation exists which constitutes a danger to the security of the State or to the maintenance of public order. In fact, to stifle just criticism could as likely lead to these undesirable situations.[71]

In a case involving a challenge to the law of sedition, the Nigerian High Court, Enugu, held:

> The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech ... to the end that government may be responsible to the will of the people and that changes, if desired, may be obtained by peaceful means.[72]

This quotation would appear to have particular relevance in this case given the content of the impugned article.

There is a clear tension in the jurisprudence on public order restrictions on freedom of expression between two competing values. On the one hand, public order and national security are important social interests which may, in appropriate circumstances, be legitimate grounds for restricting expression. On the other hand, these are very elastic notions which must be narrowly construed if they are not to seriously inhibit political debate.

The approach taken by courts in balancing these values has essentially been to require a sufficient nexus between a given expression and a purported harm to public order or national security. In assessing the nexus, these courts have focused on a number of elements such as the seriousness of the risk of harm, the imminence of the harm, the presence of a causal link between the expression and the risk of harm, the seriousness of the harm itself and, given the criminal nature of these restrictions, the presence of some sort of intention on the part of the accused to cause harm.

The Supreme Court of India has held that there must be a very close link between an expression and the threat of a disturbance:

> Our commitment to freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or far fetched. It should have proximate and direct nexus with the expression. The expression should be intrinsically dangerous to the public interest. In other words, the expression should be inseparably locked up with the action contemplated like the equivalent of a 'spark in a powder keg'.[73]

The United Supreme Court has laid out a clear test for assessing public order restrictions on freedom of expression which requires both direct advocacy of disorder and a likelihood of imminent lawless action:

> [T]he constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to

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[71] *Free Press of Namibia Pty Ltd. v. Cabinet for the Interim Government of South West Africa* [1987](1) SA 614, p. 624.
[72] *Op cit.*, p. 748.
[73] S. *Rangarajan v. P.J. Ram* [1989](2) SCR 204, p. 226.

> inciting or producing imminent lawless action and is likely to incite or produce such action.[74]

US courts have stressed the need for imminent lawless action. In *Whitney v. California*, the Supreme Court held that "no danger flowing from speech can be deemed clear and present, unless the incidence of evil apprehended is so imminent that it may befall before there is opportunity for discussion. If there be time to expose through discussion the falsehoods and the fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence."[75]

In many jurisdictions, prosecutions for public order offences are effectively a thing of the past. There has been no prosecution for sedition in the United Kingdom since 1947. In Australia, a 1986 amendment means that prosecutions now require "an intention of causing violence or creating public disorder or a public disturbance."[76] These provisions have never been used. A Canadian sedition case in 1951, before the Charter of Rights and Freedoms came into effect, defined the offence so restrictively that it has never been applied since. In that case the Supreme Court held that:

> An intention to bring the administration of justice into hatred and contempt or exert disaffection against it is not sedition unless there is also the intention to incite people to violence against it.[77]

Similar protection for expression could be found in South Africa even as long ago as 1936. In *R. v. Roux*, the accused had been convicted of printing "scandalous and dishonouring words" against the King, which included reference to the King as an imperialist and oppressor. In overturning the conviction, the appeal court held that the words could not be construed as "an incitement to taking up arms against the King or as inducing a mutiny or insurrection whereby the welfare of the King and the state (*res publica*) is placed in jeopardy."[78] The same case also established that governments cannot rely on a generally tense situation – particularly where they have cut off other, perhaps less inflammatory, avenues for promoting change – to proscribe speech. The Court noted:

> [I]f the language is unnecessarily strong, we must remember that the natives of Durban have no voice or vote in the passing of those laws or in the government of the country, and that they can only protest against what may be regarded by them as grievances.[79]

In *S. v. Nathie*, the appellant was charged with inciting offences against the Group Areas Act in the context of protests against the removal of Indians from certain areas. The appellant stated, *inter alia*: "I want to declare that to remain silent in the face of persecution is an act of supreme cowardice. Basic laws of human behaviour require us to stand and fight against injustice and inhumanity." The Court rejected the state's claim of incitement to crime, holding that since the passage in question did not contain "any unequivocal direction to the listeners to refuse to obey removal orders" it did not contravene the law.[80]

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[74] 395 U.S. 444 (1969), p. 447.
[75] 274 U.S. 357, 377 (1931).
[76] *Intelligence and Security Act*, No. 102, 1986, sections 12-13.
[77] *Boucher v. The King* [1951] SCR 265, p. 283.
[78] [1936] AD 271, p. 280.
[79] *Ibid.*, pp. 283-4.
[80] [1964](3) SA 588 (A), p. 595.

Similar protections are offered in civil law jurisdictions. In Germany, the expression must have been made with the intention of posing a concrete danger to respect for the State or its constitutional principles. The law of incitement allows publications to be restricted only where the material induces others to commit violent or arbitrary actions. In the Netherlands, a mere threat to safety is not enough - it must be reasonable to assume the feared consequences would in fact occur. In France, measures to prevent incitement to crime may be applied only in the context of a grave and urgent threat arising specifically from the publication. Spanish courts have interpreted the incitement provisions as applying only to clear statements that expressly request the audience to commit a public order offence.[81]

The question of public order restrictions on freedom of expression has not been dealt with in any detail by the European Court of Human Rights but a recent case did challenge binding over orders which were imposed on a number of demonstrators. It is significant that the Court allowed the orders only in those cases where the demonstrators had physically obstructed legal activities; where demonstrators had engaged in peaceful protest, binding over orders were not appropriate.[82]

Similar principles apply in the area of national security. In October 1995, ARTICLE 19 convened a group of experts in international law, national security and human rights which drafted what have become known as the *Johannesburg Principles on National Security, Freedom of Expression and Access to Information*. These principles have been endorsed by the UN Special Rapporteur on freedom of opinion and expression[83] and noted by the UN Commission on Human Rights.[84] Principle 6 is of particular interest:

> Subject to Principles 15 and 16 [which further limit restrictions], expression may be punished as a threat to national security only if a government can demonstrate that:
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> (a) the expression is intended to incite imminent violence;
> (b) it is likely to incite such violence; and
> (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

It is thus well-established that a number of conditions must be met before restrictions on freedom of expression for reasons of public order or national security may be legitimate. First, the risk of harm must be high, not remote or conjectural. Second, the risk must be of imminent harm, not a distant occurrence to which many factors might contribute. Third, the risk of harm must flow directly from the expression. It is not legitimate to restrict expression where tense underlying social circumstances are the real cause of the risk. Fourth, the risk must be of serious harm, that is to say violence or other unlawful action; minor or insignificant harm cannot justify restrictions on a fundamental right. Finally, some sort of intention must be present, at least where sanctions are to be applied. While it may be legitimate to interrupt a public speech which is the equivalent

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[81] Material on civil law jurisdictions was provided directly to ARTICLE 19 by the following legal experts: Ineke Boerefijn and Selina Kossen (Netherlands), Jean-Yves Dupeux (France), Dr. Jochen Frowein and Peter Radler (Germany), Dr. Angel Rodriguez (Spain).
[82] *Steel and Others v. United Kingdom*, Judgement of 23 September 1998.
[83] See *Report of the Special Rapporteur on the protection and promotion of the right to freedom of opinion and expression*, 29 January 1999, para. 23.
[84] See Resolution 1998/42, preamble.

of a “spark in a powder keg”, the speaker may only be subject to sanction where he or she intended to ignite the powder.

Application of the Principles to False News Provisions

It seems fairly clear that false news provisions in general, and Section 50 of the Law and Order (Maintenance) Act in particular, encompass a range of expression which does not meet the conditions outlined above. Such provisions are not restricted to cases where there is a high risk of harm but are rather engaged whenever there is a likelihood of fear, alarm or despondency, a much lower standard, particularly given the tenuous link to public order or national security. Imminence is not required. Section 50 does require causality, the third condition. Fear, alarm or despondency could hardly be described as serious harms, particularly compared with the violence or lawless action which is required in many jurisdictions. Finally, despite the possibility of a seven year prison sentence, intent is not required - indeed, lack of due diligence is sufficient.

The overbreadth of the false news provisions in question was a significant factor in both *Zundel* and *Hector*. National jurisprudence from a variety of countries, most of which do not have false news provisions, establishes a high standard before restrictions on freedom of expression for purposes of public order or national security may be legitimate. Section 50 clearly does not meet this standard.

Proportionality

The proportionality part of the Oakes test involves comparing two considerations: a) the importance of the right and the likely effect of the restriction on the exercise of that right; and b) the importance of the goal or legitimate aim which is sought to be protected.

Chilling Effect

The fundamental nature of freedom of expression as a human right has already been noted.

What is often referred to as the “chilling effect” must be taken into account when assessing the impact of Section 50 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. This is particularly true where breach of the provision may lead to imprisonment, as with Section 50.

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.[85]

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?[86]

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.[87]

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.[88]

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. Protection of the confidentiality of sources is both a matter of professional ethics and guaranteed under international law. The ECHR noted:

> 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.[89]

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[85] [1990] 2 AC 312 (PC), p. 318.
[86] *Zundel*, *op cit.*, p. 772.
[87] *Tromsø and Stensås v. Norway*, App. No. 21980/93, Report of 9 July 1998, para. 80.
[88] *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 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*, *op cit.*, pp. 278-9.
[89] Goodwin v. United Kingdom, 27 March 1996, 22 EHRR 123, para 39.

It may be noted that a defence of reasonable publication, as provided for in Section 50, mitigates these concerns only slightly and to this extent may provide a false sense of security. The onus of proof of reasonableness is on the defendant and so the chilling effect introduced by the threat of criminal charges and costs associated with them still operates. 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. In *Zundel*, the Canadian Supreme Court struck down a provision that required actual knowledge of falsity, let alone simply a failure to take due care.

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

The Balancing Act

When comparing the harm to freedom of expression with the importance of the goal, courts go beyond the general legitimate aim the law serves and look at its specific objectives. As the Canadian Supreme Court noted in *Zundel*:

> 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.[90]

The immediate objective of Section 50 is to protect the public from fear, alarm or despondency. The legitimacy of this as an objective worthy of any legislative attention, let alone where this involves restrictions on basic rights, is open to question. These are emotions which are common in vibrant political debate, at the core of protected speech, and which many newspapers specifically seek to arouse in their columns. There is in any case no logical connection between falsity and these emotions and Section 50 does not prohibit other forms of expression which may give rise to these emotions.

It is, therefore, submitted that taking into account the serious chilling effect it potentially has on freedom of expression, its tangential relation to the goal of maintaining public order and the low priority of its immediate objective, Section 50 does not meet the requirements of the proportionality part of the test for restrictions on freedom of expression.

Conclusion

The continued use of false news provisions as we approach the turn of the millennium is an anachronism and an unjustifiable restraint on freedom of expression and free political debate. A close analysis shows that false news provisions breach almost every element of the test for restrictions on freedom of expression. At least in the form found in Section 50 of the Zimbabwean Law and Order (Maintenance) Act, they are unacceptably

[90] *Op cit.*, p. 733.

vague, they serve no legitimate aim, they bear no rational connection to any aim one might posit for them, the are massively overbroad and they disproportionately limit the right to freedom of expression.

These flaws have been recognised in significant decisions by the highest appellate courts, by the UN Committee on Human Rights and by prosecutors in countries where these laws are still on the books but are not applied. Indeed, the superfluous nature of these provisions appears to have been recognised by the Zimbabwean authorities as well, who have chosen not to include it in the Public Order and Security Bill which is due to replace the Law and Order (Maintenance) Act in due course. We urge the Supreme Court to hasten this event by striking down Section 50.