

Module 8

**‘FALSE NEWS’,
MISINFORMATION
AND
PROPAGANDA**

*Summary
Modules on
Litigating Digital
Rights and
Freedom of
Expression
Online*

**MEDIA
DEFENCE**

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TABLE OF CONTENTS

INTRODUCTION	1
WHAT IS 'FALSE NEWS'	2
MISINFORMATION, DISINFORMATION AND MAL-INFORMATION	4
<i>The problem statement</i>	4
<i>Causes of misinformation</i>	5
<i>How to combat misinformation</i>	6
<i>Media and Information Literacy (MIL) strategies and campaigns</i>	6
<i>Litigation where justifiable limitations exist</i>	8
<i>Fact-checking and social media verification</i>	8
PROPAGANDA	10
CONCLUSION	10

MODULE 8

'FALSE NEWS', MISINFORMATION AND PROPAGANDA

- 'False news' refers to news items that are intentionally and verifiably false, and seek to mislead readers.
- While acknowledging the social ills occasioned by false news and misinformation, courts and international actors maintain that general and over-broad provisions which criminalise false news and misinformation violate the right to freedom of expression.
- As a result, strategies to combat misinformation, at this stage, are more social and educational in their character. These include Media and Information Literacy (MIL) strategies and campaigns which focus on human rights, media, computer, intercultural, and privacy literacy as a holistic method of mitigating misinformation. These strategies may be complemented by social media verification, fact-checking, and the publication of counter-narratives.
- In limited instances, misinformation may constitute hate speech and litigation may be necessary. However, any litigation relating to expression should be fully considered for unintended consequences and the possibility of jurisprudence which may negatively impact freedom of expression.
- Propaganda is dissimilar to misinformation in that it is expressly prohibited in international law, where it propagates for war or advocacy of hatred that constitutes incitement.

INTRODUCTION¹

The phenomenon of false news and misinformation has increased exponentially in recent times with the advent of the internet and social media platforms. While manipulating and distorting information is squarely part of the historical record, the weaponisation of information in the 21st century is occurring on an unprecedented scale, which requires urgent and effective responses.² This module focuses on 'false news', misinformation and propaganda and provides guidance on media and information literacy (MIL) strategies and campaigns³ which may assist with mitigating misinformation while ensuring that the right to freedom of expression is not violated.

¹ For more on this topic see Media Defence "Training Manual on Digital Rights and Freedom of expression Online: Litigating digital rights and online freedom of expression in East, West and Southern Africa (accessible at: <https://www.mediadefence.org/wp-content/uploads/2020/06/MLDI-Training-Manual-on-Digital-Rights-and-Freedom-of-Expression-Online.pdf>). For further information see First Draft, 'Understanding and addressing the disinformation ecosystem' (2017) (accessible at: <https://firstdraftnews.org/wp-content/uploads/2018/03/The-Disinformation-Ecosystem-20180207-v3.pdf?x17007>).

²

³ *Id* at page 70 (accessible at: <https://unesdoc.unesco.org/ark:/48223/pf0000265552>).

For the purposes of this module, the terms “misinformation” is used broadly and, unless otherwise specified, includes reference to disinformation and mal-information.

WHAT IS ‘FALSE NEWS’

‘False news’ refers to news items that are intentionally and verifiably false, and seek to mislead readers. In March 2017, the Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda ([2017 Joint Declaration](#)) was issued by the relevant freedom of expression mandate-holders of the United Nations ([UN](#)), the African Commission on Human and Peoples’ Rights ([ACHPR](#)), the Organisation for Security and Co-operation in Europe ([OSCE](#)), and the Organisation of American States ([OAS](#)).⁴ The 2017 Joint Declaration noted the growing prevalence of disinformation and propaganda, both online and offline, and the various harms to which they may contribute or be a primary cause. The quandary remains that the internet both facilitates the circulation of disinformation and propaganda and also provides a useful tool to enable responses to this.

Importantly, the 2017 Joint Declaration stressed that general prohibitions on the dissemination of information based on vague and ambiguous ideas, such as “false news”, are incompatible with international standards for restrictions on freedom of expression. However, it went further to state that this did not justify the dissemination of knowingly or recklessly false statements by official or state actors. In this regard, the Joint Declaration called on state actors to take care to ensure that they disseminate reliable and trustworthy information, and not to make, sponsor, encourage or further disseminate statements that they know (or reasonably should know) to be false or which demonstrate a reckless disregard for verifiable information.

The 2017 Joint Declaration identified the following standards on disinformation and propaganda:

“Standards on disinformation and propaganda

- (a) General prohibitions on the dissemination of information based on vague and ambiguous ideas, including “false news” or “non-objective information”, are incompatible with international standards for restrictions on freedom of expression, as set out in paragraph 1(a), and should be abolished.
- (b) Criminal defamation laws are unduly restrictive and should be abolished. Civil law rules on liability for false and defamatory statements are legitimate only if defendants are given a full opportunity and fail to prove the truth of those statements and also benefit from other defences, such as fair comment.
- (c) State actors should not make, sponsor, encourage or further disseminate statements which they know or reasonably should know to be false (disinformation) or which demonstrate a reckless disregard for verifiable information (propaganda).
- (d) State actors should, in accordance with their domestic and international legal obligations and their public duties, take care to ensure that they disseminate reliable and trustworthy information, including about matters of public interest, such as the economy, public health, security and the environment.”

⁴ Accessible at: <https://www.osce.org/fom/302796?download=true>.

False news provisions are laws which prohibit and punish the dissemination of false or inaccurate statements. This has been decriminalised in various countries. For example, in the matter of *Chavunduka and Another v Minister of Home Affairs and Another*,⁵ the Zimbabwe Supreme Court dealt with the constitutionality of the criminal offence of publishing false news under Zimbabwean law. In 1999, following the publication of an article in *The Standard* titled “Senior army officers arrested”, the editor and a senior journalist were charged with contravening section 50(2)(a) of the Law and Order Maintenance Act, on the basis that they had published a false statement that was likely to cause fear, alarm or despondency among the public or a section of the public. The editor and journalist challenged the constitutionality of this provision as being an unjustifiable limitation of the right to freedom of expression and the right to a fair trial.

Of particular relevance, in finding that the section was indeed unconstitutional, the Supreme Court stated that:

“Because s 50(2)(a) is concerned with likelihood rather than reality and since the passage of time between the dates of publication and trial is irrelevant, it is, to my mind, vague, being susceptible of too wide an interpretation. It places persons in doubt as to what can lawfully be done and what cannot. As a result, it exerts an unacceptable “chilling effect” on freedom of expression, since people will tend to steer clear of the potential zone of application to avoid censure, and liability to serve a maximum period of seven years” imprisonment.

The expression “fear, alarm or despondency” is over-broad. Almost anything that is newsworthy is likely to cause, to some degree at least, in a section of the public or in a single person, one or other of these subjective emotions. A report of a bus accident which mistakenly informs that fifty instead of forty-nine passengers were killed, might be considered to fall foul of s 50(2)(a).

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

Accordingly, the Supreme Court held that the criminalisation of false news, as contained in section 50(2)(a), was unconstitutional and a violation of the right to freedom of expression.

More recently, the ECOWAS Court of Justice delivered a landmark judgment in the case of *Federation of African Journalists and Others v The Gambia*,⁶ where it found that the rights of four Gambian journalists had been violated by the state authorities. It was submitted that security agents of The Gambia arbitrarily arrested, harassed and detained the journalists

⁵ Supreme Court of Zimbabwe, 2000 (1) ZLR 552 (S) (2000) (accessible at: <https://globalfreedomofexpression.columbia.edu/cases/chavunduka-v-minister-home-affairs/>).

⁶ ECOWAS Community Court of Justice, Application No. ECW/CCJ/APP/36/15, (2018) (accessible at: <https://globalfreedomofexpression.columbia.edu/cases/federation-african-journalists-faj-others-v-gambia/>).

under inhumane conditions, and forced them into exile for fear of persecution as a consequence of their work as journalists.

The Court upheld the claim, finding that The Gambia had violated the journalists' rights to freedom of expression, liberty, and freedom of movement, as well as violated the prohibition against torture. As such, it awarded six million Dalasi in compensation to the journalists. Importantly, the Gambia was ordered to immediately repeal or amend its laws on, amongst others, false news in line with its obligations under international law.

MISINFORMATION, DISINFORMATION AND MAL-INFORMATION

The problem statement

Misinformation is distinct to the quality of journalism and the circulation of trustworthy information which complies with professional standards and ethics.⁷ However, misinformation and its ilk are not new but rather have become increasingly more powerful as they are fueled by new technologies and rapid online dissemination. The consequence is that digitally-fueled misinformation, in contexts of polarisation, risks eclipsing quality journalism, and the truth.⁸

Increasingly, the strategies to combat misinformation are more social and educational in their character in order to ensure that the right to freedom of expression is not violated by over-broad legislative provisions which criminalise or, in any way, chill expression. The current misinformation ecosystem, therefore, requires a critical assessment of the reasons for the dissemination of misinformation and the establishment of MIL campaigns.⁹ In effect, combatting misinformation, at this stage, falls more within the realm of advocacy and education than it does litigation. The limited litigation in this space bears testament to this. However, this is likely to change as digital rights litigators engage in more strategic and test case litigation seeking to mitigate misinformation while protecting and promoting freedom of expression.

Defining false information¹⁰	
Disinformation	Disinformation is information that is false, and the person who is disseminating it knows it is false. "It is a deliberate, intentional lie, and points to people being actively disinformed by malicious actors". ¹¹
Misinformation	Misinformation is information that is false, but the person who is disseminating it believes that it is true. ¹²
Mal-information	Mal-information is information that is based on reality but it is used to inflict harm on a person, organisation or country. ¹³

⁷ UNESCO Handbook above n 2 at p.18.

⁸ *Id.*

⁹ *Id* at p. 70.

¹⁰ *Id* at pp. 45-6.

¹¹ *Id* at pp 44-5.

¹² *Id.*

¹³ *Id.*

Causes of misinformation

To understand how to combat misinformation, it is useful to first understand how it spreads. With the advent of the information age and the internet, information is spread more rapidly and often with the click of a mouse.¹⁴ Equally, the speed at which information is transmitted and the instant access to information which the internet provides has caused a rush to publish and be the first to transit information. This, alongside more insidious practices such as the intentional distribution for disinformation for economic or political gain, has created what the UN Educational, Scientific and Cultural Organisation ([UNESCO](#)) refers to as a “perfect storm”.¹⁵

UNESCO identifies three causes enabling the spread of misinformation:

1. **Collapsing traditional business models.** As a result of the rapid decline in advertising revenue and the failure of digital advertising to generate profit, traditional newsrooms are bleeding audiences, with media consumers moving to “peer-to-peer” news products offering “on demand-access”. These decreasing budgets lead to reduced quality control and less time for “checks and balances”. They also promote “click-bait” journalism.¹⁶ Importantly, peer-to-peer news has no agreed-upon ethics and standards.
2. **Digital transformation of newsrooms and storytelling.** As the information age develops, there is a discernible digital transformation in the news industry. This transformation causes journalists to prepare content for multiple platforms, limiting their ability to properly interrogate facts. Often, journalists apply a principle of “social-first publishing” whereby their stories are posted directly to social media to meet audience demand in real-time. This, in turn, promotes click-bait practices and the pursuit of “virality” as opposed to quality and accuracy.¹⁷
3. **The creation of new news ecosystems.** With increasing access to online audiences as a result of the advent of social media platforms, users of these platforms can curate their own content streams and create their own “trust network” or “echo chambers” within which inaccurate, false, malicious and propagandistic content can spread. These new ecosystems allow misinformation to flourish as users are more likely to share sensationalists stories and are far less likely to properly assess sources or facts. Importantly, once published, a user who becomes aware that a publication may constitute misinformation is largely unable to “pull back” or correct the publication.¹⁸

These causes continue to pose difficulties for newsrooms, journalists, and social media users as the new news ecosystems, in particular, enable malicious practices and actors to flourish. However, as discussed, there is a fine line between seeking to combat the spread of misinformation online and violating the right to freedom of expression.

¹⁴ *Id* at p.55.

¹⁵ *Id.*

¹⁶ *Id* at p. 57.

¹⁷ *Id* at pp. 57-8.

¹⁸ *Id* at pp. 59-61.

WASHLITE v Fox News¹⁹

On 2 April 2020, the Washington League for Increased Transparency and Ethics (WASHLITE) instituted proceedings against Fox News, a conservative American news network, claiming that “Fox’s repeated claims that the COVID-19 pandemic was/is a hoax is not only an unfair act, it is deceptive and therefore actionable under Washington’s Consumer Protection Act.”²⁰ WASHLITE sought a declaration to this effect and an injunction (interdict) prohibiting repeated statements on Fox News stating that COVID-19 is a hoax. In its findings, the Washington Superior Court found that WASHLITE’s goal was “laudable” but that its arguments ran “afoul of the protections of the First Amendment”, the right to freedom of expression. Its case was subsequently dismissed.

How to combat misinformation

Effectively combatting misinformation remains a pressing contemporary issue, with various remedies posited by jurists, academics, and activists. Notably, Associate Justice of the Supreme Court of the United States, Anthony Kennedy, in his majority decision in *United States v Alvarez*²¹ held that “[t]he remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth.”²² MIL strategies and campaigns proposed by UNESCO seek to operationalise the position proposed by Justice Kennedy and provide a holistic approach to combating misinformation, without limiting the right to freedom of expression.

Media and Information Literacy (MIL) strategies and campaigns

As a point of departure, UNESCO proposes MIL strategies and campaigns as a process which enables the detection of misinformation and a means to combat its spread, particularly online.²³ MIL is an umbrella and inter-related concept which is divided into:

- **Human rights literacy** which relates to the fundamental rights afforded to all persons, particularly the right to freedom of expression, and the promotion and protection of these fundamental rights.²⁴
- **News literacy** which refers to literacy about the news media, including journalistic standards and ethics.²⁵ This includes, for example, the specific ability to understand the “language and conventions of news as a genre and to recognise how these features can be exploited with malicious intent.”²⁶

¹⁹ *Washington League for Increased Transparency and Ethics v Fox News*, Plaintiffs Complaint for Declaratory and Injunctive Relief, 2 April 2020 (accessible here:

<https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=3190&context=historical>).

²⁰ *Id.*

²¹ *United States v Alvarez*, 567 U.S. 709 (2012) (accessible at:

<https://www.supremecourt.gov/opinions/11pdf/11-210d4e9.pdf>).

²² *Id.* at pp. 15-6.

²³ UNESCO Handbook above n 2 at p.70.

²⁴ *Id.* at p.70.

²⁵ *Id.*

²⁶ *Id.*

- **Advertising literacy** which relates to understanding how advertising online works and how profits are driven in the online economy.²⁷
- **Computer literacy** which refers to basic IT usage and understating the easy manner in which headlines, images, and, increasingly, videos can be manipulated to promote a particular narrative.²⁸
- **Understanding the “attention economy”** which relates to one of the causes of misinformation and need for journalists and editors to focus on click-bait headlines and misleading imagery to grab the attention of users and, in turn, drive online advertising revenue.²⁹
- **Privacy and intercultural literacy** which relates to developing standards on the right to privacy and a broader understanding of how communications interact with indivial identity and social developments.³⁰

MIL strategies and campaigns, such as the COVID-19 campaign by the UN detailed below, should underscore the importance of media and information literacy in general but should also include a degree of philosophical understating. According to UNESCO, “[MIL strategies and campaigns should assist users] grasp that authentic news does not constitute the full ‘truth’ (which is something only approximated in human interactions with each other and with reality over time).”³¹

Five ways in which the UN is fighting the COVID-19 ‘infodemic’³²

The coronavirus (COVID-19) pandemic has generated significant amounts of misinformation, ranging from the use of disinfectants to combat the virus to false claims that the virus can spread through radio waves and mobile networks. In order to counter this “infodemic”, the UN has taken five steps to combat misinformation:

1. **Produce and disseminate facts and accurate information.** As a point of departure, the UN identified that the World Health Organisation ([WHO](#)) is at the foreground of the battle against the pandemic and that it is transmitting authoritative information based on science while also seeking to counter myths. Identifying sources such as the WHO that produce and disseminate facts is a central tenet to countering misinformation.
2. **Partner with platforms and suitable partners.** Allied to the distribution of accurate information is finding the right partners. The UN and the WHO have partnered with the International Telecommunications Union ([ITU](#)) and the UN Children’s Fund ([UNICEF](#)) to help persuade all telecommunications companies worldwide to circulate factual text messages about the virus.
3. **Work with the media and journalists.** UNESCO has published two policy briefs that assess the COVID-19 which assist journalists working on the frontlines of the “infodemic” around the world to ensure accurate, trustworthy and verifiable public health information.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id* at p.47.

³⁰ *Id* at p.70.

³¹ *Id* at p.72.

³² Accessible at: <https://www.un.org/en/un-coronavirus-communications-team/five-ways-united-nations-fighting-%E2%80%98infodemic%E2%80%99-misinformation>.

4. **Mobilise civil society.** Through the UN Department of Global Communications, key sources of information on opportunities to access, participate and contribute to UN processes during COVID-19 have been communicated to civil society organisations (CSOs) to ensure that all relevant stakeholders are communicated.
5. **Speak out for rights.** Michelle Bachelet, recently joined a chorus of other activists, to speak out against restrictive measures imposed by states against independent media, as well as the arrest and intimidation of journalists, arguing that the free flow of information is vital in fighting COVID-19.

Litigation where justifiable limitations exist³³

The International Covenant on Civil and Political Rights ([ICCPR](#)) provides in article 20 that “[a]ny propaganda for war shall be prohibited by law” and that “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”

In addition, article 4(a) of the International Convention on the Elimination of All Forms of Racial Discrimination ([CERD](#)) requires that the dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, must be declared an offence that is punishable by law.

Despite the importance of freedom of expression, not all speech is protected under international law, and some forms of speech are required to be prohibited by states. However, there is a need for clear and narrowly circumscribed definitions of what is meant by the term “hate speech”, or objective criteria that can be applied. Over-regulation of hate speech can violate the right to freedom of expression, while under-regulation may lead to intimidation, harassment or violence against minorities and protected groups.

In instances where misinformation is so egregious that it meets the definitional elements of hate speech, litigation may be a useful and important tool in the protection and promotion of fundamental rights, includes the right to equality and dignity.³⁴ However, such litigation should be fully considered for unintended consequences and the possibility of jurisprudence which may negatively impact freedom of expression. Dependent on the content of the speech and the harm that it causes, the publication of counter-narratives may constitute a useful complementary strategy to litigation.

For more information on this topic, see module 6 of this series.

Fact-checking and social media verification

Alongside MIL strategies and campaigns and litigating misinformation that constitutes hate speech, another effective tool to combat misinformation is fact-checking and social media verification. According to the Duke Reporters’ Lab, in 2020 there are over 290 fact-checking

³³ See Module 6 of this series for more information on hate speech and justifiable limitations to freedom of expression.

³⁴ For a useful discussion on the balancing of rights see J Geldenhuys and M Kelly-Louw, ‘Hate Speech and Racist Slurs in the South African Context: Where to Start?’ (Vol 23) [2020] PER 12 (accessible at: <http://www.saflii.org/za/journals/PER/2020/12.html>).

projects debunking false news and misinformation in 83 countries, an increase of over 100 organisations from 2019.³⁵

In general, fact-checking and verification processes, which were first introduced by US weekly magazines such as *Time* in the 1920s,³⁶ consist of:

- **Ex-ante fact-checking and verification.** Increasingly and due to shrinking newsroom budgets, ex-ante (or before the event) fact-checking is reserved for more prominent and established newsroom and publications who employ dedicated fact-checkers.³⁷
- **Ex-post fact-checking, verification and “debunking”.** This method of fact-checking is becoming increasingly popular and focuses on information published after the fact. It concentrates “primarily (but not exclusively) on political ads, campaign speeches and political party manifestos” and seeks to make politicians and other public figures accountable for the truthfulness of their statements.³⁸ Debunking is a subset of fact-checking and requires a specific set of verification skills, increasingly in relation to user-generated content on social media platforms.

Fact-checking is central to strategies to combat misinformation and has grown exponentially in recent years due to the increasing spread of false news and misinformation, and the need to debunk viral hoaxes.³⁹ Alongside MIL strategies and campaigns, fact-checking and social media verification is becoming increasingly important in the fight against false news and misinformation.

The REAL411⁴⁰ and PADRE⁴¹

The Real 411 is a new initiative which was recently launched in South Africa and which constitutes a civil society-led strategy to combat disinformation. The online [REAL411 platform](#), which was supported by South Africa’s Independent Electoral Commission during South Africa’s 2019 national elections, allows users to report disinformation to the Digital Complaints Committee (DCC) who assist a complainant with referrals to one of the multiple statutory bodies in South Africa which may assist with a remedy. The DCC may also assist with the publication of counter-narratives. Aggrieved parties may appeal to the Appeals Committee should they be dissatisfied with an outcome.

In addition to the REAL411, [PADRE or the Political Party Advert Repository](#) was an innovative civil-society initiative which collated political party advertisements and assisted users to distinguish between genuine and false political party advertising during South Africa’s 2019 national elections.

³⁵ Duke Reporters’ Lab, Annual census finds nearly 300 fact-checking projects around the world’ (22 June 2020) (accessible at: <https://reporterslab.org/tag/international-fact-checking-network/>).

³⁶ UNESCO above n 2 at p.81.

³⁷ *Id.*

³⁸ *Id* at p.82.

³⁹ For more resources on the legal defence of factcheckers, see the Fact-Checkers Legal Support Initiative (accessible at: <https://factcheckerlegalsupport.org/>).

⁴⁰ Accessible at: <https://www.real411.org/>.

⁴¹ Accessible at: <https://padre.org.za/>.

PROPAGANDA

As detailed above and in module 6 of this series, unlike dis- and misinformation, the spread of propaganda is expressly prohibited in international law, provided that it propagates for war or advocacy of hatred that constitutes incitement.⁴² In these instances, multiple direct legal remedies such as criminal prosecutions and interdictory or injunctive relief may result. However, often propaganda does not meet these thresholds. In these instances, MIL strategies and campaigns and fact-checking, coupled with the publication of counter-narratives or counter-disinformation, are effective remedies.⁴³

CONCLUSION

The advent of the internet and the proliferation of false news and misinformation occasioned by the increased use of social media platforms is a primary contemporary concern. It fuels political polarisation and impacts a plethora of fundamental rights, including the right to freedom of expression, equality, and free and fair elections. However, absent unprotected speech, the remedies to combat misinformation are, at this stage, largely social and educational. MIL strategies and campaigns, coupled with fact-checking and the publication of counter-narratives, remain the primary vanguard in the fight for the truth.

⁴² Article 20 of the ICCPR, read with article 4(a) of CERD.

⁴³ See, for example, the UK Government Communications Services, 'RESIST: Counter-disinformation toolkit' (accessible at: <https://www.fundacioncarolina.es/wp-content/uploads/2020/11/Toolkit-UK.pdf>).