THE PROSECUTION OF  
DR. MONCEF MARZOUKI

PUBLIC STATEMENT FROM ARTICLE 19, THE GLOBAL CAMPAIGN  
FOR FREE EXPRESSION\(^1\)

London, 12 December 2000

Summary

ARTICLE 19 is of the view that the charges of “spreading false news that could disturb public order” against Dr. Moncef Marzouki, due to appear before the Tribunal de Première Instance in Tunis on 16 December 2000, are incompatible with international law and with the Tunisian Constitution. We recommend that they be dropped immediately and that the law be reformed to bring it into line with international and constitutional guarantees of freedom of expression.

This statement addresses the incompatibility of false news\(^2\) provisions with international and constitutional guarantees of freedom of expression, noting national and international cases and statements bodies on the issue of false news, including specific mention of Tunisia. It also describes the general conditions which should be met before expression may legitimately be banned on public order grounds.

ARTICLE 19 regards legal provisions banning the dissemination of ‘false news’ as being in clear breach of international and constitutional guarantees of freedom of expression. Courts and official human rights bodies around the world have found false news provisions to be contrary to international law, or to breach constitutional human rights guarantees. ARTICLE 19 therefore recommends that the Tunisian government abandons the prosecution of Dr. Marzouki on charges of “spreading false news that could disturb public order” and abolishes Article 49 of the Criminal Code and any other legal provisions which address the dissemination of ‘false news’.

Problems with Banning False Statements

A fundamental principle in a democracy is that speech which is merely offensive, but not harmful, must be tolerated. As a result, the guarantee of freedom of expression, both


\(^2\) False news provisions are laws which prohibit the dissemination of false statements *per se*, as though society needs to be protected from the spread of wrongful statements rather than regarding this as a necessary is undesirable byproduct of a free society. Most false news provisions criminalise the act of publication, even though they may appear in the context of press or other specific civil laws. Although many such laws do make culpability conditional upon a risk of some harm – such as causing fear or alarm among the public, or disturbing the peace – the central element of the offence is to have disseminated information which is deemed to be untrue.
internationally and under most national constitutions, only permits restrictions on freedom of expression where they serve a goal of such importance that they warrant overriding a fundamental human right. In relation to false statements, the dictum that the best answer to bad speech is more speech\(^3\) is particularly apposite. Where false allegations are made, the government can substantially mitigate any potentially negative effect by simply refuting the allegations and bringing forward evidence to shown they are false. 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.\(^4\)

Prohibiting false statements also fails to take into account the fact that language takes many different forms and that it is impossible to draw a clear dividing line between statements of fact and statements of opinion. Examples abound of statements which appear on their face to be false but are actually substantially correct, or really express opinions. Exaggeration, ridicule and sarcasm are some examples.

Another serious problem with banning false news is that the very notion of truth, and indeed the dividing line between facts and opinions, is often profoundly subjective which no one – neither society itself nor the courts – should presume to definitively determine. It is preferable that decisions about truth are a matter of public debate, which allows an open discussion around different opinions and interpretations to determine what the truth is. False news prosecutions, almost by definition, involve the publication of controversial material and in such cases the line between facts and opinions becomes particularly cloudy. As a result, a prevailing view in a particular sector may be seen as the correct view. In such cases, false news provisions may effectively render dissent illegal.

**False News and Public Order**

The case of Dr. Marzouki raises the issue of maintaining public order, clearly an important social goal which may in appropriate cases warrant restricting freedom of expression. It is possible that false news might, in certain extreme circumstances, actually cause a real risk of public disorder, but such cases will be extremely rare and there is no reason why false statements should undermine public order. Indeed, this is hardly likely to be the primary, or even a significant, outcome of the publication of false statements. At the same time, it may be noted that extreme opinions and even true statements are at least as likely as false facts to pose a threat to public order and yet false news provisions do not prohibit these. Whether the information is true or false should be immaterial when it comes to deciding if a declaration is harmful to public order.

At the same time, almost all States have at their disposal a wide variety of other effective means to protect public order without resorting to banning false statements. General provisions in the

---


\(^4\) [1946] SA 999 (AD), pp. 1012-3.
Criminal Code relating to public order should be entirely sufficient to deal with any real threats to public order. For this reason, most democratic States have not felt the need for false news provisions.

**Statements by international bodies on false news provisions**

Statements by a number of authoritative UN bodies concerned with human rights suggest that false news provisions are inconsistent with the guarantee of freedom of expression. The UN Human Rights Committee, established under the ICCPR, is the body officially responsible for supervising States’ compliance with their obligations under the ICCPR, including Article 19 guaranteeing the right to freedom of expression. It is composed of eighteen independent experts representing all the regions of the world.

The Committee monitors compliance, inter alia, by providing comments on the regular reports States are obliged to submit to it. On at least five occasions in recent years – including in relation to Tunisia, Mauritius, Armenia, Uruguay and Cameroon – the Committee has expressed concern in these comments at 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”. 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. The UN Special Rapporteur on Freedom of Opinion and Expression, Abid Hussain, has noted with concern the application of this provision to Tunisian human rights campaigner Khemais Ksila, charged with spreading false news.

In 2000, the UN Special Rapporteur on Freedom of Opinion and Expression stated in very clear terms that imprisonment under false news provisions was unacceptable:

> In the case of offences such as … publishing or broadcasting “false” or “alarmist” information, prison terms are both reprehensible and out of proportion to the harm suffered by the victim. In all such cases, imprisonment as punishment for the peaceful expression of an opinion constitutes a serious violation of human rights.

**False news provisions in a democracy**

It may be noted that most democratic countries either do not have or do not apply false news provisions. In Zundel, the Canadian Supreme Court noted that it could point to no other free and democratic country which finds it necessary to criminalise false news. In at least three cases, the highest courts of appeal – the Canadian Supreme Court, the Judicial Committee of the Privy Council and the Zimbabwean Supreme Court – have held false news provisions to be unconstitutional. The Committee monitors compliance, inter alia, by providing comments on the regular reports States are obliged to submit to it. On at least five occasions in recent years – including in relation to Tunisia, Mauritius, Armenia, Uruguay and Cameroon – the Committee has expressed concern in these comments at 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”. 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. The UN Special Rapporteur on Freedom of Opinion and Expression, Abid Hussain, has noted with concern the application of this provision to Tunisian human rights campaigner Khemais Ksila, charged with spreading false news.

In 2000, the UN Special Rapporteur on Freedom of Opinion and Expression stated in very clear terms that imprisonment under false news provisions was unacceptable:

> In the case of offences such as … publishing or broadcasting “false” or “alarmist” information, prison terms are both reprehensible and out of proportion to the harm suffered by the victim. In all such cases, imprisonment as punishment for the peaceful expression of an opinion constitutes a serious violation of human rights.

---

5 No international judicial or quasi-judicial body has yet had to consider the legitimacy of a false news provision in the context of an actual case.


be unconstitutional in Canada, Antigua and Barbuda, and Zimbabwe. In DATE 2000, the 
Zimbabwean Supreme Court struck down their false news provision, stating:

[T]he effect of overriding the most precious of all the protected freedoms, resting as it does at the very core of a democratic society – 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.10

**Protection of Public Order**

We have already noted that banning false news is not an appropriate or legitimate way of protecting public order. At the same time, laws which do serve to protect public order must themselves be carefully tailored so as not to breach international and constitutional guarantees of freedom of expression. In most cases, the preferred approach is to prohibit **actions** which disrupt public order, rather than banning certain types of **expression** on the grounds that it may lead to disruptive actions.

A comparative survey of public order laws drawn from countries around the world, including India and South Africa, indicates that a number of conditions should apply before individuals may be convicted for expressing themselves in a way which poses a threat to public order:

1. The individual must have acted with a specific intention to cause public disorder; where the disorder is an unintended consequence of one's statements, no conviction should result.
2. The threat of disorder must be significant: a remote or slight risk of disorder is an insufficient reason to restrict freedom of expression.
3. There must be a close causal link between the prohibited expression and the risk of disorder: thus, where the real reason for disorder is the underlying situation to which the expression relates, the expression should not be prohibited. (For example, it is legitimate to point out that there were irregularities in an election, even if disorder may result, since it is the irregularity and not the noting of it that really caused the problem).
4. There must be a close connection in time between the expression and the risk of actual disorder.

It seems very clear that the restrictions imposed under Article 49 of Tunisia’s Press Code, at least as they apply to the case of Dr. Marzouki, do not satisfy these requirements.

---