

The relief sought is a declaration to the effect that the section is unconstitutional and therefore null and void.

The Court apologises for the delay in giving judgment in this case. The delay has been caused by the fact that reasons for judgment in the case of *Jestina Mukoko v The Attorney-General* SC-11-12 had to be given first. The facts of that case had a direct bearing on the circumstances in which the statements forming the subject matter of the charges which gave rise to the Constitutional questions for determination in this case were published. The determination of the issues raised in the case of *Mukoko v The Attorney-General* required time for research and reflection on the interpretation and application of the relevant law.

The constitutional question was raised by the applicants in criminal proceedings in the Magistrates Court. They were charged with having committed the crime of publishing or communicating a false statement prejudicial to the State. Following their request the question was referred by the Magistrate to the Supreme Court for determination in terms of s 24(2) of the Constitution.

The first and second applicants are the reporter and editor respectively of a weekly newspaper called “The Independent” (“the newspaper”). The newspaper is published by the third applicant, a company incorporated in terms of the laws of Zimbabwe. They were jointly charged with the offence of publishing in the newspaper a false statement to the effect that the law enforcement agency abducted people during the period extending from 25 November to 13 December 2008. The allegation was that they published the statement with the intention or realising that there was a real risk or possibility of undermining public confidence in the security service institution.

The period extending from 2 August to 20 November 2008 saw bombs being planted by saboteurs at CID Harare Central Police Station; Manyame River Bridge; Manyame Rail Bridge; CID Headquarters at Morris Depot and Harare Police Station. When the bombs exploded, extensive damage was caused to the bridges and parts of the buildings such as the walls, doors and window panes.

From 25 November to 13 December 2008 a few human rights activists and some members of the MDC-T political party employed in the security department were abducted from different places at different times. The identities of the abductors and places where the abductees were taken remained a closely guarded secret. Except for those who were involved in the planning and execution of the abductions no-one knew what had happened to the people abducted. As a result fear for their lives gripped family members and relatives.

The cases of abduction were widely reported in the print and electronic media. The question of who had kidnapped the people concerned became a matter of public discussion. The law enforcement agency, that is to say, the police and State security agents said that they had no knowledge of who the abductors were and what their motive was. The police said they were investigating what had happened with the view of apprehending the culprits and accounting for the whereabouts of the victims. As the law enforcement agency denied having the abductees in its custody and without communication from the persons concerned, family members and relatives could not invoke the legal remedy of *habeas corpus*.

On 22 December 2008, after twenty-seven days of forced disappearance, the victims appeared at various police stations in Harare. They had been brought there by State security agents. These people were divided into two groups. The first group was made up of seven people who appeared at the Magistrates Court at Rotten Row on 29 December 2008 in the case of the *State v Kisimusi Emmanuel Dhlamini and Six Others*. They were charged with the crime of insurgency, banditry, sabotage or terrorism in terms of s 23(1)(i) and (ii) of the Criminal Code. The allegation was that whilst acting in common purpose they planted and ignited the bombs that exploded at the Police Stations, Manyame River Bridge and Manyame Rail Bridge.

The second group was made up of nine people who appeared at the Magistrates Court at Rotten Row on 14 January 2009 in the case of *State v Manuel Chinanzvavana and Eight Ors*. They were charged with the crime of contravening s 24(a) of the Criminal Code. The allegation was that whilst acting in common purpose, in the months of June and July 2008 they recruited or attempted to recruit or assisted in the recruitment of a former member of the Zimbabwe Republic Police to undergo military training in a neighbouring country in order to commit any act of insurgency, banditry, sabotage or terrorism in Zimbabwe.

On 31 December 2008 all the accused persons in the first case deposed to affidavits in which they revealed that they had been forcibly abducted by State security agents and members of the police. They alleged in the affidavits that they were taken to Goromonzi Prison where they were held until they were released into the custody of the police.

In the affidavits deposited to on 31 December 2008 and 20 June 2009 Kisimusi Emmanuel Dhlamini gave names of the State security agents and members of the police he alleged abducted him from home on 25 November 2008.

In the second case only Jestina Mukoko raised the question of the violation of the fundamental right not to be subjected to torture, inhuman or degrading treatment. She requested the magistrate to refer the question to the Supreme Court for determination. Reasons for judgment in *Jestina Mukoko v The Attorney-General* SC-11-12 have since been given. There is uncontested evidence that Jestina Mukoko was abducted from her home at 4a.m. on 3 December 2008 by State security agents.

On 6 April 2009 the respondent served indictments on Kisimusi Emmanuel Dhlamini and Six Others for trial at the High Court on 29 June 2009. The respondent gave notice in terms of s 110(6) of the Criminal Procedure and Evidence Act [*Cap. 9:07*] that at the trial he intended calling the witnesses whose names he gave. A summary of what each witness would say at the trial was given. The witnesses were members of the law enforcement agency.

After perusing the indictment papers, and the notice the first applicant wrote two articles which the second applicant edited and the third applicant published in the edition of the newspaper for the week beginning 8 May 2009.

The first article was on the front page. It was titled: “ACTIVISTS’ ABDUCTORS NAMED”. The story was that:

“The Attorney-General’s Office revealed the names of some members of Central Intelligence Organisation and the police who were allegedly involved in the abduction of human right and MDC activists last November.”

At page two of the newspaper there was the second article. It was titled: “CIO POLICE ROLE IN ACTIVISTS’ ABDUCTION REVEALED”. Under the heading the article stated that:

“Notices of indictments for some of the activists this week revealed the role the CIO and the Police played when the activists were reported missing last year. A perusal of notices revealed that Assistant Director External in the CIO Retired Brigadier Asher Walter Tapfumanei, Police Superintendent Regis Chitekwe and Joel Tenderere, Detective Inspector Elliot Muchada and Joshua Muzanago, Officer Commanding CID. Homicide Crispin Makendenge, Chief Superintendent Peter Magwenzi and Assistant Commissioner Simon Nyathi were involved in some of the abductees’ cases.”

The respondent was of the view that the articles contained false statements about the involvement of the law enforcement agency and its members in the abduction of the human rights activists and members of the MDC-T political party. He concluded that the articles contained statements which were materially false and prejudicial to the State. The respondent authorised the institution of criminal proceedings against the applicants for contravening s 31(a)(iii) of the Criminal Code.

Section 31 falls in the category of offences under the heading: “CRIMES AGAINST THE STATE”. Under the heading is found political crimes such as treason, subversion of constitutional government, insurgency, banditry, sabotage or terrorism and recruiting or training insurgents, bandits, saboteurs or terrorists. Section 31(a)(iii) of the Criminal Code deals with consequences of the publication or communication of a false statement which harms or is likely to harm the interests of the State in the performance of its functions.

The section reads:

“31 Publishing or communicating false statement prejudicial to the State:

- Any person who, whether inside or outside Zimbabwe –
- (a) Publishes or communicates to any other person a statement which is wholly or materially false with the intention or realising that there is a real risk or possibility of –
 - (i) inciting or promoting public disorder or public violence or endangering public safety; or
 - (ii) adversely affecting the defence or economic interests of Zimbabwe, or
 - (iii) undermining public confidence in a law enforcement agency, the Prison Service or the Defence Forces of Zimbabwe or
 - (iv) interfering with or disrupting any essential service; shall whether or not the publication or communication results in a consequence referred to in subparagraph (i), (ii), (iii) or (iv) be guilty of publishing or communicating a false statement prejudicial to the State and liable to a fine up to or exceeding level fourteen or imprisonment for a period not exceeding twenty years or both.”

The essential elements of the offence which the State must establish beyond reasonable doubt are:

- (1) That the accused published or communicated to another a statement;
 - (2) That the statement was wholly or materially false in meaning;
 - (3) That the accused intended to undermine public confidence in a law enforcement agency, the Prison Service or the Defence Forces of Zimbabwe;
- or
- (4) That the accused realised that there was a real risk or possibility of undermining public confidence in a security service institution referred to in para (3).

Section 31(a) (iii) of the Criminal Code is also important for what it omits. It does not require proof by the State that the false statement undermined public confidence in the security service institution concerned. The State is not required to prove that the accused had knowledge of the falsity of the statement.

Section 34 forbids the institution or continuation of proceedings in respect of the crime against any person without the authority of the Attorney-General except for purposes of remand.

The applicants challenged the constitutionality of s 31(a) (iii) of the Criminal Code on the ground that it contravenes s 20(1) of the Constitution which guarantees freedom of expression. The contention is that the provision is not saved by s 20(2). Section 20 of the Constitution provides:

“20: Protection of Freedom of Expression

- (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 opinion 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) ...
 - (c) ...”

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.”

The applicants do not deny that the right to freedom of expression is not absolute at all times and under all circumstances. They accept that inherent in the exercise of the right to freedom of expression is a duty not to injure the rights of others or the public interests listed in s 20(2) of the Constitution. They argue that the restriction imposed by s 31(a) (iii) of the Criminal Code is an impermissible legislative limitation of the exercise of freedom of expression.

The respondent urges the court to uphold the constitutionality of the provision. He argued that should the court find that the provision contravenes s 20(1) of the Constitution it would be bound by the provisions of s 24(5) of the Constitution to issue a rule *nisi* to the Minister of Justice and Legal Affairs. In that event, the court would call upon the Minister to show cause why the provision should not be declared to be in contravention of s 20(1) of the Constitution and void before making a declaratory order to that effect. See *Re Munhumeso & Ors* 1994(2) ZLR 49(S); *Retrofit (Pvt) Ltd v PTC & Anor* 1995(2) ZLR 199(S); *S v Tsvangirai* 2001(2) ZLR 426(S).

There is one indivisible freedom for every individual and that is freedom from unwarranted interference by Government. The fundamental rights protected by the Constitution and exercised by the individual are assertions against the State of different aspects of the freedom inherent in every individual as a human being. Freedom of expression asserts the autonomy of thinking, linguistic and communicative elements of the life of an individual and a thin slice of the universe of communication policy.

Section 20(1) of the Constitution defines in broad terms the nature, content and scope of the cluster of rights the enjoyment of which is protected against interference by the Government under the principle of freedom of expression. The respondent does not dispute the fact that liberty of publishing or communicating one's thoughts, ideas and information expressed in an oral, written or symbolic act to others is essential to the enjoyment of freedom of expression.

There are in fact three dimensions to the process of the exercise of the rights guaranteed by s 20(1) of the Constitution. There is an internal dimension (the formation and

holding of opinion, ideas and information); a communicative dimension (the expression of opinion, imparting of ideas and information) and an external dimension (the effect of opinions, ideas and information on the addressee or the audience i.e. on the rights of others or public interests listed in s 20(2) (a) of the Constitution). The guarantee of freedom of expression affects the holding sphere, the communicative sphere and the external sphere. The areas constitute an indissoluble unit.

Protection of the fundamental right to freedom of expression is based on the belief that man is an autonomous and rational agent capable of acquiring knowledge which he or she uses to distinguish right from wrong. He or she is under a duty to promote the general welfare of the community to the extent that it is not injurious to his or her own lawful interests. Freedom of expression is defined not only in terms of the protection of the right to hold opinions but also to receive and impart ideas and information without interference. What is protected by the right is not only the benefits of the communicative process but also the effects the dissemination of ideas and information has on the audience including public interests.

The State is placed under an enforceable fundamental obligation not to interfere with the exercise of freedom of expression. It may interfere only when the activity or expression poses danger of direct, obvious and serious harm to the rights of others or the public interests listed in s 20(2) of the Constitution.

Ideas and information are the result, basis and means of cognitive interpretation by man of the real world around him or her. It is by imparting ideas and information he or she holds to others that an individual can let them know his or her thoughts

on matters of private and public concern. In that way he or she is able to influence the attitude of others towards him or her. In that regard freedom of expression consists of the right to express and convey one's conviction and opinion on any matter orally or by writing, printing or any other method addressed to the eyes and ears of other people.

It is by receipt of ideas and information imparted to him or her by others that the individual can become a social being. He or she would know whether his or her view of the world is correct or wrong thereby attaining self-fulfilment, political or social participation and discovery of truth.

The nature and scope of the rights guaranteed covers every activity which conveys or attempts to convey a message in a non-violent form. Section 20(1) of the Constitution embraces all content of expression irrespective of the nature of the message sought to be conveyed. The right to freedom of expression applies to ideas and information of any kind. Conduct which does not convey meaning or seeks to convey meaning in a violent form or manner does not fall within the protection. "Form" refers to the physical form including words in which the message is communicated and does not extend to content.

A free person abhors violence perpetrated against him or her by others just as they also abhor violence perpetrated by him or her against them. Ideas and information are imparted and received for mental digestion and acceptance or rejection. Freedom of thought means that the mind must be ready to receive new ideas, to critically analyse and examine them and to accept those which are found to stand the test of scrutiny and to reject the rest: *Naraindas v State of Madhya Pradesh* (1974) 3 SCR 624 at 650. It is the battle of minds and the free debate of ideas and information that enjoy the benefits of the protection of freedom

of expression. Any form of violence by which meaning is conveyed is an antithesis of freedom of expression. The purpose of the guarantee is to ensure that people can manifest and convey the meaning of their thoughts and feelings in non-violent ways without fear of censure.

The Supreme Court of Canada determined the question of the scope of the guarantee of freedom of expression in the case of *Irwin Toy Ltd. v Quebec (AG)* (1989) 39C.R.R. 193. Writing for the majority DICKSON CJC at p 228-229 said:

“Expression” has both a content and a form, and the two can be inextricably connected. Activity is expressive if it attempts to convey meaning. That meaning is its content. ... Indeed, if the activity conveys or attempts to convey a meaning, it has expressive content and prima facie falls within the scope of the guarantee. Of course, while most human activity combines expressive and physical elements, some human activity is purely physical and does not convey or attempt to convey meaning. ... The content of expression can be conveyed through an infinite variety of forms of expression: for example the written or spoken word, the arts and even physical gestures or acts. While the guarantee of free expression protects all content of expression certainly violence as a form of expression receives no such protection.”

See also *R v Keegstra* [1991] LRC (Const.) 333 at 350b (Supreme Court of Canada).

Publication or communication of a false statement to any other person on any subject matter or topic in a non-violent form is an activity which conveys or attempts to convey meaning. The protection provided by s 20(1) of the Constitution does not have regard to the truth or falsity of the meaning of the ideas and information published or communicated. Section 20(1) is a value free provision which does not recognise any basis for the test of truth. In other words truth is not a condition *sine qua non* of the protection of freedom of expression. This freedom applies to all expressions regardless of their nature, content, quality or truth. The content of a statement should not therefore determine whether it falls within s 20(1) of the Constitution’s protection: See *New York Times v Sullivan* 376 US 254(1964) at 271-272.

Freedom of expression finds its true meaning when its enjoyment is protected from interference by Government. The Constitution recognises the fact that people tell lies in a variety of social situations for different reasons. Lies are not necessarily without intrinsic social value in fostering individual self-fulfilment and discovery of truth. For that reason the Constitution protects against State interference the rights of every person to speak or write and communicate or publish to others what he or she thinks. These rights are part of the “freedom” or “liberty” guaranteed by the Constitution.

The only limitation on the “freedom” or “liberty” is the duty not to injure the rights of others or the collective interests listed in s 20 (2) (a) of the Constitution. In other words the State through the exercise of legislative power may limit the individual’s exercise of the right to freedom of expression if that were necessary for the protection of one or more of the public interests listed in s 20(2)(a) of the Constitution.

It is, in short, not simply the falsity of the message of the verbal or non-verbal nature of expression which determines the validity of a restriction. It is the rights to others or the public interests and actual or potential harm thereto that help to determine whether a restriction on the expression is valid. See *Texas v Johnson* 491US 397(1989) at 407.

The fact that a person has told lies to others on any subject matter should not be of concern to the State. Government is prohibited from appointing itself as a monitor of truth for people. They are able to do that for themselves through the free exchange of ideas and information on matters of public interest. People must not be denied the right to freely use speech or the press to silence each other and decide what views shall be voiced. What is protected is really the indivisible freedom of everyone to speak even when they may after

they have done so be called liars. Anyone has a right to impart or receive ideas and information about the activities of security service institutions regardless of the falsity or truth of the message conveyed, provided no harm or real likelihood of harm to the rights of others or public interest results in breach of law.

The principle of equality of treatment behind the right assures those who tell lies and those who tell the truth that the guarantee of the right to freedom of expression belongs to them together. They are assured that when they exercise it to harm the rights of others or public interest they will be treated the same in the eyes of the Constitution and the law. The liberty cannot be denied to some ideas and saved for others.

The bedrock principle (to borrow the words of JUSTICE BRENNAN in *Texas v Johnson supra* at p 414) of the guarantee is that no exercise of the right to freedom of expression can, without more, be restricted on the ground that the message conveyed is false, offensive or not favourable. *R v Zundel* (1992) 10CRR (Can SC) (2d) 193 at 206. This rule against content-based discrimination is truly, the cornerstone of contemporary free expression protection jurisprudence. If expression has to be prohibited because of content there has to be a demonstrable direct and proximate causal link between it and actual or potential harm to a public interest listed in s 20(2) of the Constitution. In other words the interest that is pursued by the constraint on the exercise of freedom of expression must be protected from harm regardless of whether it can be violated through publication or communication of a true or false statement.

There would be no basis for holding that publication or communication of a false statement on any subject matter is not protected “expression” in light of the broad,

generous and purposive interpretation of s 20(1) of the Constitution adopted by the court in its case-law to give to individuals the full measure of the fundamental right. See *United Parties v Minister of Justice, Legal and Parliamentary Affairs & Ors* 1997(2) ZLR 254(S); *Smyth v Ushewokunze & Anor* 1998(3) SA 1125(ZSC).

Section 20 (1) of the Constitution underscores the importance of freedom of expression in a free and democratic society, subject, of course, to s 20 (2). The overriding importance of the right has been widely recognised, for its own sake and as an essential underpinning of democracy and a means of safeguarding other human rights. It is the duty of the State in the exercise of collective power to act in terms of the principles of fundamental human rights and freedoms whilst advancing social justice.

The court recalls what it said in *Chavunduka & Anor v Minister of Home Affairs & Anor* 2000(1) ZLR 552(S). Writing for the unanimous court GUBBAY CJ at 558C-G said:

“This court has held that s 20(1) of the Constitution is to be given a benevolent and purposive interpretation. It has repeatedly declared the importance of freedom of expression to the Zimbabwean democracy – one of the most recent judgments being that of *United Parties v Minister of Justice & Ors* 1997(2) ZLR 254(S) at 268C-F, 1998(2)BCLR 224(ZS) at 235I-J. Furthermore, what has been emphasised is that freedom of expression has four broad special objectives to serve: (i) it helps an individual to 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. See, to the same effect, *Thomson Newspapers Co. V Canada* (1998) 51CRR (2d) 189 (Can SC) at 237.

Plainly embraced and underscoring the essential nature of freedom of expression, are statements, opinions and beliefs regarded by the majority as being wrong or false. As the revered HOLMES J so wisely observed in *United States v Schwimmer* 279 US 644(1929) at 654, the fact that the particular content of a person’s speech might “excite popular prejudice” is no reason to deny it protection for “if there is any principle of the Constitution that more imperatively calls for attachment than any other, it is the principle of free thought – not free thought for those who agree with us

but freedom for thought of that we hate”. Mere content, no matter how offensive cannot be determinative of whether a statement qualifies for the Constitutional protection afforded to freedom of expression. See *R v Keegstra* (1991) 3 CRR (2d) 193 (Can SC) at 286. Sixty years later in *R v Zundel* (1992) 10 CRR (2d) 193 (Can SC) MADAM JUSTICE MCLACHLIN expressed much the same sentiment as HOLMES J.”

Thomas Emerson in his article titled “*Toward a General Theory of the First Amendment*” 72 YALE L.J 877 (1963) notes at p 886 that:

“... the theory of freedom of expression involves more than a technique for arriving at better social judgments through democratic procedures. It comprehends a vision of society, a faith and a whole way of life. The theory grew out of an age that was awakened and invigorated by the idea of a new society in which man’s mind was free, his fate determined by his own powers of reason and his prospects of creating a rational and enlightened civilization virtually unlimited. It is put forward as a prescription for attaining a creative, progressive, exciting and intellectually robust community. It contemplates a mode of life that, through encouraging toleration, scepticism, reason and initiative, will allow man to realise his full potentialities. It spurns the alternative of a society that is tyrannical, conformist, irrational and stagnant.”

Freedom of expression is described in Article 11 of the French Declaration of the Rights of Man and of the Citizen (1789) as “one of the most precious rights of man”. In *Palko v Connecticut* 302 US 319(1937) at 327 MR JUSTICE CARDOZO said it is “the matrix, the indispensable condition of nearly every other form of freedom”. At its very first session in 1946 the United Nations General Assembly declared that “freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated”. Resolution 59(1), 14 December 1946.

Section 20(2) of the Constitution prescribes strict requirements for any measure in the exercise of State power which has the effect of restricting the exercise of the right to freedom of expression. The recognition of the power of Government to limit the exercise of freedom of expression is based on the concept of a free and democratic State

based on the rule of law. This concept is based on the possibility that freedom of any kind, even constitutional freedom of expression, could be abused for the purposes of harming the rights of others or public interest. The exercise of the power to limit the exercise of the right to freedom of expression is not only required to be constitutionally justified. It is itself restricted by the principle of proportionality.

The first thing the Constitution controls in the exercise by the Government of the power to hinder the enjoyment of freedom of expression under the strict justificatory requirements of s 20(2) is the degree of interference. The interference imposed in terms of the impugned law must be limited to being a restriction or hindrance of the enjoyment of the exercise of the right to freedom of expression. There must be a limitation of acts by which the right to freedom of expression is exercised.

It would not be an interference within the meaning of the Constitution if the measure adopted by the Government amounts to authorisation of the destruction or abrogation of the right to freedom of expression itself. To control the manner of exercising a right should not signify its denial or invalidation. The right in the person is indivisible whilst its exercise can differ depending on the situation. The idea must be to harmonise the individual's pursuit of his or her ends with those of others. It is a power which must be exercised in a manner not inconsistent with the continued existence of the right.

Whilst non-interference with the enjoyment of the fundamental right is an obligation on the State, the imposition of restrictions on its exercise in terms of s 20(2) (a) of the Constitution is not. It is optional. Not every instance of likely harm from expression and dissemination of ideas and information to a public interest listed in s 20(2) of the Constitution

would justify the imposition of a restriction on the exercise of freedom of expression. If that were to be the practice the area of freedom of expression would be reduced to naught.

It is only the prohibition of those acts in the exercise of freedom of expression by the speaker, writer, publisher, or actor shown to pose danger of direct, obvious, and serious harm to one or more of the public interests listed in s 20 (2)(a) of the Constitution which is justifiable. The right to freely express one's opinion or ideas and information on any subject to others goes together with the right to choose the effect one wants the communication or publication to have on the listener or reader and the circumstances likely to produce the strongest effect.

In deciding whether a measure imposes restrictions to the exercise of freedom of expression the court examines its purpose or effect. The court does not examine the measure at this stage for the purpose of ascertaining its objective. It does not make any reference to the consequences of the prohibited activity. The court looks at what has been called the "facial" purpose of the legislative technique adopted by Parliament to achieve its ends. The question is whether or not the purpose or effect of the provision is to restrict freedom of expression. In *Irwin Toy Ltd* supra at pp 232-233 DICKSON CJC said:

"If the government's purpose is to restrict the content of expression by singling out particular meanings that are not to be conveyed, it necessarily limits the guarantee. If the government's purpose is to restrict a form of expression in order to control access by others to the meaning being conveyed or to control the ability of the one conveying the meaning to do so, it also limits the guarantee. On the other hand, where the government aims to control only the physical consequences of certain human activity, regardless of the meaning being conveyed, its purpose is not to control expression."

See also: In *re Munhumeso & Ors* 1994(1) ZLR 49(S) 62F; *Retrofit (Pvt) Ltd v PTC & Anor* 1995(2) ZLR 199(S) 216C, *Bennett Coleman and Co. Ltd & Ors v Union of India & Ors* AIR 1973 SC 106 at 118, *R v Big M Drug Mart Ltd* (1985) 18DRLR (4th) 321 at 374.

In the case of s 31(a) (iii) of the Criminal Code not every publication or communication of a false statement about a security service institution is prohibited. It is only when the prohibited expression and dissemination of ideas and information are done with the specific intention or realisation that there is a real risk or possibility of undermining public confidence in a security service institution that the crime is committed. The prohibition is not applicable for example, when a person publishes or communicates a false statement with the intention of inciting others to public disorder.

The effect is that the applicants are or anyone else is, denied the right to impart the ideas and information in the form of a statement to other people if the message is wholly or materially false. There is a specificity of the quality of the false statement in terms of consequences and the circumstances in which its publication or communication is prohibited as a crime. The other people would be denied the right to receive the statement because of the prohibition on the exercise of the right by the applicants to publish the ideas and information expressed in the statement.

As long as the prohibition is extant the publication of a false statement with the requisite state of mind would offend against the provisions of s 31(a) (iii) of the Criminal Code. One of the effects of s 31(a) (iii) of the Criminal Code is to subject a person charged with the commission of the offence to criminal conviction and potential imprisonment. It is clear that the provision is a material interference by the State with the constitutionally guaranteed right to freedom of expression by making publication or communication of a false statement with the requisite state of mind a punishable crime.

The holding brings into operation the application of the requirements of permissible legislative limitation of the exercise of freedom of expression. Is the interference with the exercise of freedom of expression justifiable under s 20(2) of the Constitution? The decision whether or not to promote or protect a particular public interest by imposing restrictions on the exercise of freedom of expression is a political decision beyond the powers of judicial review.

When the Government decides to accomplish the policy objective by the imposition of restrictions on the exercise of the right to freedom of expression by means of criminal law with its attendant sanctions for disobedience it must act lawfully. The Constitution imposes minimum standards of permissible legislative limitation of the exercise of freedom of expression which it requires the Legislature to strictly comply with. Violation of any of the principles constituting the permissible limit of interference with a fundamental right constitutes a violation of the right.

The question whether a restriction satisfies all the mandatory requirements of permissible legislative limitation of the exercise of freedom of expression and therefore enacted as a valid law is a constitutional question the determination of which falls exclusively within the judicial power of review. The court is under an obligation to give full effect to the requirements in determining the question whether the limitation has not been shown to be arbitrary or excessive.

Compliance by the Legislature with each of the requirements of permissible legislative limitation of the exercise of the right to freedom of expression was put in issue. The issues for determination are therefore these:

- (1) Is the restriction on the exercise of the right to freedom of expression imposed under s 31(a) (iii) of the Criminal Code contained in law.
- (2) If the restriction is contained in law does the provision have as its primary objective the protection of a public interest in one or more of the matters listed in s 20(2)(a) of the Constitution.
- (3) If the protection of a public interest listed in s 20(2) (a) of the Constitution is the primary purpose of the legislation, is there a rational connection between the restriction on the exercise of the right to freedom of expression and the objective pursued.

The onus of proving the assertions of fact in the issues listed above is on the State. The standard of proof is a preponderance of probabilities. If the answer to each question is in the affirmative, the onus shifts to the applicants. They bear the onus of showing on a preponderance of probabilities that the legislation is not reasonably justifiable in a democratic society. This involves showing absence of a reasonable relationship of proportionality between the means used to impose the restriction on the exercise of the right to freedom of expression and the objective sought to be achieved. The purpose of the proportionality test is to strike a balance between the interests of the public and the rights of the individual in the exercise of freedom of expression.

The applicants must establish the following facts arising from the application of the three criteria of the proportionality test:

- (a) That there is no rational connection between the restriction on the exercise of the right to freedom of expression and the objective sought to be achieved by the provisions of the statute.

- (b) That even if there is a rational connection between the restriction on the exercise of freedom of expression and the objective pursued the means used to effect the connection do not impair the right to freedom of expression as little as possible. That would mean that there are other less intrusive means available which the legislature could have used to restrict the exercise of the right to freedom of expression to achieve the same objective.
- (c) That the effects of the restrictive measure so severely trench on the right to freedom of expression that the legislative objective sought to be achieved is outweighed by the restriction on freedom of expression.

The criterion of the proportionality test applicable will vary depending on the circumstances of each case. See *R v Oakes* (1986) 19CRR 308 at 336-337 (Supreme Court of Canada) *Nyambirai v NSSA & Anor* 1995 (2) ZLR 1(S) at 13D-F, *Attorney General v Morgan* [1985] LRC (Const) 770 at 797, *Capital Radio (Pvt) Ltd v Broadcasting Authority of Zimbabwe & Ors* 2003(2) ZLR 236(S) at 308A-B.

In the determination of the issues raised, it is ever so important to bear in mind that, every new legislative restriction on the exercise of the right to freedom of expression, has the effect of reducing the existing realm of freedom of expression whilst adding to and expanding the area of governmental control of the exercise of the fundamental right. It is the duty of the court as guardian of the constitution and fundamental human rights and freedoms to ensure that only truly deserving cases are added to the category of permissible legislative restrictions of the exercise of the right to freedom of expression.

The principles impose limitations on the restrictions imposed by the legislature on the exercise of freedom of expression. They are the standard according to which the legitimacy of any restriction on the exercise of freedom of expression must be assessed. Every case must be decided in the context of a legal system with constitutionally entrenched human rights provisions binding the legislature, the executive and the judiciary. The approach is not that what Parliament has ordained goes but whether what Parliament has ordained is consistent with fundamental human rights and freedoms or violates them as measured against the requirements of s 20(2) of the Constitution.

One is reminded of what JUSTICE BREWER of the US Supreme Court said in *Muller v Oregon* 208 US 412 (1908) at 421. He said:

“Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a written Constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking.”

The next matter which the Constitution controls is the origin and quality of the provision by which the restriction is imposed on the exercise of the right to freedom of expression. It requires that any interference with freedom of expression must be “contained in law”. The legislature alone may specify clearly and concretely in the law the actual limitations to the exercise of freedom of expression. If the restriction on the exercise of freedom of expression is imposed by a decision or action of the judiciary or the executive the decision or action must be under the authority of law. In the latter case the validity of the law itself is not in issue.

Is the restriction on the exercise of freedom of expression imposed by s 31(a)(iii) of the Criminal Code “contained in law”. It is a fundamental principle of

constitutional law that any restriction which hinders the enjoyment of a fundamental right must be introduced by a legal provision. The grounds for the justification of the restriction must be found in the law by which it is imposed. Fundamental rights and freedoms and other constitutional values are protected by the fundamental law which is the supreme law of the land. Restrictions imposed on them must be consistent with the fundamental law otherwise they are void.

The requirement that the restriction on the exercise of the right to freedom of expression must be contained in law is expressive of and consistent with the principle of the rule of law. The principle is to the effect that every governmental action which adversely affects the legal situation of persons in a free and democratic society must be justifiable by reference to an existing law.

No person shall be prevented in a free and democratic society from doing an act which is not prohibited by law at the time he or she does it. There cannot be a crime and punishment without law. What that means is that there must be first put in place a provision which meets all the characteristics of a legal norm by which the conduct to constitute a crime is defined and in terms of which the State may then interfere with the exercise of the right. There must be an offence prohibiting and defining in clear and precise terms what conduct is a crime. To act without a legal basis is to act arbitrarily and therefore unlawfully.

The “rule of law” is an indispensable principle on which any free and democratic society is based. It is an integral part of the vision and way of life in a free society. Where there is rule of law there is peace, justice and freedom. Law plays its proper role only if it takes due account of all the three elements. It does not admit of the rule of

man. No individual is above the law. In other words what is envisaged is “a government of laws and not of men”: *Bennett Coleman and Co. Ltd & Ors v Union of India & Ors* AIR 1973 SC 106 at 150.

The words “contained in ... any law” or “done under the authority of any law” used in s 20(2) of the Constitution have been given meaning similar to that given to such equivalent phrases as “provided by law”, “in accordance with the law”, “prescribed by law”, “determined by law” and “in terms of law” used in international human rights instruments and constitutions of other nations. In *Chavunduka & Anor* supra at 560F it was held that “the meaning of these phrases is substantially the same”. They all refer to the legality of the positive law, that is to say the law which is binding on the executive and the judiciary. In fact the word “legality” is derived from the latin word “legalis”, which means “in accordance with a law”. The word “legalis” is in turn derived from *lex*, which means “law”. See CR.Syman: “*Criminal Law*” 2ed [1989] p 29. The Constitution requires that the provision by which the restriction on the exercise of freedom of expression is to be imposed must have all the universally recognised characteristics of a legal norm.

In *Regina v Therens* [1985] 13 CRR 193 when interpreting the requirement of s 1 of **The Canadian Charter of Rights and Freedoms** to the effect that a limit on the exercise of freedom of expression must be “prescribed by law” BROWNRIDGE JA at p 216 said:

“The requirement that the limit be prescribed by law is chiefly concerned with the distinction between a limit imposed by law and one that is arbitrary. The limit will be prescribed by law within the meaning of s 1 if it is expressly provided for by statute or regulation or results by necessary implication from the terms of the statute or regulation or from its operating requirements. The limit may also result from the application of a common law rule.”

The applicants did not attack the restriction on the ground of the origin of the law making provision for its imposition. They accepted that the measure is a product of the process and procedures for the exercise of the legislative powers by Parliament. They accepted that Parliament had the competence to legislate in respect of the subject - matter of the provision. *Prima facie*, the restriction is contained in law because it is provided for in s 31(a) (iii) of the Criminal Code.

The applicants attacked the quality of the law. There is no question of breach of the rule of adequate accessibility. The law is published in a form accessible to those affected. The contention was that the provision is not a rule of law because the essential elements of the crime do not define the scope of the prohibited acts in a language which is sufficiently clear and adequately precise. A compliant law must, in accordance with the principle of legality, enable a person of ordinary intelligence to know in advance what he or she must not do and the consequences of disobedience. This is the requirement of foreseeability of law.

It was argued that the restriction provided for cannot be regarded as “contained in law” because the means or concepts by which it is defined and imposed suffer from the vice of unconstitutional vagueness. The sufficiency of the precision of the definition of the acts prohibited in the exercise of the right to freedom of expression is not considered at this stage. It will be considered when the question of the relationship of proportionality between the restriction and the objective pursued by the legislation is determined.

Behind the requirement that restrictions on the exercise of the right to freedom of expression must be based in law lies an order of completeness allowing the complete extent of such restrictions to be identified on the basis of the interpretation of the provisions of the law. It is important that the concepts chosen to define the essential elements of the offence provide for the judiciary and the executive a workable means of enforcing the restriction.

Mr *Chagonda* argued in support of the alleged unconstitutional vagueness of s 31(a)(iii) of the Criminal Code that the phrase “real risk or possibility” refers to anything which can scientifically happen without necessarily being probable. The contention was that people often act without considering the circumstances of their behaviour to identify the existence of the real risk or possibility of an event occurring as a consequence of their conduct.

It was Mr *Chagonda*'s submission that the use of the word “false” introduces into the essential elements of the offence a concept which cannot describe the content of a statement with certainty. The argument was that the word “false” was wide enough in meaning to embrace a statement which is merely incorrect or inaccurate. He argued that it is always difficult to conclusively determine total falsity.

Mr *Chagonda* argued further that the concept of “public confidence” as the prejudicial consequence to the state with which the offence deals, is nebulous and susceptible of change as to render the offence unconstitutionally vague. He said as the offence does not relate to undermining the authority of the institution concerned it becomes difficult to ascertain the level of public confidence in the institution at any given time. According to Mr *Chagonda* it is almost impossible to measure “public confidence” in a public institution as it

depends on such factors as the political and economic conditions of a country at any given time.

The rationale underlying the principle of unconstitutional vagueness of a statute is clear. A law which does not meet the constitutional requirement of legality cannot be saved by s 20(2) of the Constitution. It is essential in a free and democratic society that people should be able within reasonable certainty to foresee the consequences of their conduct in order to act lawfully. The fact that one can on a fair warning about what is criminal, dependably calculate action in advance is a very fundamental element of law, order and therefore peace.

On the fair notice component of the rule against unconstitutional legislative vagueness, it is not enough that a person of average intelligence has had notice of the legislation. He or she must on reasonable examination of its provisions be able to appreciate that the law proscribes certain conduct and what that conduct is.

The Constitution insists that laws must give people of ordinary intelligence a reasonable opportunity to know what is prohibited so that they may act lawfully. The assumption is that man is free to steer between lawful and unlawful conduct. Once a person has a fair notice of what conduct is lawful, he or she is able to order his or her actions together with others thereby giving rise to order and stability in society.

The second component of the doctrine is based on the belief that if arbitrary and discriminatory enforcement is to be preventable laws must provide explicit standards for those who apply them. The discretion of those entrusted with law enforcement should be limited by clear and explicit legislative standards. This is especially important in the use of

criminal law because people are potentially liable to deprivation of personal liberty if their conduct is in conflict with the law.

A vague law impermissibly delegates basic policy matters to policemen, prosecutors and judges for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. So the legislature is prevented from passing arbitrary and vindictive laws. *Grayned v City of Rockford* 408 US 104(1972) at pp 108-109; Reference Re Criminal Code ss 193 and 195.1(1)(C) (1990) 48 CRR I at p 25.

In *Chavunduka & Anor* supra at pp 560G-561A GUBBAY CJ quoted with approval from the *Sunday Times v The United Kingdom* (1979-80) 2EHRR 245 at p 271 (para 49) where the majority of the European Court of Human Rights said:

“In the court’s opinion, the following are two of the requirements that flow from the expression “prescribed by law”.

First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly 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. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its trail excessive rigidity and the law must be able to keep pace with changing circumstances.”

Many laws are inevitably couched in terms which are to a greater or lesser extent vague. Their interpretation and application in many cases are questions of practice by the courts. The standard is one of sufficient clarity. It is not one of absolute clarity. Mr *Chagonda* based his submissions on the need to apply the standard of absolute clarity in the interpretation of the word “false” and the phrases “real risk or possibility” and “public

confidence” used in s 31(a)(iii) of the Criminal Code. What degree of vagueness is acceptable largely depends on the circumstances.

A norm imposing restrictions on the exercise of the right to freedom of expression will be unconstitutionally vague if it fails to provide a standard for legal debate and discussion as to whether a particular conduct is in violation of it or not.

Section 15(1) of the Criminal Code defines the subjective concept of realisation of a “real risk or possibility” of an event resulting from unlawful conduct as consisting of two components:

- “(a) a component of awareness, that is, whether or not the person whose conduct is in issue realised that there was a risk or possibility, other than a remote risk or possibility that –
 - (i) his or her conduct might give rise to the relevant consequence; or
 - (ii) the relevant fact or circumstance existed when he or she engaged in the conduct
- and
- (b) a component of recklessness, that is, whether despite realising the risk or possibility referred to in paragraph (a) the person whose conduct is in issue continued to engage in that conduct.”

The Court respects the power of the legislature to define the terms it uses in a statute to make clear the meaning they should be given, consistent with the rule of law principle. What is clear from the meaning the legislature intends the words to have in the context of s 31(a)(iii) of the Criminal Code, is what they denote. They denote a test to be used to establish a subjective state of mind accompanying the publication or communication of a false statement relating to the security service institution referred to in the provision. The requisite state of mind is related to the aim of the unlawful conduct and the real likelihood of it materialising.

The prohibition provided for by s 31(a)(iii) of the Criminal Code is not concerned with the way the statement is published or communicated. It is concerned with what is published or communicated, the purpose of its publication or communication and the effect the statement has or is likely to have on the audience.

Whether there is a “real risk or possibility” of an event happening as a natural consequence of another is a question of fact provable by evidence. Whether or not an accused person had the requisite state of mind at the time he or she engaged in the prohibited conduct is a question to be determined by reference to the circumstances of the case. The circumstances would have been given rise to by the conduct of the accused in publishing or communicating the false statement. The presumption is that a rational person will undertake an act or do a thing he or she knows is likely than not to produce the consequence he or she wants. He or she is likely to undertake an act when he or she foresees that the consequence is likely than not to flow from it.

The fact of a person having foresight from the circumstances of his or her own conduct of a “real risk or possibility” of an event happening as a natural consequence of what he or she is doing is a common feature of offences created by criminal law. The concept of “realisation of a real risk or possibility” of the occurrence of a specific event as a consequence of the proscribed conduct has been used in the definition of crimes for many years. It has been used to denote a subjective state of mind of crimes to the extent that it has now acquired a special meaning in criminal law jurisprudence. Courts are not unfamiliar with the requirements of the test for a subjective state of mind denoted by the words “real risk or possibility” used in a statute.

A statement is a means by which a person expresses to others by way of spoken or written words or any other action a message about the relationship between what he or she thinks and the real world. Where the relationship is presented in terms of a correspondence between the idea or information imparted or received and reality or fact the statement is a true statement. What is reality or fact does not change. It may expand as more ideas or information about it comes to light. Reality defines the difference between truth and falsity.

The truth or falsity of an alleged fact is a matter of evidence. Where there is no relationship of correspondence between the ideas or information imparted or received and reality the statement is false. To say something has happened when it has not happened is a lie. A statement is indeed defined by s 19 of the Criminal Code to mean “any expression of fact or opinion whether made orally, in writing, electronically or by visual images”. So a “false statement” of fact is a statement which is in “conflict with reality”. It is a misrepresentation that what is stated or expressed is a fact. Difficulty of verification of the “falsity” or “truth” of a statement does not detract from the definitional clarity of the meaning of “false statement”.

The words “public confidence” are not so vague as to escape definition by the courts. As shall be shown later these words are to be interpreted in the context of the performance by a security service institution referred to in s 31(a)(iii) of the Criminal Code of functions in the exercise of the powers conferred on it by the Constitution. Public confidence in that context refers to the trust reposed in the institution by the public. The basis of the trust is a belief that members of a security service institution will be able to execute their duties in

accordance with the purposes for which the institution was established under the Constitution.

The contention that s 31(1)(iii) of the Criminal Code as it is framed is unconstitutionally vague as to fail the test of legality is clearly unsustainable. Any man or woman of ordinary intelligence can foresee, to a reasonable extent, what conduct is prohibited by the statute and the consequences of committing the conduct.

The concepts of “false”; “real risk or possibility” and “public confidence” do not in themselves cause insurmountable problems of interpretation when used in a statute. The meaning to be given to each word or phrase as used in s 31(a)(iii) of the Criminal Code is clear. What they describe is adequately foreseeable. The interference the description of which they form a part has a legal basis. In that sense the restriction is contained in law within the meaning of s 20(2) of the Constitution.

The next matter the Constitution addresses is the objective the impugned legislation must pursue. Every legislation is animated by an object the legislature intends to achieve: *R v Big M Drug Mart Ltd* (1985) 18D.L.R. (4th) 321 (Supreme Court of Canada) at p 350. The constitution prescribes the interests a law which imposes restrictions on the exercise of the right to freedom of expression must have been enacted to protect if it is to be consistent with the purpose for which the fundamental right is guaranteed.

A law shall not be held, if all other requirements are met, to be in contravention of the protection of the exercise of the fundamental right to freedom of expression if the objective of its enactment is the protection of a public interest listed in

s 20(2)(a) of the Constitution. Interference with freedom of expression may only be justified if it pursues a legitimate aim. The reason is that freedom of expression is guaranteed by the Constitution so that it is not exercised in a manner that is detrimental to the rights of others or the public interests listed in s 20(2)(a) of the Constitution. The public interest lies in the need for the individual to respect the interests listed when he or she exercises the right to freedom of expression.

The specific aims which must be pursued by a provision imposing restrictions on the exercise of freedom of expression and the legitimacy of them are pre-determined and established directly by the Constitution. The interests to be protected and sufficiency of their importance are pre-determined. The legislature is bound under the principle of legitimacy by the higher norm to limit the exercise of the right to freedom of expression only for clearly defined purposes. The question in each case is whether the aim pursued by the prohibition imposed by the impugned legislation is the protection of an interest directly related to or falling within the categories of the interests listed in s 20(2)(a) of the Constitution. It seems clear therefore that in assessing whether a restriction on freedom of expression addresses a legitimate aim both its purpose and its effect should be taken into account. *R v Big M Drug Mart Ltd* supra p 3.

In ascertaining the objective of a statute the court construes the language used in the provision taking into account its subject matter, the reasons for and effects of the restriction imposed on the exercise of freedom of expression. In other words the court must look at the intention of Parliament. An object is the interest which the legislature intends to promote or protect by means of the prohibition by criminal law of expression causing or likely to cause harm to it. The public interest in this case is that members of the security

service institutions referred to in s 31(a)(iii) of the Criminal Code be left to enjoy public confidence in the performance according to law of the functions for which the institutions were established.

The object of a statute provides the ground for the justification of the prohibition of acts as a crime and the basis for a precise definition of the scope of the proscribed conduct. The words “to the extent that the law in question makes provision ... in the interests of”, mean that it must be shown that the primary purpose of creating the crime out of the expression and dissemination of the ideas and information accompanied by the requisite state of mind was to protect one or more of the public interests listed in s 20(2)(a) of the Constitution.

The presumption is that legislative action is a rational process with ends to serve and reasons for its products. O.W. HOLMES JR in his article titled “*The Path of the Law*” 10 *Harvard Law Review* 457 (1897) at p 469 put it thus:

“It is true that a body of law is more rational and civilized when every rule it contains is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated or are ready to be stated in words.”

The list of the matters which define the categories and nature of the objects of legislative protection which may justify the imposition of restrictions on the exercise of freedom of expression is exhaustive. A restriction may in consequence constitute a breach of s 20(1) of the Constitution if its purpose is not one of the legitimate aims listed. The pre-determination and direct establishment of the nature of the substance of the objective to be pursued limit the exercise of the legislative power as to the nature and scope of the means to be used.

The Government has no power to create its own interests to protect by imposition of restrictions on the exercise of freedom of expression using criminal law. By defining the grounds on which limitations on the exercise of freedom of expression may be imposed the Constitution has made provision for the settlement of conflicts between the rights of the individual and the exercise of State power so that the latter cannot relapse into arbitrariness. The list of the interests in s 20(2) of the Constitution is therefore exclusive in the sense that they are the only interests whose protection might justify a restriction on freedom of expression.

Is the purpose of the restriction to achieve one or more of the legitimate aims specifically listed in s 20(2)(a) of the Constitution? The fact that s 31 (a) (iii) of the Criminal Code mentions specifically the three security service institutions is significant. It is not Government in general referred to but specific institutions. The subject-matter of the restriction of the exercise of freedom of expression must relate to the functioning of the particular institutions. In subjecting the exercise of freedom of expression to the statutory falsehood to provide immediate protection to public confidence in a security service institution Parliament took into account the fact that public confidence in a public institution arises from and is directly related to the manner the institution performs its Constitutional functions.

The objective of protecting public confidence in a security service institution by prohibiting as a crime the acts of publishing or communicating a false statement with the intention or realising that there is a real risk or possibility of undermining it must lie in the role public confidence plays in the exercise by the security service institution of its constitutional functions.

Mr *Zvekare* argued that the offence was created to make provision for the protection of public order and public safety. The parties were agreed that the words “in the interests of” used in s 20(2)(a) of the Constitution mean for the protection of a public interest listed or an interest falling within the categories of the public interests listed therein. They differed on the question whether the aim pursued by s 31(a)(iii) of the Criminal Code is the protection of public order and/or public safety. Mr *Chagonda* argued that the restriction on the exercise of freedom of expression was imposed to protect the honour of the institutions referred to in the provision. It must be established as a fact that the prohibition of the publication or communication of a false statement as a crime under s 31(a)(iii) of the Criminal Code is in the interests of the maintenance of public order and/or preservation of public safety.

It is common cause that, all the institutions referred to in s 31(a)(iii) of the Criminal Code are established by the Constitution for the specific purpose of enforcing laws for the maintenance of public order and the preservation of the security of the State. An Act of Parliament relating to each institution defines the powers to be exercised, the procedures and conditions to be complied with in the proper exercise of the powers conferred on it in the performance of the functions for the achievement of the purposes of its existence.

Section 93(1) of the Constitution provides for the establishment of a Police Force which, together “with such other bodies as may be established by law for the purpose, shall have the function of preserving the internal security of and maintenance of law and order in Zimbabwe”. Under s 19 of the Criminal Code “a law enforcement agency” is defined to mean “the Police Force (including a member of the Police Constabulary as defined

in s 2 of the Police Act) [*Cap. 11:10*] or an intelligence service maintained by the government, or any agency assigned by an enactment to maintain and enforce the law”.

Section 96(1) of the Constitution provides that for the purpose of defending Zimbabwe there shall be Defence Forces consisting of an Army, and Air Force and such other branches, if any, of the Defence Forces as may be provided for by or under an Act of Parliament. Section 99(1) of the Constitution provides that there shall be a Prison Service for the administration of prisons in Zimbabwe and for the protection of society from criminals through the incarceration and rehabilitation of offenders and their re-integration into society.

It is clear from the relevant provisions of the Constitution that the institutions referred to in s 31(a)(iii) of the Criminal Code were established to serve specific needs of the community. Security service institutions are important national institutions which form part of the essential framework of a constitutional democracy. They are known and accepted by the public at large as being responsible for the defence of the country, preservation of public safety and maintenance of public peace and tranquillity.

All criminal laws provide protection to public order and/or public safety. Justification under s 20(2) of the Constitution requires more than the general goal of protection from harm common to all criminal legislation. Interests of public order or public safety are quite general in nature. It is therefore important to look at the role public confidence plays in the performance by the security service institutions of their functions and the impact on society of undermining or likelihood of undermining it. The reason for such an approach is that on its own public confidence in a security service institution hardly qualifies

as an interest whose protection would constitute a legitimate aim under s 20(2) of the Constitution.

The public has an interest in the maintenance of public peace and tranquillity and the preservation of public safety in accordance with the law. In an organised society, the presence of public order and public safety is a pre-condition for the enjoyment of freedom of expression. An impression should not be created in the minds of the public that the exercise of the right to freedom of expression is not subject to the responsibility to keep peace and tranquillity.

A valid legislative restriction of the exercise of the right to freedom of expression should be as limited as the scope of the meaning of the public interest for the protection of which it is imposed. While it is intended that there should be freedom of expression it is also intended that in the exercise of the right, conditions should not be deliberately created for the undermining of the maintenance of the public order or preservation of public safety. There is a direct and vital relationship between the exercise of freedom of expression and the preservation of public peace and tranquillity.

Freedom of expression can only thrive in an orderly society. Fundamental rights have no real meaning if the State itself is in danger and disorganised. If the State is in danger the liberties of the individual are themselves in danger. The very fact of belonging to a society ordered by law implies that the actions of the individual cannot be deployed absolutely in all direction without being contained within the limits imposed by community life. Section 20 (1) of the Constitution guarantees complete freedom of expression but it also makes an exception in respect of breach of public order and public safety in s 20 (2)(a). As

MR JUSTICE JACKSON of the U.S. Supreme Court once observed in *Terminiello v City of Chicago* 337 US1, 37(1949):

“The choice is not between order and liberty. It is between liberty with order and anarchy without either.”

A law cannot be used to restrict the exercise of freedom of expression under the guise of protecting public order when what is protected is not public order. This is because the maintenance of public order or preservation of public safety is synonymous with the protection of fundamental human rights and freedoms. The State cannot therefore violate fundamental human rights and freedoms under the cover of maintaining public order or preserving public safety. It is always important to understand and appreciate the meaning of the concepts of public order and public safety. They describe the definitional balancing line between the exercise of the right to freedom of expression and the public interests for the protection of which the State may restrict the exercise of that right.

Public order is a concept used to describe the state of calm or even tempo of the life of the community brought about by laws enforced by the State. Order is the basic need in any organised society. It implies the orderly state of society or community in which people can peacefully pursue their normal activities of life. It refers to the absence of acts which aim at endangering the safety of the lives and property, peace and tranquillity of the community.

It is synonymous with the peace and tranquillity of the community. Public order does not in that limited sense refer to isolated acts which affect individuals leaving the tranquillity of the community unaffected. Not every violation of law constitutes breach of

public order. The isolated acts of violence may not affect the even *tempo* of the life of the community.

Public order excludes from its ambit the more serious offences which are against public safety and endanger the security of the State itself. It is clear from the juxtaposition of the different grounds in s 20(2)(a) of the Constitution on which the exercise of freedom of expression may be restricted that although they sometimes tend to overlap they are intended to exclude each other. Public order is therefore something which is demarcated from the ground of public safety.

Whether an act is of a character that affects public order is a question of degree. It is not the quality of the act that matters but its potentiality. It is a matter of context. One act may in one context have effects that injure the individual only whilst in another context the same type of act may have effects that endanger the peace and tranquillity of the community. What is clear is that the maintenance of public order is equated with the maintenance of public peace and tranquillity. See *Elliot v Commissioner of Police & Anor* 1997(1) ZLR 315(S) at 322E-H.

In “*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 66” the Inter-American Court of Human Rights stated that the term “public order” does not refer simply to the maintenance of physical order but also includes “the organisation of society in a manner that strengthens the functioning of democratic institutions and preserves and promotes the full realization of the rights of the individual”.

The argument that s 31(a)(iii) of the Constitution does not make provision in the interests of public order or public safety is based on the absence of express reference to public order or public safety in the terms of the statute. Unlike subpara(s) (1) and (ii) which make express reference to the legitimate aims prescribed by s 20 (2) (a) of the Constitution, subpara (iii) of s 31 (a) of the Criminal Code makes reference to “public confidence” in the security service institutions.

On the face of it the specific purpose of the provision is to protect public confidence in a security service institution referred to in the provision. It is protected from being undermined or the likelihood of being undermined by a false statement published or communicated with the requisite state of mind. That would, however, suggest that public confidence in a security service institution is an end in itself equivalent to and as important as the public interests listed in s 20(2)(a) of the Constitution.

The fact that the location of the offence in the Criminal Code suggests that it is intended to serve a political purpose requires that its objective be closely scrutinised. Protection of public confidence in a security service institution is not one of the legitimate aims for the achievement of which permissible legislative limitation on the exercise of freedom of expression can be imposed.

The Constitution does not require that a law restricting the exercise of freedom of expression must state in express terms that its objective is to protect the interest listed in s 20(2) of the Constitution. That it must have that as its object is an obligation the breach of which affects the legitimacy of the legislative action and the legality of the provision in question. It is a matter the determination of which may call for construction of the provision

in the light of its history and the circumstances of its enactment. In other words all relevant circumstances would have to be considered to determine the question whether the objective pursued by the legislation is one or more of the legitimate aims listed in s 20(2)(a) of the Constitution.

The purpose for enactment of a provision of a law may be expressly stated by the terms of the provision or it may be implied by them. A law can be in the interests of public order or public safety without it being stated in so many words that it is for that purpose. The words “in the interests of ...” in s 20(2)(a) of the Constitution are of wide connotation. The words would cover legislation which expressly and directly purports to maintain public order or preserve public safety and one which does not expressly state the said purpose but leaves it to be implied therefrom. They would also cover legislation which protects the exercise of functions for the purposes of maintaining public order or preserving public safety.

In its plain terms s 31(a)(iii) of the Criminal Code does not create a crime out of acts which breach public peace and tranquillity or public safety directly. Other provisions of the Criminal Code create and define such crimes. Section 31(a)(iii) creates a crime out of acts which have the effect of interfering with the ability of the security service institutions to prevent occurrences of those offences which breach public order or endanger public safety directly.

As an offence against the State and not against public order or public safety s 31(a)(iii) of the Criminal Code has as its primary objective the protection of the interests of the State from the consequences of the proscribed acts. Those are acts which undermine or

are likely to undermine the ability of the security service institutions to perform their functions efficiently and effectively in accordance with the law.

The words “in the interests of ...” do not limit the provisions of the law to having to be for the protection of the public interest listed in s 20(2)(a) of the Constitution from consequences of acts which harm or are likely to harm it to the exclusion of the public interest in its maintenance or preservation. In other words can it be said that a law the purpose of which is to protect the ability of the State to secure public safety and the maintenance of public order is not in the interest of these matters?

The proscription of the publication or communication of a false statement about lawful activities of a security service institution with the intention of undermining public confidence in that institution, is in the interests of public order or public safety when specific conditions are met. It must be shown that public confidence in the institution is an essential element in the ability of the institution to efficiently and effectively secure the maintenance of public order or preservation of public safety. In that sense the words “in the interests of public order” are of wider connotation than the words “for the maintenance of public order” or “for the preservation of public safety”.

A law may not have been designed to directly maintain public order or preserve public safety in the sense of creating an offence against public order or public safety and yet it may have been enacted “in the interests” of public order or public safety. *Ramji La Modi v The State of UP* 1957 SCR 860 at 866.

If it appears on the examination of the relevant factors that the intention is to establish a rule of conduct carefully designed to ensure that security service institutions are able to efficiently and effectively secure the maintenance of public order or the preservation of public safety the legislation would be “in the interests of public order” or “public safety”. It would be a limitation designed to ensure that the enjoyment of the right to freedom of expression does not prejudice the interest of public order or public safety.

Public confidence in a security service institution is a measure of the expectation the public have that members of the institution concerned will act in accordance with the law. They are expected to do so in the exercise of functions to ensure the safety of lives and property, peace and tranquillity in the community. The measure of public confidence in the institution in the circumstances lies in the lawful acts done and expected to be done by the members of the institution in the exercise of the functions imposed on it for the achievement of the purposes of its constitutional existence.

The interest of the public is not in the mere existence of a security service institution without reference to the manner in which the exercise of its functions affects the enjoyment of their rights and freedoms. The public interest is in ensuring that the exercise of freedom of expression does not cause direct, serious and proximate harm to lawful performance by the security service institutions of the functions for which they were established by the Constitution.

There is general recognition of the fact that members of security service institutions cannot operate in a vacuum. They carry out their duties in the communities they serve. Public confidence is therefore the result of the knowledge by members of the public of

the truth about the lawful activities carried out by members of the security service institution in securing the maintenance of public order or preservation of public safety.

The knowledge of lawful activities of members of a security service institution is acquired from statements made directly by members of the institution to members of the public or from statements published through the print and electronic media or communicated in private conversations. Where a statement about the lawful activities of members of the institution is true, the confidence of the public in the institution is enhanced. It is the justified public confidence in the institution which the provisions of s 31(a)(iii) of the Criminal Code protect. The efficient functioning of a security service institution is not valuable in itself. It is only valuable when it is in accordance with the law and therefore based on truth.

No public confidence in an institution is maintainable on an inefficient and ineffective delivery of service. There cannot be public confidence in a public institution when its members under the pretext of exercising its powers act outside the law which the people through their representatives in Parliament put in place. If the statements published or communicated show that the law enforcement agents are doing all that is required of them by the law to cut crime, public confidence translates into practical benefits to the institution in the execution of its functions. The public embrace the goals of the institution and voluntarily support it in the fight against crime. After all, peace or breach of it is a product of human behaviour. Peace starts with the people. They give the police information necessary for the prevention of crime.

The proper exercise of freedom of expression can therefore build public confidence in the law enforcement agency in the interests of public order or public safety.

The same principle would apply to the other security service institutions referred to in s 31(a)(iii) of the Criminal Code in the exercise of the functions for which they are established by the Constitution. The indissoluble unit between the procedural or functionary aspects of the communicative process and the effects on the audience of the exercise of the right to freedom of expression is protected.

Where law enforcement agents enjoy public confidence, members of the public take part in the programmes involving the policing of streets and neighbourhoods. The participation by members of the public in self-policing programmes has the effect of ensuring accountability by the institution to the public. Democratic accountability brings about efficient and effective discharge of duties by the members of the institution. Participation by members of the public in the affairs of an institution, the activities of which affect their lives is one of the fundamental values of a democratic society. All this guarantees justified public confidence in the institution.

As stated above, justified public confidence is confidence based on the knowledge of the truth of the lawful activities of members of the institution concerned in the exercise of the functions for which it is established by the Constitution. Public institutions are established under the Constitution as part of the means by which a State governed by the rule of law protects and promotes the enjoyment of fundamental human rights and freedoms.

One who upholds the Constitution respects its institutions when their powers are exercised in accordance with the law. The protection of public confidence in the security service institutions is based on the acceptance of the fact that the knowledge that members of the institutions act lawfully assures members of the public of the protection of their rights.

The public have an interest in receiving accurate information on the activities of security service institutions relating to the maintenance of public order and the preservation of public safety.

Public confidence may be undermined when the public know the truth about unlawful activities by members of the security service institutions. This is because unlawful activities by members of a security service institution are inconsistent with the protection of fundamental human rights and freedoms. It is clear that public confidence in a security service institution is based on or linked to evidence of lawful activities by its members in securing the maintenance of public order or the preservation of public safety. It is not linked to the reputation of the institution as argued by Mr *Chagonda*. The reputation of the institution would also depend on the knowledge by the public of the lawful activities the members carried out in the discharge of its constitutional mandate.

The result of knowledge by members of the public of the truth of unlawful activities by members of a security service institution would be the reduction of support by the community for programmes relating to the maintenance of public order or the preservation of public safety. Members of the public become reluctant to give information to members of the institution. They fear disclosure of their identities by unscrupulous law enforcement agents to criminals who in turn may endanger their lives. As less information is given to law enforcement agents, more crimes are committed with fewer criminals accounted for. Members of the public who lose trust in the ability of the law enforcement agency to protect them from criminals resort to self-help remedies thereby creating conditions of lawlessness. Some of them may end up taking into their own hands the punishment of what they conceive to be crimes.

It is the duty of a free media of communication to give accurate information to the public on unlawful activities of members of a security service institution. It is in the public interest that the media should be free to provide criticism of such conduct. Indeed a democracy cannot exist without that freedom to put forward opinions about the functioning of public institutions.

The concept of free and uninhibited expression and dissemination of opinion about the functioning of public institutions permeates all free and democratic societies. Not only does the media have the duty to impart such ideas and information concerning the activities of security service institutions relating to securing of the maintenance of public order or the preservation of public safety, the public have a right to receive the ideas and information.

There is danger of unjustified loss of public confidence in a security service institution if false statements about its lawful activities are published or communicated with the deliberate intention or when realising that there is a real risk or possibility of undermining public confidence in it as a custodian of public order or public safety. It must not be forgotten that the concept of limitation is inherent in that of right. Even without the necessity of criminal sanctions, freedom of expression imposes on the media the responsibility of ensuring, to the extent it is reasonably practicable to do so, the accuracy of the information conveyed to the public on matters of public concern.

Members of the public often do not take the trouble and time to verify the truthfulness of information given to them. They act on it on the assumption that the publisher or speaker has taken the trouble to verify the accuracy of the information. In that regard they act on the assumption that what is reported or said is true.

There is a real danger that a false statement published or communicated to members of the public about lawful activities of a security service institution in the maintenance of public order or preservation of public safety, may lead to withdrawal of support for law enforcement. There may be withdrawal of voluntary participation by communities in policing programmes involving their neighbourhoods. The result would be an increase in lawlessness and collapse of public order.

Section 31(a)(iii) deals with a situation where a person publishes or communicates a false statement with the intention that what is said or written be accepted as the truth. The intended result of the unlawful act is undermined confidence of the public in the ability of the security service institution to perform the functions of maintaining public order or preserving public safety. The person uses a false statement as a means of undermining public confidence in the institution concerned because he or she is aware of the vital role public confidence plays in the efficient and effective performance of its functions.

Justified public confidence reposed in a security service institution as a result of the efficient and effective performance of lawful activities in the maintenance of public order or the preservation of public safety would be known to exist by the speaker or publisher of a false statement before it is sought to be undermined.

It would be against the principle of the rule of law to allow the exercise of freedom of expression to falsely malign an institution in the proper performance of its constitutional functions with a view to diverting it from properly discharging its mandate. While actions of members of security service institutions should be open to criticism and their work subjected to scrutiny and open debate, the State should not allow public

accusations of misconduct lacking legitimate cause. Publication or communication of altogether untrue statements which have been merely invented for the purpose of providing arguments for a campaign against a security service institution would be an abuse of the right to freedom of expression. *Thorgeirson v Iceland* 14 E.H. R.R. 115 paras 79 & 81 (1990 Commission Report).

If unjustified loss of public confidence in a security service institution which would result from publication or communication of a false statement about its lawful activities is prevented justified public confidence in the institution is protected. The prohibition and punishment of the acts concerned together with the accompanying state of mind have the effect of protecting the lawful activities of the security service institution by which it enforces laws that guarantee public order or public safety. That means that an important element in the maintenance of public order or the preservation of public safety is secured.

By preventing unjustified loss of public confidence in a security service institution the law protects what secures public peace, safety and tranquillity. The objective of protecting public order or preserving public safety is in turn achieved. A democratic state system would be unthinkable without the alignment and protection of the lawful activities of state administration which in turn guarantee public order or public safety. Public order or public safety is protected in an indirect manner by the prevention of the undermining of an element which is essential to its maintenance or preservation.

The impugned statute is based on the need to protect the institutions from the perversion which might result from the distortion of public confidence on which they depend for efficient and effective operations consistent with the protection of fundamental human

rights and the public interests listed in s 20(2)(a) of the Constitution. In that regard a strong case may be made that the institutions concerned which are charged with the responsibility of maintaining public order and preserving public safety have a right to justified public confidence reposed in them.

Members of the public must be able to rely on the security service institutions carrying out their tasks effectively. They have a right not to be deliberately misinformed about the activities of the security service institutions in the discharge of the functions of maintaining public order or preserving public safety.

A provision which prohibits, under threat of punishment, any act the direct effect of which is harm or likelihood of harm to the ability of an institution entrusted with the duty of maintaining peace and tranquillity to carry out its constitutional mandate, is a law “in the interests of public order” within the meaning of s 20(2)(a) of the Constitution. In *Ghosh v Joseph AIR 1963 SC 812* at 814 the Supreme Court of India held that protection of discipline and efficiency in the performance of functions by members of a public institution “may in a sense, be said to be related to public order”.

In *Chavunduka's case supra*, the Court held that a law which made it an offence to publish or communicate a false statement with the intention of causing alarm and despondency was a law enacted in the interests of public order. The reason was that the law was enacted on the basis of the fact that there was a real danger of breach of peace. Members of the public who believed that the statement was true and felt alarmed and despondent as a result of the alleged failure of law enforcement agents to ensure peace and tranquillity in the

community, could withdraw support for the law enforcement agency to the detriment of public order.

Mr *Chagonda* strenuously sought to distinguish the effect of the provisions of the law in *Chavunduka's case* supra from those of s 31(1)(a)(iii) of the Criminal Code. The principle of prevention of actual or potential harmful effects on the maintenance of public order is the principle on which the reasoning and finding in that case were based. Its application to the facts of this case justifies the finding that the restriction imposed by s 31(a)(iii) of the Criminal Code on the exercise of the right to freedom of expression is in the interests of public order and the preservation of public safety.

The imposition of the restriction creates conditions in which the relationship between the exercise of freedom of expression and justified public confidence for the achievement of public order or public safety can prevail. The provision meets the “legitimate aim” test. The purpose of protecting public confidence in a security service institution as a means of ensuring efficiency and effectiveness in the performance of its constitutional mandate falls within the scope of the legitimate aim of protecting the interests of public order and public safety within the meaning of s 20(2) of the Constitution. *Castells v Spain* (1992) 14 EHRR 445 paras 39 & 46.

The next requirement relates to the relationship between the restriction on the exercise of freedom of expression by s 31(a)(iii) of the Criminal Code and the objective of protecting public order or preserving public safety. Once it is found that the primary purpose of interference by the State with the exercise of freedom of expression was to protect a public

interest listed in s 20(2)(a) of the Constitution the next question for determination is whether the provisions of the law put in place were carefully designed to achieve that objective only.

The question for determination is whether or not the restriction imposed by s 31(a)(iii) of the Criminal Code to the exercise of freedom of expression is rationally connected with the objective of protecting public order or public safety. This precedent rule of legitimacy requires that a provision of law prohibiting conduct in the exercise of freedom of expression to protect a public interest must be a response to the effects of direct and proximate harm or likelihood of harm to the public interest. On the contention that the means used by s 31(a)(iii) of the Criminal Code to restrict the exercise of freedom of expression are not proportionate to the objective pursued, Mr *Chagonda* was on firmer ground.

It is easy for Government to place a restriction of the exercise of a fundamental right within the requirement for adoption of a legitimate objective. It is for the court to ensure that the law was conceived and expressed solely to achieve that objective. The law should not in its design have the effect of overreaching and restricting expression which is not necessary for the achievement of the objective concerned. The court applies the principle of proportionality to test the relationship between the restriction to the exercise of the right to freedom of expression and the objective pursued. The question is whether the restriction is necessary and proportionate to the objective pursued. Any restriction to the exercise of the right to freedom of expression claiming to be for the protection of any of the public interests listed in s 20(2)(a) of the Constitution must meet strict requirements indicating its necessity and proportionality.

This part of the test presents a high standard to be overcome by the State seeking to justify the restriction: See *Thorgeirson v Iceland* (1992) 14 EHRR 843 para 63. It was held in that case that the necessity for any restriction must be “convincingly established”. The court must pay particular attention to the principles characterising a democratic society and the fundamental role which freedom of expression plays in such society. In order to permit the citizen to keep a critical control of the exercise of public power particularly strict limits must be imposed on interferences with the publication or communication of ideas and information which refer to activities of public institutions.

The question to be determined in the application of the proportionality test is whether the means used by Government to restrict the exercise of freedom of expression are those which are suitable for the achievement of the legitimate objective pursued. The principle of proportionality is not explicitly mentioned in the Constitution. It forms an implicit standard gleaned from words such as “to the extent that the law in question makes provision in the interests of ...” in s 20(2)(a) of the Constitution and the general prioritisation of personal liberty over Governmental regulation.

Protection denotes provision of relief from an actual or potential burden or harm. For the provision to constitute protection of a public interest listed in s 20(2)(a) of the Constitution the restriction imposed on the exercise of freedom of expression must form a barrier between the proscribed acts and the public interest thereby breaking the chain of causation of direct and proximate actual or likely harm on the public interest.

There cannot be a pressing social need for the imposition of a restriction on the exercise of freedom of expression for the purpose of protecting a public interest when that

interest is not under threat of direct and proximate harm from the exercise of freedom of expression. The Constitution forbids the imposition of a restriction on the exercise of freedom of expression when it poses no danger of direct, obvious, serious and proximate harm to a public interest listed in s 20(2)(a) of the Constitution.

In *Rangarajan v Ram* [1990] LRC 412 at p 427 SHETTY J said:

“There does indeed have to be a compromise between the interest of freedom of expression and social interest. But we cannot simply balance the two interests as if they were of equal weight. 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 a proximate and direct nexus with the expression. The expression of thought should be intrinsically dangerous to the public interests. In other words the expression should be inseparably locked up with the action contemplated like the equivalent of a “spark in a powder keg”.

Fundamental human rights are personal rights. Freedom of expression belongs to the individual. Any restriction must be based on the concept of personal responsibility constituted from personal conduct accompanied by a subjective state of mind. Where it has been necessary to restrict the exercise of freedom of expression by means of criminal law the individual must be the unit of analysis in the determination of the question whether the law is constitutionally valid or not.

The principle that criminal liability should be based on personal responsibility is the justification for the requirement that there ought to have been in existence before the imposition of restrictions on the exercise of freedom of expression a causal link between the prohibited acts, the accompanying state of mind of the speaker, writer or publisher or actor and actual or potential harm to the public interest the protection of which is the object pursued.

The prohibited acts and their actual or potential harmful effects on the public interest must be traceable to the speaker, writer, publisher or actor as the source. If that is not the case, they cannot be the basis for restricting the exercise of freedom of expression. The rule on the need for a causal link between the prohibited conduct and the injury to be prevented must be shown to have been satisfied by any permissible legislative limitation to the exercise of freedom of expression. In other words the sole motive of the State should be to ascertain that the protected interests of the community are respected by the individual or that a guarantee exists that they will be respected. The purpose must be to ensure that people are able to make use of their right to freedom of expression to full effect without damaging public interest.

Not every case of actual or potential harm on the public interests listed in s 20(2)(a) of the Constitution justifies the imposition of restrictions on the exercise of freedom of expression. If that were to be the case the realm of freedom of expression as protected by the Constitution would eventually shrink to zero. The exercise of the right to freedom of expression is not protected because it is harmless. It is protected despite the harm it may cause.

It also does not mean that every breach of the restrictive provision deserves the exercise of the herculean powers of the sword of prosecution. In fact a restriction is unlikely to be considered proportionate where a less restrictive, but equally effective, alternative exists. At times invoking the adage that the best remedy for a bad speech is another speech may be all that is required to refute the false allegations and disclose the truth. Government has sufficient resources for doing so. Officials within these institutions who are responsible for public relations possess the best tools for responding to false statements about

performance of their functions. That would relate to their ability to obtain the relevant information concerning their performance and in terms of their ability to draw the attention of the media and thus make their response heard. See *Castells case supra* para. 46.

As MR JUSTICE BRANDEIS of the U.S. Supreme Court in *Whitney v California* 274 US 357 (1927) at 377 said:

“To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence.”

By guaranteeing freedom to impart and receive ideas and information on any subject s 20(1) writes into the constitution as a fundamental principle that competitive persuasion is one of the means by which a public institution can effectively protect a public interest against the publication or communication of false statements about its activities without having the exercise of the right to freedom of expression curtailed by means of criminal law. The restriction becomes unnecessary.

It must be established as a fact on the examination of the provisions of the law that the concepts by which the restriction of the exercise of freedom of expression is imposed define the proscribed conduct with adequate precision. The causal connection between the legislative purpose and the means used to achieve it must be clear and convincing. Only acts in the exercise of freedom of expression the prohibition of which is necessary for the achievement of the objective should have been proscribed. The means by which the restriction to the exercise of freedom of expression is imposed must be narrowly drawn and

specifically tailored to achieve the objective pursued by the legislation. The question is not whether the means the Legislature employs to accomplish the end pursued are the wisest or the best.

In *Superintendent Central Prison Fatehgarh v Ram Manohar Lohia* 1960 SCR(2) 821 the Supreme Court of India held that for a restriction imposed by a law on the exercise of freedom of expression for the purpose of protecting public order to be rationally connected to the objective served there must be a proximate connection between the two. SUBBA RAO J observed that:

“... The limitation imposed in the interests of public order to be a reasonable restriction, should be one which has a proximate connection or nexus with public order, but not one far-fetched, hypothetical or problematical or too remote in the chain of its relation with public order.”

In *R v Oakes* (1986) 19CRR 308 at 337, the Supreme Court of Canada held that the rational connection criterion entailed the establishment of the fact that “measures adopted have been carefully designed by the legislature to achieve the objective in question. They must not be arbitrary, unfair or based on irrational consideration. In short, they must be rationally connected to the objective”. See also *R v Edwards Books & Art Ltd* (1986) 28 C.R.R I at p (p) 40-41.

The principle was also stated by the US Supreme Court in *Aptheker v Secretary of State* 378US 500(1964) in these words:

“A governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of constitutionally protected freedoms.

Even though a governmental purpose is legitimate and substantial that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be reviewed in the light of less drastic means for achieving the same purpose.

The Constitution requires that the powers of government must be so exercised as not, in attaining a permissible end, unduly to infringe a constitutionally protected freedom. ... Precision must be the touchstone of legislation affecting the liberty guaranteed in the fifth Amendment.”

A restriction which is not rationally connected with the objective pursued is an unreasonable, unnecessary and arbitrary interference with the exercise of freedom of expression.

As a means of protecting the interests of public order and public safety by the State, s 31(a) (iii) of the Criminal Code is problematic. It is not narrowly drawn and carefully tailored to achieve the objective pursued. Whilst placing substantial restriction on the basic right to freedom of expression the effectiveness of the impugned statute in achieving the legislative purpose is in practice very uncertain.

Section 31(a) (iii) of the Criminal Code must be construed taking into account the context of the company it keeps. It is indeed a principle of statutory interpretation that the true meaning of the words used and the intention of the legislature in any statute can be properly understood if the statute is considered as a whole. Every part of a section must be considered as far as it is relevant to do so in order to get the true meaning and intent of any particular portion of the enactment. It is also important to bear in mind that as the statute purports to implement derogation from the principle of a guaranteed fundamental right it must be strictly construed.

It has already been found that s 31(a) prohibits publication or communication of a false statement when it is accompanied by the subjective state of mind to secure the results specified in subpara(s) (i), (ii) (iii) and (iv). The prohibited consequences show the

interest protected. Subparagraph (i) protects public safety or public order. Subparagraph (ii) protects the defence and economic interests of Zimbabwe. It must follow that subpara (iii) protects public confidence in the security service institutions referred to in the provision. Section 31(a)(iii) of the Criminal Code makes no reference to public peace and tranquillity or public safety except by inference drawn from the reference to security service institutions in the provision.

Public order, public safety, defence and economic interests of Zimbabwe are interests specifically listed by s 20(2)(a) of the Constitution for the protection of which imposition of a restriction on the exercise of freedom of expression may be justified. Public confidence in a security service institution is not one of those interests. A restriction in the interest of public confidence in a security service institution is not one of the restrictions permitted by s 20(2)(a) of the Constitution. As an end in itself protection of public confidence in a security service institution cannot justify the imposition of a restriction on the exercise of freedom of expression under s 20(2)(a) of the Constitution. Its protection can only be as part of the means of securing the maintenance of public order or preservation of public safety.

If public confidence is viewed in the light of the role it plays in influencing the efficient and effective performance of the functions of maintaining public order and preserving public safety, the conduct prohibited by s 31(a)(iii) of the Criminal Code is covered by s 31(a)(i) or (ii) of the Criminal Code. Section 31(a)(iii) of the Criminal Code would be an unnecessary enlargement of the provisions of the preceding subparagraphs.

Section 31(a)(iii) of the Criminal Code prohibits publication or communication of a false statement on any subject matter accompanied by the requisite state of mind. It does so without regard to the question whether the fact about which the lie is published or communicated relates to an important aspect of the performance by a security service institution of its functions. For the protection of public confidence in a security service institution to have any connection with the legitimate aim of protecting the interests of public order and public safety, the false statement the publication or communication which is prohibited must relate to the performance by the security service institution of its functions as defined by law.

The matter to which the false statement relates does not have to be a matter within the jurisdiction of a security service institution referred to in s 31(a)(iii) of the Criminal Code. The prohibition is not even limited to apply only to a publication or communication which reaches a significant number of people. A conversation between two people in a private home would be covered.

A statement the publication or communication of which is suppressed because its content is intended to undermine public confidence in a security service institution may not also undermine the ability of the security service institution to efficiently and effectively secure the maintenance of public order and preservation of public safety. There are many activities by security service institutions on which false statements may be published or communicated to others to undermine public confidence in them which are unrelated to their efficient performance of the functions of maintaining public order or preserving public safety. The legislative purpose of protecting public order or public safety from the false statements, the publication or communication of which is prohibited by s 31(a)(iii) of the Criminal Code

was not necessarily achieved by the method used in the statute. The effectiveness of the prohibition for achieving the proposed legislative objective is open to serious doubt.

It would be actual or likely harm to the public interest in the ability of the security service institution to efficiently and effectively perform the function of maintaining public order and preserving public safety which would justify the imposition of the restriction on the exercise of freedom of expression. Section 31(a)(iii) of the Criminal Code makes no reference to the functioning of the security service institution as an interest to be protected.

There is the problem of the use of the words “wholly” or “materially” false. The word “wholly” suggests an intention to exclude a statement which is a “half-truth” because it is always also a “half-lie”. The use of words “materially false” in the alternative undermines that conception. For example a statement that police caused crime suspects to walk for 50km may be a true statement. The half lie would be in not revealing that they did so because of lack of transport but suggesting instead that they were doing so to torture the suspects. The statement is not wholly true because the omission of the information on the non-availability of transport makes it a half-lie. A person may have published or communicated the statement with the intention of undermining public confidence in the police. To say a statement is “materially false” is to say it is not “wholly false”.

False news that is harmless to the effectiveness of a security service institution in maintaining public order or preserving public safety would be covered by the offence as long as it is accompanied by an intention to undermine public confidence in the security service institution. The point is not that a requirement of actual harm to public confidence in a security service institution is necessary. It is that protecting public confidence in a security

service institution in the manner it does s 31(a)(iii) of the Criminal Code has the effect of shielding the public interest from every possibility of harm. That includes harm the occurrence of which is a remote possibility.

A remote possibility of harm to the maintenance of public order or preservation of public safety cannot be a reasonable basis for the legislative imposition of a restriction on the exercise of freedom of expression. When the enforcement of the provisions of a criminal law can lead to conviction and punishment of a person even in situations in which the harm intended to be prevented is a remote possibility the reason for the law is lost.

In *Gosh's case* supra at 814-815 the Supreme Court of India held that:

“... the words “in the interests of ...” ... cannot be interpreted to mean that even if the connection between the restriction and the public order is remote and indirect the restriction can be said to be in the interests of public order. A restriction can be said to be in the interests of public order only if the connection between the restriction and the public order is proximate and direct. Indirect or far-fetched or unreal connection between the restriction and public order would not fall within the purview of the expression “in the interests of public order”.

The danger of undermining public confidence in the security service institution by a false statement does not have to be significant. The prohibition applies to cases where the harm caused by a false statement to public confidence in a security service institution is of a trivial nature. The clear principle is that prohibition of the exercise of freedom of expression is a measure so stringent that it would be inappropriate as a means for averting a relatively trivial harm to society. Where the evil apprehended is not relatively serious the fact that the exercise of freedom of expression is likely to undermine public confidence in a security service institution is not enough to justify its suppression. See *Whitney case* supra at pp 377 to 378.

The provision permits the State to restrict constitutional rights in circumstances that may not justify the action. As the offence relates to expression, state of mind and effects on attitudes of people it was imperative that it be narrowly drawn and specifically tailored to achieve the objective so as not to inhibit expression which does not require that the ultimate sanction of the criminal law be brought to bear. Protecting public confidence in a security service institution may give rise to a situation where the law is invoked to prevent the publication or communication of a false statement because it upsets people.

Where public confidence is temporarily lost security service institutions may be able to maintain public order and preserve public safety by use of the coercive force of the State. Without specific reference to maintenance of public order or public safety in the terms of the impugned provision there would be no obvious obligation on the State to prove that the proscribed conduct posed any real danger to the public interest concerned. Nothing in the language of the statute limits its applicability to situations where the prohibited acts directly and proximately cause harm to the maintenance of public order or preservation of public safety.

The concept of “undermining” requires that there be some sort of actual or likelihood of concrete change of attitude in the audience from reposition of confidence in the security service institution to a withdrawal of such confidence. It is, however, not a requirement of the offence that the false statement be of the nature from which such consequence would flow. It is what the person thinks the statement will do for him or her when it reaches the audience which matters.

A person who publishes or communicates a false statement without an intention to also undermine public order is not necessarily outside the constitutional guarantee although he or she may be within the statutory prohibition. Whilst it does not specify any subject matter of a false statement published or communicated with the requisite state of mind s 31(a)(iii) of the Criminal Code fails to require that the subject matter then conveyed must be shown to have a direct and proximate deleterious effect on the public interest the protection of which is the objective pursued.

In *Hector v Attorney General of Antigua and Barbuda & Others* 1991 LRC 237 the appellant was the editor of a newspaper published in Antigua known as the “Outlet”. He was charged in respect of an article published in the “Outlet” in May 1985. The charge alleged that the article complained of was a false statement which was likely to undermine public confidence in the conduct of public affairs in contravention of s 33B of the Public Order Act 1972 as amended by the Public Order (Amendment) Act 1976.

Section 33B provided:

“Notwithstanding the provisions of any other law any person who –

- (a) in any public place or at any public meeting makes any false statement; or
- (b) prints or distributes any false statement which is 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 shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding five hundred dollars or to a term of imprisonment not exceeding six months.”

The appellant challenged the validity of the prosecution on the ground that the specific provisions of s 33B under which the charge was laid on him violated s 12(1) of the Constitution of Antigua and Barbuda. Section 12(1) guarantees to every person the right to freedom of expression in terms and to the scope similar to that guaranteed by s 20(1) of our Constitution. Section 12(4) of the Constitution of Antigua and Barbuda provides that:

“Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision –

- (a) that is reasonably required
- (i) in the interests of defence, public safety, public order, public morality or public health.”

In considering the question whether s 33B was justified under s 12(4) of the Constitution of Antigua and Barbuda, LORD BRIDGE of HARWICH writing for the unanimous bench of the Judicial Committee of the Privy Council, addressed the constitutionality of legislation which applied to situations in which harm to public order was a remote possibility. His Lordship at p 241f-g said:

“If ... a particular false statement although likely to undermine public confidence in the conduct of public affairs is not likely to disturb public order, a law which makes it a criminal offence cannot be reasonably required in the interests of public order by reference to the remote and improbable consequence that it may possibly do so.”

Section 20 (2) (a) of the Constitution having allowed the imposition of restrictions on the exercise of freedom of expression only in cases where danger to the public interests listed therein is involved, an enactment which is capable of being construed and applied to cases where no such danger could arise cannot be held to be constitutional and valid to any extent. As s 31(a)(iii) of the Criminal Code would apply where the false statement published or communicated to others would cause no harm or be unlikely to cause harm to a public interest listed in s 20(2)(a) of the Constitution it must be held to be constitutionally invalid. In other words the restriction must be exclusively not just tangentially directed towards the legitimate aim.

In *Ramesh Thapper v State of Madras* (1950) SCR 594 at p 603 (Supreme Court of India) PATANJALI SASTRI J as he then was: stated the legal position thus

“Where a law purports to authorise the imposition of restrictions on a fundamental right in language wide enough to cover restrictions both within and without the limits

of constitutionally permissible legislative action affecting such right, it is not possible to uphold it even so far as it may be applied within the constitutional limits, as it is not severable. So long as the possibility of its being applied for purposes not sanctioned by the constitution cannot be ruled out it must be held to be wholly unconstitutional and void.”

The legislation sweeps under the prohibition a person who at the time he or she publishes or communicates a statement sincerely believes that it is true, although it happens to be false. It does not use such words as “falsely publishes” which would connote a knowledge requirement. It is left to be assumed in every case that the accused person had reasonable opportunity to investigate the accuracy of the statement communicated or published and knowing that it was false, deliberately chose to publish or communicate it to others.

The assumption required to be made of the fact that the accused person had knowledge of the falsity of the statement does not take into account the fact that news media in particular often work in situations in which information changes fast denying even the most responsible journalist time to verify the accuracy of the information received. It is one thing to say it is a basic rule of journalism that news media need to verify the accuracy of their stories before publishing them. It is another to enact it as a requirement of a criminal law in the form of a subtle presumption of knowledge of falsity of a statement the responsibility of disproving of which is on the journalist.

The argument was that a person who does not know that a statement is false at the time he or she publishes or communicates it, would not be convicted because the State would not prove that he or she had the intention to undermine public confidence in a particular security service institution. The contention is based on the assumption that the intention to undermine public confidence in the institution is a substitute for knowledge of the

falsity of the statement. It fails to appreciate the fact that insistence on knowledge as a requirement of a law imposing restrictions to the exercise of freedom of expression is an element of permissible legislative limitation. It also overlooks the fact that intent and knowledge have different meanings depending on the elements to which they are connected. Knowledge is a different state of mind from intent. It refers to a conscious awareness of the existence of a thing whilst intent refers to the purpose of an act.

An act committed with a specific intent is an act committed in order to achieve a specific result. The act cannot be separated from the result. The accompanying state of mind directs the act towards the achievement of the desired result. A deed is not done with intent to produce a consequence unless the consequence is the aim of the deed. Knowledge relates to the facts which make the statement false. Knowledge and intent relate to the subjective state of mind of the accused person at the time of publishing or communicating the statement to others. The latter is, however, concerned with the purpose of publishing or communicating the statement and events in future which may happen or not happen after the readers or listeners have received the statement.

Whilst intent is associated only with the relevant consequences there is no knowledge associated solely with the relevant conduct. The knowledge element is important because a false statement may be a result of unscrupulous fabrication by the publisher or speaker or it may originate from someone-else with the accused person being a facilitator in publishing it or it may be a result of interpretation of facts in a statement made by another person.

The conduct as defined by s 31(a)(iii) of the Criminal Code includes the factual circumstance of the false statement. The element of the crime is a statement which is already false. A false statement is a fact which forms an integral part of the criminal conduct. Once the State proves a false statement it does not have to prove that the accused person knew that the statement was false at the time of publishing or communicating it.

A person who sincerely believes, at the time of publication or communication of the statement, that it is true would not have the state of mind justifying the imposition of criminal liability. Liability must be based on the notion of personal responsibility inherent in the concept of the exercise of freedom of expression.

A person may not be in a position to prove at the trial the facts on which his or her belief that the statement is true was based. That failure may lead to the inference that he or she knew or “must have known” that the statement was false and intended to use it to undermine public confidence in the security service institution concerned. The consequences of failure to prove lack of knowledge of falsity of the statement would be the rigorous sanction of criminal conviction and possible imprisonment for a period up to twenty years. In *Hector’s case* supra, the Privy Council noted at p 318 that it would be “a grave impediment to freedom of the press” if one could publish only after having verified the accuracy of all statements of fact. Fear of erroneous finding of fact by the judicial process in such cases may deter citizens from uttering true statements.

When determining the question whether s 181 of the Canadian Criminal Code was rationally connected to the objective of fostering social harmony MCLACHLIN J (as she then was) in *R v Zundel’s case* supra at p 217 said:

“What is false may be determined by reference to what is generally accepted as true, with the result that the knowledge of falsity required for guilt may be inferred from the impugned expression’s divergence from prevailing or officially accepted beliefs. This makes possible conviction for virtually any statement which does not accord with currently accepted “truth” and lends force to the argument that the section could be used (or abused) in a circular fashion essentially to permit the prosecution of unpopular ideas.”

Section 181 of the Canadian Criminal Code punished any person who wilfully published a false statement knowing it to be false which caused or was likely to cause injury or mischief to a public interest.

A person who voices a genuine concern, about selective or discriminatory enforcement of the law by the law enforcement agency may find himself or herself charged and convicted of the offence because of the difficulty of proving the truth of the allegation in a court of law. Genuine criticism of the way law is enforced may be suppressed. The suppression may be justified by labelling the statement a false statement published or communicated with intent to undermine public confidence in the law enforcement agency.

Information confirmatory of the truth of a statement may in some cases be in the possession of the institution. Withholding such information would inevitably create a situation where the statement is labelled a false statement. As opposed to the usual situation in which one can verify the relevant facts with relative ease, the possibility of obtaining information concerning improper actions of security service officials is typically quite limited. Such a statement may be regarded as false because a journalist feels compelled to uphold the principle of confidentiality protecting the sources of his information within the institution from disclosure.

It is a fundamental principle of the protection of freedom of expression that the State should not penalise people who make false statements in good faith about a matter of public concern. That is the case if the statement is published or communicated to another person without knowledge of its falsity or without reckless disregard as to whether the statement is false or not. Reckless disregard in this usage would mean that the person subjectively believed that what he or she published or communicated was probably false.

The principle that there be an element of knowledge of falsity of the statement published or communicated proved by the prosecution is based on the assumption that journalists, in particular, are responsible professional people. They value freedom of expression and its importance to society such that they would in most cases not deliberately propagate falsehood. A reporter's reputation depends on the quality of information he or she provides. Journalists would naturally have a strong incentive, only to share news which they are fairly confident is correct.

The lies criminalised by the offence under s 31(a)(iii) of the Criminal Code are not necessarily fraudulent because the section does not require a person to act in reliance on the lie or that the lie should cause individual harm. Courts have nonetheless insisted in such cases that the statement must be a knowing or reckless falsehood. The rule with its tolerance of honest mistakes of fact limits criminal liability whilst more freedom of expression is protected than less. It prevents the unhindered exercise of freedom of expression from being unacceptably chilled when people choose to make only statements which "steer far wider of the unlawful zone". See *New York Times v Sullivan* supra at 280.

The harm caused by the unacceptable chilling of the exercise of freedom of expression is comparatively greater than the harm resulting from the chilling of other activities. The logical mandate of the chilling effect doctrine is that legal rules should be formulated to allocate the risk of error away from the preferred value thereby minimizing the occurrence of the most harmful errors. See *Antonio J. Califa*, “Rico Threatens Civil Liberties” 43 Vand. L. Rev 805, 833(1990).

The principle is that taking into account the importance of freedom of expression in a democratic society it would be better to let ten irresponsible journalists free than have one responsible one refrain from reporting an otherwise true story for fear of ending up in jail lest the story is found to have been false. The chilling effect objective is the more obnoxious when regard is had to the fact that it is presented as an unavoidable consequence of the exercise of legislative power. In other words are the people better off for a law which in seeking to protect their confidence in the efficient and effective performance by a security service institution of the functions of maintaining public order and preserving public safety from deleterious effects of publication or communication of false statements has the indirect and noxious effect on lawful exercise of freedom of expression?

A narrowly drawn offence would criminalise only false factual statements made with knowledge of their falsity and with intent that they be taken as true. Applying the same principle the Supreme Court of the United States of America had occasion to state in *Garrison v Louisiana* 379 US 64(1964) at p 73 that:

“Even when the utterance is false the great principles of the constitution which secure freedom of expression ... preclude attaching adverse consequences to any except the knowing or reckless falsehood.”

See also: *Gooding v Wilson* 405US 518 (1972) at 522.

There is an element of affront to a writer's, publisher's or speaker's dignity and autonomy when he or she is punished for writing, publishing or saying what he or she believed to be true. Most people would probably feel that the Government was reaching too far if it punished them for innocent falsehoods. They would feel a loss of dignity and equal respect owed to them as citizens. See Mark Spottswood: "Falsity, Insincerity and the Freedom of Expression" *William & Mary Bill of Rights Journal Vol 16 Issue 4 Article 10*(2008).

In *Castells case* supra the European Commission of Human Rights states in para 69 that:

"It is as a general rule difficult to justify the "penalisation of the expression... of erroneous facts in as much as the person relating them has good reasons to believe that they are true."

A provision may not only infringe the requirement of permissible legislative limitation of the exercise of a fundamental right by what it imposes by way of essential elements of an offence. It can breach the requirements of permissible legislative limitation by omitting from the essential elements of an offence matters which if included as a requirement of the law would make the provision restrict the exercise of the fundamental right as little as possible.

It must follow from the above analysis that a rational connection between the restriction and the objective pursued by the legislation would be one which incorporate the requirement of knowledge of the falsity of the statement published or communicated as the element of the offence on the basis of knowledge of its effectiveness as part of measures for

the protection of the interests in public order and public safety without the chilling effect on freedom of expression.

The duty of the court is not limited to the elaboration of constitutional principles. It may examine for itself the statements in issue and the circumstances under which they were made to see whether they are of a character which the principles of freedom of expression protect.

In this case the question arising from the first article is whether the Attorney-General named the law enforcement agents as abductors or witnesses. The determination of the accuracy of the statement would be based on the interpretation of what the Attorney-General wrote. The cynical may say that the writer of the article was simply saying that from what the Attorney General recorded as what each person was going to say in the criminal proceedings it was reasonable to infer that the person was involved in the abductions. The cynical may go on to say, after all a witness is a person who gives evidence of what he or she did or saw being done by another. At law a witness can have been a participant in the commission of an offence.

The accuracy of the statement that the summary of the State case named the law enforcement agents as the abductors would not relate to the question whether the people named were the abductors or not. The fact of their being the abductors would be irrelevant to the consideration of the question whether the statement was false. The determination of the question would not even prove the offence. It was a matter of public knowledge at the time that the law enforcement agency was involved in the abductions. That fact had been established by the uncontested evidence in the case of *Jestina Mukoko v The Attorney*

General supra. The statements would have to be looked at in their proper context and in the light of the particular circumstances of the case.

Section 31(a)(iii) of the Criminal Code is particularly invasive because of the level of the maximum penalty by which it has chosen to effect its end. A penalty of imprisonment up to twenty years for publishing or communicating a false statement with the intention or realising that there is a real risk or possibility of undermining public confidence in a security service institution is draconian. In the “Commentary on the Criminal Law (Codification and Reform) Act 2004” published by the Legal Resources Foundation Professor G. Feltoe at p 28 expresses the view that the penalty “can only be described as savage”. It is also disproportionate to the harm against which the public interest in the ability of the institution to efficiently and effectively perform its functions is protected.

The legislature having constitutional powers to set out punishments and the severity of those punishments when laying down the constitutive elements of a particular criminal offence has a duty to set the maximum limits on the punishments for the particular criminal offence. The constitutional principles of justice and a State governed by the rule of law presuppose that every penalty imposable in this sphere must be proportionate to the legitimate aim pursued and the seriousness of the offence. The maximum penalty of imprisonment to which a person convicted of the offence is made liable does not meet this test.

The establishment is not permitted of punishments, the severity of which are obviously inappropriate for the criminal offence and the purposes of the punishment for which maximum penalties are ordinarily fixed. No relevant and sufficient reasons were advanced by the State for the decision to fix the maximum penalty of imprisonment at twenty

years. It is very hard to see in the circumstances the justification for the use of such a maximum sentence on the principle of general deterrence of commission of similar offences.

The only inference that can be drawn from the maximum penalty of imprisonment to which the offender may be subjected is that the punishment is intended to have a chilling effect on the exercise of freedom of expression as opposed to merely deterring the occurrence of the prohibited acts. This is particularly the case when regard is had to the fact that the cases to which s 31(a) (iii) of the Criminal Code applies would not involve actual violence or threats of violence. It is an offence which punishes a person for conduct committed with intent to produce a specific result or when realising that there is a real risk or possibility of the result occurring quite often regardless of whether the result materialises or not.

By its nature the offence is committed in a peaceful environment and does not usually give rise to actual disturbance of public order. In this case the ability of the law enforcement agency to maintain peace and tranquillity in the community remained what it was before the two articles were published in the newspaper. The security service institutions continued with the performance of the functions of maintaining public order and preserving public safety.

The factor of seriousness of the offence could not have caused Parliament to set the maximum penalty of imprisonment at twenty years. It is equally difficult to imagine the worst offence and worst offender deserving of the imposition of the maximum penalty of imprisonment of twenty years. The proportionality requirement takes into account the fact that a threat of criminal prosecution, conviction and punishment for publishing or communicating falsehood to undermine public confidence in a security service institution

must inevitably have an inhibiting effect on the exercise of freedom of expression. The principle is concerned to prevent inhibition which extends beyond the subject matter of the law.

The pervasive threat inherent in the very existence of a law authorising a criminal prosecution for making a false statement coupled with the prospects of suffering a sentence of imprisonment up to twenty years has an unconstitutionally inhibiting effect on the exercise of the right to freedom of expression by all citizens.

People may be inhibited from saying what they desire to say or publish for fear that if they are caught, prosecuted and fail to prove that what they said or wrote is true they may be convicted and sentenced to long terms of imprisonment. This is particularly the case when regard is had to the fact that because of the pervasive nature of false factual statements, Government is provided with a weapon which it may use to prosecute falsehoods against security service institutions without more. Those who are unpopular may fear that the Government will use that weapon selectively against them.

The chilling effect of the disproportionate threat of the period of the maximum penalty of imprisonment to which a person convicted of the offence is liable harms operations of a free media. By authorising the discretionary imposition of a maximum punishment of twenty years imprisonment for offences amounting to attempts, s 31(a) (iii) of the Criminal Code has a serious inhibiting effect on the exercise of the right to freely criticise public institutions in the performance of their functions.

A strong constitutional protection of freedom of expression cannot tolerate the imposition of self censorship on free speech and press through fear of lengthy sentences of imprisonment for offences of publishing or communicating false news.

Taking into account the fact that freedom of expression is peculiarly more vulnerable to the “chilling effects” of criminal sanctions than any other fundamental right it has been stated by the UN Special Rapporteur on freedom of opinion and expression that penal sanctions, particularly imprisonment should never be applied to offences of publishing false news. The higher the level of the maximum penalty of imprisonment the greater the chilling effect on freedom of expression.

The United Nations Human Rights Commission commented on the effect of the use of sentences of imprisonment for offences of publishing or communicating false news. In 2000 the UN Special Rapporteur made a statement on the unacceptability of imprisonment under false news provisions saying:

“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.”

Provisions of a law which fixes a maximum level of punishment disproportionate to the objective pursued have the effect of setting a court up as an inadvertent censor of freedom of expression contrary to its constitutional function of safeguarding the enjoyment of fundamental human rights.

Experience has shown that it is difficult to excise false statements on matters of public concern such as the performance of law enforcement agents without significantly

damaging democratic self-governance. The UNHRC has even gone to the extent of recommending the scrapping of false news provisions from statute books because they “unduly limit the exercise of freedom of opinion and expression”. What all this means is that such laws are not deemed necessary in a democratic society. What is clear is that because of the severity of the deleterious effects on the exercise of freedom of expression of the level of the maximum penalty of imprisonment the law is not justified by the objective it is intended to serve. The requirement that there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by the measure applied by the State in restricting the exercise of freedom of expression was not met.

It has not been shown that s 31(a) (iii) of the Criminal Code was not in contravention of s 20(1) of the former Constitution. Section 24(5) of the former Constitution applies. The Minister of Justice, Legal Affairs and Parliamentary Affairs is hereby called upon to appear if he so wishes before the Constitutional Court on 20 November 2013 at 9.30am to show cause why s 31 (a) (iii) of the Criminal Code should not have been declared to be in contravention of s 20(1) of the former Constitution.

CHIDYAUSIKU CJ: I agree

ZIYAMBI JA: I agree

GARWE JA: I agree

CHEDA AJA: I agree

Messrs Atherstone & Cook, applicants' legal practitioners

Civil Division of the Attorney-General's Office, respondent's legal practitioners