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FAKE NEWS AND THE LAW. A SHORT INTERNATIONAL OVERVIEW

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As the world has stepped into 2024, we face a year with a record-breaking number of countries (50) holding national elections including the United States, India and Mexico. With these elections come heightened concerns about the spread of disinformation and the challenge of providing voters with fact-based news.

Discussions about how to guard against disinformation and encourage the delivery of fact-based news are more than ever, but not in Italy, surprisingly, critical.

In working toward the best actionable outcomes, these discussions need to consider both the potential and realized impact of recent legislative policies related to this topic. This study focuses specifically on some policies laid out as guarding against “fake news.”

This work is built upon datasets created by LEXOTA (Laws on Expression Online: Tracker and Analysis: www.lexota.org), Poynter (a guide to anti-misinformation actions around the world), and Carnegie’s Partnership for Countering Influence Operations (Misinformation Legislative Review Dataset). For more detail on the methodology: you can conduct, as I did, a Boolean search of several databases (Factiva, LexisNexis, and Google Search) using the following logic: “(COUNTRY NAME)” AND (“fake news” OR “misinformation” OR “false information” OR “disinformation” OR “false news”) AND (“law*” OR “bill” OR “legislation”),

The spread of misinformation, disinformation, and mal-information (MDM) online is becoming one of the most pressing issues of our time. Around the world, people have been inundated with false, misleading, and deceptive information about health, politics, and science. Journalists are on the front lines of these digital battles over truth, working to provide citizens with accurate news and information. However, in a “post-truth” era,¹ like the one we live in today, or so it seems, independent journalism faces great constraints with governments passing legislation to combat the threats of misinformation and “fake news,” which both intentionally and may

impinge upon freedom of the press. These measures can sometimes interfere with the free and open exchange of ideas, as well as citizens' ability to hold leaders to account.

Since 2011, MDM laws have come in force, with greatest increase seen during the COVID-19 pandemic. Seventy-eight countries have passed laws designed to limit the spread of false or misleading information. Some of these laws focus on improving platform transparency and increasing media literacy. However, many of them criminalize the creation and distribution of "fake news." Such laws often lack definitional specificity and can lead to greater overreaches of power. As such, they can have long-term consequences for freedom of the press and other human rights online.

Indeed, many MDM laws have already been used to arrest citizens and journalists for publishing or sharing false information online. According to the Committee to Protect Journalists, almost 400 reporters were imprisoned around the world in 2022. Of those, 39—nearly 10 percent—were jailed on MDM charges.²

My analysis of the 105 MDM laws, basing on the datasets above, has identified four types of legal penalties embedded in these laws that could potentially hinder press freedom:

1. Monetary fines, which impose a range of financial penalties on journalists or media organizations
2. Imprisonment, which involves arresting and imprisoning journalists and editors (Criminal Perspective)
3. Content controls and corrections, which require journalists and media organizations to remove content or post state-approved corrections
4. Increased administrative controls and burdens, which include measures like licensing regimes, data localization, transparency requirements, or mandated press or media council.

Balancing Misinformation Laws and Freedom of Expression

Examining a broad scope of new laws to combat misinformation and disinformation globally, passed between 2011 and 2022, aims to discover IF, and HOW, such legal measures affect freedom of the press. The dataset used in this report was built in two parts, first by reviewing a collection of existing databases about government responses to mis- and disinformation,¹¹ then

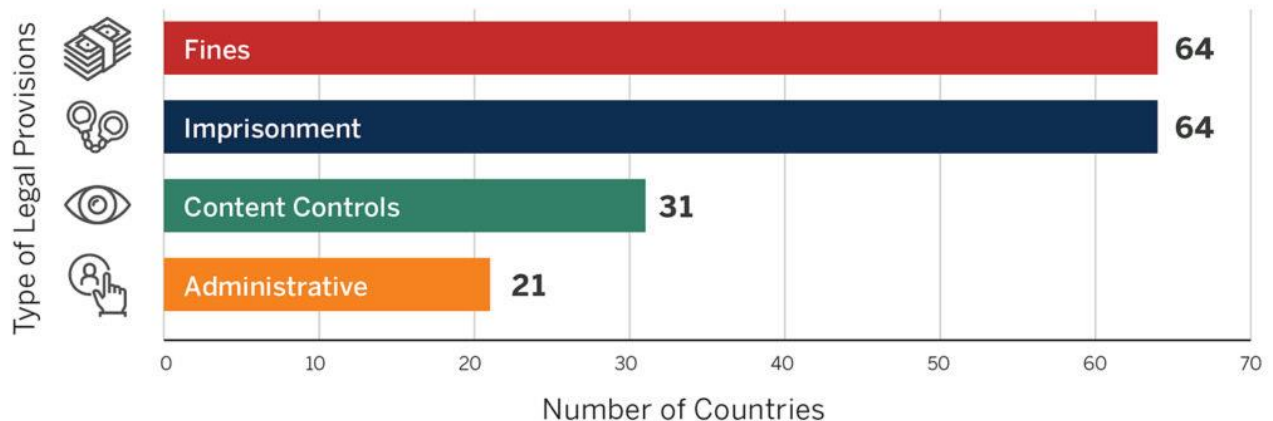
surfacing additional examples and data through a systematic content analysis of news articles, think tank reports, academic articles, and legislative proposals for 178 countries and territories. I included laws and bills in the dataset based on the results of a key word search of several databases to find laws in each country that include the terms “fake news,” “misinformation,” “disinformation,” or “false information.” This surfaced a wide variety of laws and regulations designed to combat MDM.¹²

Between 2011 and 2022, 105 laws to combat MDM have been issued across 78 countries. Between 2011-2015, only 14 laws were adopted that explicitly mentioned sharing or publishing false information. In contrast, between 2016-2022, 91 laws were enacted or amended to include provisions regarding false or misleading information. In 2020 only, 36 new MDM laws were passed, which is indicative of heightened government concern regarding information amid the COVID-19 pandemic.

It is important to note that not every country needed to pass new legislation to combat MDM because old laws were enough and in force to prosecute individuals. For example, in Iran, journalists are frequently jailed and punished for spreading misinformation online. But these prosecutions are often made under long-standing defamation laws or under the realm of secret courts that lack due process and transparency.¹³ Other countries, like Malaysia, have passed and repealed MDM laws. However, old laws are still frequently used to prosecute individuals for spreading false information online.¹⁴

Also, not all of the laws identified have impacted press freedom. But the majority of laws passed by governments are content-specific, focusing on the creation and distribution of MDM, rather than other legal or regulatory mechanisms that focus on increasing digital literacy or improving platform accountability and transparency.

Overview of MDM Laws and Their Legal Provisions



Note: Number of countries that have passed MDM laws that contain provisions for fines, imprisonment, content controls, or administrative measures. The total number across categories of provisions is larger than the total number of countries analyzed as one country might have more than one law and one law may contain provisions that fall under more than one category.

Fines and Monetary Penalties

Fines are the most commonly imposed penalty for creating or sharing misinformation, with varying levels of enforcement, targeting individuals, company executives, media organizations, or social media platforms. Certain penalties may be applicable based on qualifiers such as the number of followers or the size of a media organization or platform before they come into effect. For example, under France's 2018 *La Lutte Contre la Manipulation de l'Information* (The Fight Against Information Manipulation), an individual who engages in the widespread and rapid dissemination of MDM could pay up to €75,000 (\$80,300).¹⁵

Whereas, in Ethiopia under the Hate Speech and Disinformation Prevention and Suppression Proclamation Act No. 1185/2020, an individual can be fined up to 100,000 birr (\$1,860) if they spread disinformation on social media *and* have more than 5,000 followers.¹⁶

For an independent news outlet, a fine may become debilitating. For example, Malaysian publisher *Malaysiakini* was fined 500,000 MYR (approximately \$124,000) for comments left by readers on one of its articles, which courts found "spurious" and "untrue."¹⁷ Fortunately, through crowdfunding efforts, the outlet was able to pay the fine.¹⁸ It should also be noted that the use of monetary penalties spans both liberal and illiberal states. Within the dataset, countries across the spectrum of democracy, as classified by the Varieties of Democracy database, passed MDM legislation with monetary penalties.¹⁹

Criminalization and Incarceration

The second most common penalty shown by the laws analyzed involved imprisonment for publishing or spreading MDM. This is not surprising, as it is one of the oldest forms of information control, predating the internet. For example, under Cambodia's 2018 Joint Directive, someone found guilty of sharing false information could face imprisonment for up to two years.³¹ Similar to fines and other monetary penalties, the justification for imprisoning those who spread what the government deems to be MDM varies depending on the political environment or security concerns. For example, following the full-scale invasion of Ukraine by Russia in February 2022, Russia passed additional MDM laws aimed specifically at content regarding practically any government body, including the Russian Guard, Russian embassies, and the military, that they deemed false or misleading.³² This broad piece of legislation builds on existing statutes criminalizing false information, exacerbating an already dangerous and fearful climate that induces self-censorship among Russian journalists, whether living within Russia or abroad.³³

Under these new laws, many journalists went to prison. For instance, in 2018 the Egyptian government jailed more journalists under MDM laws compared with any other country in the world, with 19 people arrested.³⁴ Following Egypt, Cameroon arrested four journalists, Rwanda three journalists, and China and Morocco both arrested one journalist.³⁵ In the same way that the number of laws enacted has increased rapidly, the number of journalists jailed on MDM charges has risen steadily over the years. According to the Committee to Protect Journalists (CPJ), a total 22 journalists were imprisoned on MDM charges between 2011 and 2015. Between 2016 and 2022, that number shot up to 225.³⁶

Forced Content Removal and Corrections

A third category of penalties and requirements can be grouped under content removal and corrections, which entail compelling publishers, social media platforms, internet service providers, or users to remove offending content or provide a mandatory correction. These types of penalties and requirements span all media systems and are not limited to the internet. For example, under Egypt's 2018 Law on the Organization of Press, broadcasts can be banned or suspended by the government if they spread "fake news."⁴⁰ Tanzania's Electronic and Postal Communications (Online Content) Regulation prevents online service providers from releasing so-called prohibited content, which includes false content that is likely to mislead or deceive the public.⁴¹ Such kinds of requirements and penalties can therefore affect the user as well as

providers and publishers.

While content controls often focus on the removal of content itself, some countries have also introduced laws that compel platform companies to leave content up or label content in a certain way. For example, in 2022, former President Jair Bolsonaro of Brazil signed a decree, now overturned, that temporarily banned social media platforms from removing certain kinds of content, including content identified by social media platforms as misinformation about COVID-19 and the country's upcoming presidential election.⁴²

Increasing Administrative Requirements

Administrative and technical regulations represent the fourth largest category of laws, and perhaps some of the widest ranging types of requirements, included in the dataset. These include mandatory reporting requirements, licensing regimes, data localization, transparency requirements, or mandated press or media councils. Due to the variety of stipulations, this category of legal requirements is not as clear cut with respect to press freedom. For example, Belarus' Amendments to Media Laws to Address Fake News require that media organizations register with the government and that the authors of posts and comments in online forums shall be identified.⁴⁸ Though proponents of the law say this will "facilitate the efficient provision of information security and the enforcement of citizens' constitutional right to receive full, accurate, and timely information," rights groups, including the CPJ and the Belarusian Association of Journalists, argue this will simply act as another tool for censorship.⁴⁹

These administrative requirements can affect press freedom in ways that go beyond self-censorship or onerous administrative reporting. They can infringe on privacy, as the Belarusian law above risks doing due to the identification requirement. Or they can increase a state's surveillance powers, such as Vietnam's cybersecurity law, which requires foreign and domestic technology firms to set up offices and store data locally.⁵⁰ If news organizations are operating social media pages or accounts, law enforcement agencies can more easily obtain warrants to demand that platforms turn over sensitive information about the identity of the pages' operators, since the data are located in-country, rather than abroad. However, like monetary penalties, due to the broad scope of obligations, severity, and entities responsible, not all legally mandated administrative requirements are a net negative on press freedom. Contextual factors and the existing legal environment must also be considered.

Lastly, due to the fact that outright imprisonment and forced content removal can typically provoke widespread and international condemnation, administrative controls can provide more subtle or covert alternatives to controlling the press. On the surface, data localization or a press registry may seem good or even in the interest of the public; however, it may increase the centralization of information control, harassment and intimidation of journalists, and government surveillance. Moreover, the onerous nature of some administrative measures, such as requiring objectional content to be removed within 24 or 48 hours or setting up physical in-country offices, may force smaller independent media organizations to shut down or be overwhelmed with administrative requirements.

Final Remarks

False and misleading content is undoubtedly, nowadays, a concern for most countries; however, it has also served as a catalyst for the adoption of a wide range of legal mechanisms that risk constraining press freedom around the world. In addition to silencing otherwise warranted reporting, such laws, when worded vaguely and without democratic guardrails, may also lead to a widespread chilling effect that goes beyond the media. As journalists, bloggers, reporters, and other media workers become targets of the state under the guise of “public safety” or “national security,” civil society organizations, activists, and average citizens may also engage in self-censorship.

However, it is not only illiberal or authoritarian governments that are looking to the law to combat misinformation. Democratic states have also been at the forefront, as many of these governments have become increasingly concerned about foreign interference in elections. In the last few years, there has been a persistent use of securitizing language about misinformation, frequently portraying it as an existential threat to democracy and national security.⁵¹ Combined with proposed and adopted legislation, this language risks giving justification for less liberal states to enact their own laws, but without the democratic guarantees and processes necessary to ensure press freedom.

On recognition of the threat that both misinformation and the legal mechanisms included in many MDM laws pose to press freedom, the following suggestions may limit the impact of MDM laws on press freedom:

1. Broaden policy solutions beyond the remit of the security apparatus and the courts

Based on this analysis of global MDM-related legislation, to limit the potential risks of these laws to press freedom, the problem of misinformation should not be viewed solely as a national security concern. Rather, misinformation concerns should also be included under other domains, such as education, technology and innovation, civic tech, and election resiliency. While, in some instances, false and misleading information may lead to real-world harm, a blanket generalization of “national security” over a problem as complex as MDM is likely to be ineffective at actually countering the problem, in addition to the potential for rights-infringing actions. There are many reasons why MDM spreads or is believed, ranging from the individual to the socio-political. Though evidence on what approaches are most effective at curbing misinformation’s negative effects is still mixed, addressing the issue will likely require broadening potential solutions beyond the remit of the national security apparatus and top-down content controls.

Moreover, once an issue is framed as a threat to national security or public safety, it may receive a disproportionate amount of attention, resources, and mobilization, often resulting in “extraordinary” actions that would not in regular times be deemed appropriate or legal.⁵²

In some instances, this may be warranted, such as during the COVID-19 pandemic when governments had to fast-track certain public health measures to ensure public safety, or in the case of armed conflict and an active crisis, such as the war in Ukraine. However, once something is in the realm of national security, exceptional measures may also be taken that risk infringing on rights and civil freedom.⁵³ Security thus becomes a rhetorical justification for illiberal policies. It is therefore important to assess whether content controls are being enacted for reasons that are proportionate and necessary for the issue in question, or for other purposes.

For example, during the COVID-19 pandemic, health and medical misinformation was frequently framed as a threat to national security, which gave governments around the world leeway to target opponents and journalists in ways that would not have been justified under normal circumstances. In their own tracking of COVID-related abuses by the state, Human Rights Watch found that at least 83 governments used the pandemic to silence critics and prevent peaceful assembly. This included physically assaulting

journalists or bloggers, as well as censoring media coverage of the pandemic.⁵⁴ Though medical misinformation certainly should be dealt with, other policy options should have been considered, such as working with civil society and media outlets to produce timely, accurate, credible information; providing the medical sector with communications support; empowering frontline health workers to know when to spot and combat misinformation; and in the long run building up trust in governmental and medical institutions.⁵⁵ These policy options, however, go beyond the courts and the security apparatus.

2. *Improve tracking and reporting on the use of misinformation laws against journalists*

There is no doubt that press freedom has come under increasing strain due to the resurgence of MDM laws. However, it is difficult to empirically measure the silencing effect these laws are having on journalism worldwide. Measuring the impact of MDM laws on press freedom can begin by monitoring indicators such as frequency of arrests, prosecutions, fines, and other instances where governments have invoked these laws. This could involve investing resources into organizations that monitor press freedom—to investigate and document arrests, and build a public database of cases that can be used to support broader efforts in activism and advocacy for press freedom. While there are some country case studies and attempts at documenting journalist arrests and murders,⁵⁶ a broader attempt that tries to consolidate these findings into a global dataset would be helpful. While these types of statistics would not necessarily capture broader issues of how these laws are having a chilling effect on journalism and promoting self-censorship, keeping data up-to-date about MDM laws, journalist arrests, and prosecution outcomes could help inform advocacy and activism on the ground.

3. *Identify ways to repeal or counter rights-infringing legislation*

Once MDM legislation has been passed, it becomes extremely difficult to repeal. To date, there have been only a small handful of laws that have been repealed or overturned. In Bolivia, for example, after intense pushback from rights groups, the original decree, which was passed during COVID-19, was annulled.⁵⁷ However, it's unclear exactly what led to this outcome as Bolivia was also undergoing a political crisis following a disputed general election in 2019.⁵⁸ Public disapproval and frustration over then President Jeanine Añez's handling of the pandemic may have therefore played a role in having the decree overturned. In the Malaysian case, the 2018 Anti-Fake News Act was strategically framed

as a means of covering up government corruption by opposition politicians, independent media outlets, and rights groups. When the opposition won the general election that year, the law was subsequently repealed.⁵⁹

Further research into what conditions, strategies, or tactics may help advocates of press freedom counter government overreach when it comes to misinformation is needed. Currently, it is not entirely obvious why some laws are withdrawn or repealed, while others are not. In both the Bolivian and Malaysian cases, talk of democracy, human rights, and civil liberties was not enough to repeal the laws. Material well-being and real-life concerns, such as COVID-19 and widespread government corruption, were also involved in the discussion.

Footnotes

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