

Regulation of the Social Media in Electoral Democracies: A Case of Kenya

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The emergence of peer-to-peer platforms such as social media has broken down traditional barriers to one-to-many communication and widespread engagement. While the unique features of social media serve as an attractive selling point, they are also often the source of a multitude of problems.

Unlike traditional media, there is a glaring absence of fact checking and content filtration on social media platforms, raising concerns around their level of involvement in democracies. The recent 2017 elections in Kenya are believed to have been influenced by the propagation of fake news and inciting ethnic messaging disseminated through social media. While the exact impact of fake news and hate speech disseminated through social media in Kenya is unknown, the proliferation of such content during democratic processes is worrying. In response, these modern platforms have become the subject of attempted regulation by a number of countries, with these regulations often

focusing on fake news and hate speech. For example, Kenya recently criminalised false publication. In some extreme cases, there have been knee-jerk government reactions such as total internet shutdowns. Generally, attempts at regulation within Kenya remain disjointed with multiple laws each dealing with different problematic content.

Using the example of Kenya to demonstrate the importance of balancing regulation and freedom, this Article discusses the unique characteristics of social media that make it a particularly effective tool for democratic elections. We argue that an approach that targets platform design instead of content may be better suited to the ends of upholding democratic values.

Introduction

I. Introduction

Like the printing press, the radio, the television, and the internet, social media as a phenomenon has revolutionized society.¹ Unlike the aforementioned examples, which were more-or-less single technological developments that later allowed for creativity in the content delivered, social media

¹ John Downing, 'Social Movement Media and Media Activism', *Oxford Research Encyclopedia of Communication* (2018).

simultaneously allows for creativity in the content and in the way that it is distributed and consumed.

The peer-to-peer nature and potential for self-expression are key aspects of political participation and a unique motivation for using social media in such context.²

Indeed, as a result of these characteristics, social media is increasingly featuring in politics.³ Unlike traditional media, there is a glaring absence of fact checking and content filtration on these platforms, raising concerns around their level of involvement in democracies.⁴ The recent 2017 Kenyan elections are believed to have been influenced by the propagation of fake news and inciting of ethnic messaging disseminated through social media.⁵ While the exact impact

2 J Knoll, J Matthes, & R Heiss, 'The social media political participation model: A goal systems theory perspective' [2008] *Convergence* 1, 5.

³ Open Society European Policy Institute, *Social Media Monitoring During Elections: Cases and Best Practices to Inform Electoral Observation Missions*, (Open Society Foundations, May 2019), 7.

⁴ Diana Owen, 'The Age of Perplexity: Rethinking the World We Knew. Radically Reassessing 'The Economic'', (Penguin Random House Grupo Editorial, 2017).

⁵ Portland Communications, 'The Reality of Fake News in Kenya' (2018) <<https://portland-communications.com/pdf/The-Reality-of-Fake-News-in-Kenya.pdf>> accessed 4 July 2019. See also, Abdi Latif Dahir, 'Fake News is Already Disrupting Kenya's High-Stakes Elections Campaign' (*Quartz Africa*, 25 June 2017), <<https://qz.com/africa/1011989/fake-news-and-misinformation-are-upstaging-kenyas-upcoming-high-stakes-election/>> accessed 4 July 2019.

of fake news and hate speech disseminated through social media in Kenya is unknown⁶, the proliferation of such content during the democratic processes is worrying.

In response, these modern platforms have become the subject of attempted regulation by a number of countries, with these regulations often focusing on fake news and hate speech.⁷ For example, Kenya recently enacted the Computer Misuse and Cybercrimes Act which criminalises false publication of communications and communications deemed by the recipient as offensive.⁸ In some extreme cases, there have been knee-jerk government reactions such as total internet shutdowns.⁹ Generally, attempts at regulation within Kenya remain disjointed with multiple laws each dealing with different problematic content.¹⁰ This holds true for a number

⁶ Noah Miller, *The Tyranny of Numbers on Social Media During Kenya's 2017 Elections* (*LSE Africa Blog*, 4 September 2017) <<https://blogs.lse.ac.uk/africaatlse/2017/09/04/the-tyranny-of-numbers-on-social-media-during-kenyas-2017-elections/>> accessed 4 July 2019.

⁷ See Section IV of this Article where these laws are elaborated on.

⁸ Computer Misuse and Cybercrimes Act No 5 2018 (Kenya), sections 22-23.

⁹ Chipu Dendere, 'Why Are So Many African Leaders Shutting Off the Internet in 2019?' (*The Washington Post*, 30 January 2019) <www.washingtonpost.com/news/monkey-cage/wp/2019/01/30/why-are-so-many-african-leaders-shutting-off-the-internet-in-2019/> accessed 4 July 2019.

¹⁰ There exists the Computer Misuse and Cybercrimes Act, the Kenya Information Communication Act 1998 and, more recently, the Data Protection Act.

of other jurisdictions, and the variety of policies regulating digital space continues to expand.¹¹

In light of recent global trends, this Article explores social media law and policy in the context of democracy, using the example of Kenya's electoral process to demonstrate the importance of balancing regulation and freedom.¹² In the first part, the Article discusses the unique characteristics of social media that make it a particularly effective tool for democratic elections. These same characteristics engender difficulties in regulation. Two primary uses of social media in political processes are identified and discussed: broadcasting and engagement. Subsequently, the Article discusses the current state of social media regulation. It identifies two types of problematic content as posing a threat to democracies: fake news and hate speech. Following this discussion, we canvass global approaches to regulation, finding that, by and large, regulations adopted are targeted at

¹¹ Select Committee on Communications, *Regulating in a Digital World* (House of Lords, 9 March 2019, 2nd Report of Session 2017-19), 3.

¹² A difficulty with writing about social media, particularly in an academic setting, is the rapidly changing nature of the medium. Specific platforms are mentioned here as instructive examples, with full knowledge that such platforms may be on the decline or virtually unused shortly after publication of this work. Accordingly, it may be for the reader to apply the discussion herein to the popular platforms that exist at the time of reading. See, for example, John Downing, 'Social Movement Media and Media Activism', *Oxford Research Encyclopedia of Communication* (2018).

content as opposed to the structure or design of platforms that facilitate dissemination of said content. These content-centric regulations impose liability on either the user or the platform, or some combination of the two. The challenges posed by such laws are discussed and include violations of free speech and privacy rights. In the final Section, the Article analyses the state of regulation in Kenya, finding that existing content-centric regulations fail to effectively and proportionately achieve the objective of regulating political speech. As a solution, the Article proposes – by way of example – the use of a principles-based approach that inspires co-regulation (i.e., joint efforts by governments and platforms).

II. Social Media in Electoral Democracies

In the broadest of contexts, former United States (US) President Barack Obama is often credited with popularising the use of social media in elections.¹³ Slightly over a decade later, the use of social media in electoral contexts has risen significantly. Only as recently as 2013 did Kenyan electoral politics begin the shift from traditional media to social media.¹⁴ This has grown over the past few years to the extent

¹³ Jennifer Aaker and Victoria Chang, 'Obama and the power of social media and technology' [2010] *The European Business Review*, <<https://jaaker.people.stanford.edu/sites/g/files/sbiybj2966/f/tebrmay-june-obama.pdf>> accessed 4 July 2019.

¹⁴ Christa Odinga, 'Use of New Media during the Kenya Elections' (Uppsala Universitet, 2013) <<http://www.diva->

that a recent study identified politics as one of the primary reasons for social media use in Kenya.¹⁵

For purposes of this Article, social media usage in an electoral democracy is conveniently classified in two categories – use as a broadcast tool and use as a forum for engagement and dialogue¹⁶ – that are discussed below.

A) Social Media as a Broadcast Tool

Political candidates, activists, and government officials have always sought effective means for communicating with the general public and are finding social media to be a tool with unmatched benefits. The gatekeepers of traditional media – editors, journalists, etc. – are entirely absent from social media, thus allowing complete control over content and

<portal.org/smash/get/diva2:633138/FULLTEXT01.pdf>> accessed March 12, 2020, 18.

¹⁵ Social Media Lab Africa (SMELab Africa), 'Social Media Consumption in Kenya: Trends and Practices, (USIU Arica, 2018)

<https://www.usiu.ac.ke/assets/file/SIMELab_Social_Media_Consumption_in_Kenya_report.pdf> accessed 12 March 2020.

¹⁶ Hannah O'Morain, 'What is the role of social media in a general election campaign? A case study of the 2016 Irish General Election' (2016) Maynooth University Research Project Repository

<www.maynoothuniversity.ie/sites/default/files/assets/document/Hannah%20Byrne%20O%27Morain_0.pdf> accessed July 4 2019.

messaging. Just as important, the low cost of engagement¹⁷ and wide reach¹⁸ contribute a great degree of the democratizing power of social media.

Due to the aforementioned qualities, social media use often obviates particular hindrances to broadcasting and may be useful as compared to traditional media. This is particularly the case in electoral contexts in democracies such as Kenya where the freedom of the press is often limited.¹⁹ For example, during the 2017 Kenyan elections, when the government effectively shut down traditional media outlets (in particular TV), the online activities of traditional media houses were largely unaffected. Media houses continued to post online content regarding the shutdown of their traditional outlets.²⁰ Similarly, this particular use of social media was demonstrated in Sudan, when the military removed President Al Bashir in 2019.²¹ Sudanese nationals

¹⁷ Hunt Allcott and Matthew Gentzkow, 'Social Media and Fake News in the 2016 Election' (2016) 31(2) *Journal of Economic Perspectives*, 211, 221.

¹⁸ John Ndavula and Joy Mueni, 'New Media and Political Marketing in Kenya: The Case of 2013 General Elections' (2014) 3(6) *International Journal of Arts and Commerce* 69, 82.

¹⁹ Odinga (n 14) 9-10.

²⁰ See Tweets by Daily Nation and Business Daily <<https://twitter.com/dailynation/status/959670285325680640>> and <https://twitter.com/BD_Africa/status/960105657847263232> accessed July 30, 2019.

²¹ BBC News, 'Omar Al Bashir: Sudan's ousted president' (*BBC News* 2019) <<https://www.bbc.com/news/world-africa-16010445>> accessed 12 July 2019.

around the world were kept apprised of developments through social media.²² Referred to as the #BlueForSudan movement, the level of engagement was remarkable and demonstrated considerable and widespread solidarity with Sudan.²³

In addition to its use in electoral contexts, social media platforms have been recognised as convenient tools of dissemination by various government entities.²⁴ Through these platforms, various governmental bodies regularly update citizens on service delivery and even provide avenues for public participation in some instances. For example, in Kenya, following the 2013 elections, the President set up the Presidential Strategic Communications Unit which kept the public apprised of the government's projects on social media platforms.²⁵

²² Ayen Bior, 'Sudan's Social Media Deemed Major Player in Bashir Ouster' (*VOA News*, 18 April 2019) www.voanews.com/archive/sudans-social-media-deemed-major-player-bashirs-ouster accessed 4 July 2019.

²³ Natalia Faisal and Rym Bendimerad, '#BlueforSudan: Why is social media turning blue for Sudan?' (*Al Jazeera News* 13 June 2019) <www.aljazeera.com/news/2019/06/blueforsudan-social-media-turning-blue-sudan-190613132528243.html> accessed July 4 2019.

²⁴ David Landsbergen, 'Government as Part of the Revolution: Using Social Media to Achieve Public Goals' (2010) 8(2) *Electronic Journal of e-Government* 135, 136-137.

²⁵ Grace Mutung'u, 'The Influence Industry Data and Digital Campaigning in Kenya', (*Our Data Ourselves*, June 2018) <

B) Social Media as a Forum for Engagement and Dialogue

Mass communication is not the only appeal of social media: the two-way interaction that is a feature of most platforms also plays a significant role in fostering civic engagement. Political actors can directly engage with each other – and their target audiences – at a peer-to-peer level, in ways that were not possible on such a wide scale prior to social media.²⁶ Some academics have linked the interactivity of social media with concepts of active citizenship.²⁷

As a tool for dialogue and civic engagement, social media is particularly effective in grassroots organising. The popularity and success of movements such as #MeToo, #BlackLivesMatter, #ArabSpring, #BlueForSudan, and #TakeAKnee signals the rise of a hashtag democracy – i.e. a global and borderless system of civic engagement in which any cause can gain power through effective social media

<https://cdn.ttc.io/s/ourdataourselves.tacticaltech.org/ttc-influence-industry-kenya.pdf> > accessed 4 July 2019, 5.

²⁶ Missy Graham and Elizabeth Avery, 'Government Public Relations and Social Media: An analysis of the Perceptions and Trends of Social Media Use at the Local Government Level' (2013) 7(4) *Public Relations Journal* 1, 1.

²⁷ Gibril Schmiemann, 'Social Network Sites and Political Participation: Attributes of the European Union's Facebook Pages' (2015) University of Twente Essays <https://essay.utwente.nl/67151/1/Schmiemann_BA_MB.pdf> accessed 4 July 2019, 22.

engagement.²⁸ In key political moments, hashtags have also trended in Kenya such as #SomeoneTellCNN and #OccupyParliament.

Mainstream politicking also benefits from the technology. The design of social media platforms allows political actors to market their policies and have dialogues with each other²⁹, thereby influencing perceptions.³⁰ For example a recent study found that the primary motivations for political actors' use of social media are: visibility, communication, and the creation of a perception of relevance due to the use of such platforms.³¹ These platforms tear down the barriers between the audience and the author, thereby enabling political actors to reach out and directly influence users in various ways, i.e. through intimate posts regarding their private lives, or policy briefs, or simply answering queries from the electorate. In the 2013 Kenyan elections, a number of candidates engaged with users regularly on Facebook, generating hashtags and catchy phrases to solicit responses.³²

²⁸ Glenda Daniels, 'Scrutinizing Hashtag Activism in the #MustFall Protests in South Africa in 2015' in Bruce Mutsvairo (ed), *Digital Activism in the Social Media Era* (Palgrave Macmillan, 2016)

²⁹ Gunn Enli and Eli Skogerbø, 'Personalized Campaigns in Party-Centred Politics' (2013) 16(5) *Information, Communication and Society* 757, 763.

³⁰ O'Morain (n 16).

³¹ Karen Ross and Tobias Bürger, 'Face to face(book): Social media, Political Campaigning and the Unbearable Lightness of Being There' (2014) 66(1) *Political Science* 46, 59.

³² Ndavula and Mueni (n 18) 79.

It is not surprising, then, that the use of social media for political purposes has steadily increased. An increased level of political engagement can be construed as beneficial for most democracies, however, not all uses of social media are peaceful or beneficial for democracy. As examples, various social media channels were used in the 2017 Kenyan general election to aggravate ethnic tensions³³ and Facebook was found to have been used to incite violence in Myanmar.³⁴ The power of social media platforms lies, in part, in its independence from any form of censorship and regulation. This is also the strongest argument for imposing rules of engagement for the sake of preserving democratic and human rights. However, imposing such rules is easier said than done. More often than not, attempts at regulating these new mediums raise further concerns as is discussed in the next Section.

³³ Robert Muthuri et al. 'Biometric Technology, Elections and Privacy: Investigating Privacy Implications of Biometric Voter Registration in Kenya's 2017 Election Process' (Strathmore Centre for Intellectual Property and Information Technology Law, 2018) <<https://privacyinternational.org/sites/default/files/2018-06/Biometric%20Technology-Elections-Privacy.pdf>> accessed July 5 2019.

³⁴ Alexandra Stevenson, 'Facebook Admits It Was Used to Incite Violence in Myanmar' (*New York Times*, 6 November 2018) <www.nytimes.com/2018/11/06/technology/myanmar-facebook.html> accessed July 5, 2019.

III. Social Media Regulation

The very characteristics that make social media particularly effective in fostering political engagement are the ones that create opportunities for misuse. It is therefore necessary to discuss social media regulation, particularly in Africa where ICT laws and policies are currently being enacted at a steadily increasing rate.

Technology often outpaces the law in terms of speed of development. Consequently, existing laws governing the offline world are used to deal with illegal online conduct. In this Section, we discuss the application of non-specific laws to social media activity showing the lack of nuance that this engenders. It subsequently discusses particular problematic content resulting from social media use that may necessitate slightly more specific regulatory efforts: fake news and hate speech.

A) Offline Laws in an Online World

There are few laws existing world-wide written specifically to regulate social media activities. Instead, laws that exist independently of social media are typically applied to social media activities.³⁵ Where the law was originally written to target and regulate offline activities, the online nature of social media can present a challenge to effective and fair application of the law.³⁶ Nevertheless, unless and until social

³⁵ Select Committee on Communications (n 11), 9.

³⁶ Valerie Brannon, 'Free Speech and the Regulation of Social Media Content' (Congressional Research Service Reports, 27

media-specific laws are created, law enforcement and the courts are forced to apply non-specific laws. In applying non-specific laws, liability for the content on a social media site generally falls into two categories – content for which the posting user is liable, and content for which the social media site operator is liable.³⁷

i. Primary liability

All or nearly all content on social media falls into the first category, and any such material can also concurrently fall into the second category under specific conditions.

Unless a user can show that s/he temporarily or permanently lost control over a social media account, such as due to hacking activities, the user is generally liable for any content posted under that account. This clearly includes original content created by the user, and also includes reposted content where the original content was prepared and first posted by another user. Thus, for example, a user is responsible and liable for offensive content in an original tweet. The user is also liable for offensive content in a “re-tweet” – i.e., a reposting of an original tweet from another user – just as the originator of the content is also liable.

March 2019)

<<https://crsreports.congress.gov/product/pdf/R/R45650>>
accessed 5 July 2019.

³⁷ Michal Lavi, ‘Content Providers’ Secondary Liability: A Social Network Perspective’ (2016) 26 *Fordham Intellectual Property, Media and Entertainment Law Journal* 858, 859.

During the 2017 Kenyan elections, the Communications Authority together with the National Cohesion and Integration Commission issued guidelines to regulate political messaging via new media. These guidelines set limits on the content capable of being shared through social media, providing that existing 'offline' laws such as the Penal Code and National Cohesion and Integration Act would be applied in prosecuting offenders.³⁸

Some social media activities result from non-human actions. Automated social media management software tools are created to assist users – mainly corporations but increasingly politicians and political groups – to manage multiple social media accounts and platforms.³⁹ These tools may automatically generate social media content in order to provide updates on product development, remind consumers about the existence of a product, highlight trends in a product or business sector, or report news events, among various other purposes. Such tools should be used with caution, as they typically fail to account for important

³⁸ Communications Authority of Kenya and National Cohesion and Integration Commission, 'Guidelines on Prevention of Dissemination of Undesirable Bulk and Premium Rate Political Messages and Political Social Media Via Electronic Communications Networks' (July 2017) <<https://ca.go.ke/wp-content/uploads/2018/02/Guidelines-on-Prevention-of-Dissemination-of-Undesirable-Bulk-and-Premium-Rate-Political-Messages-and-Political-Social-Media-Content-Via-Electronic-Networks-1.pdf>> accessed March 12, 2020.

³⁹ See for example SocialPilot, <<https://www.socialpilot.co>> accessed 5 July 2019.

contextual factors that a human would understand. Nevertheless, the social media account holder is responsible for the legal and non-legal repercussions of content generated automatically. A further complication in terms of regulating online activities results from the growing importance and influence of “bots” in steering online conversations.⁴⁰ Such automated posting of content has been recognized as a serious threat to the trustworthiness of online interactions.⁴¹ Bots were found to be particularly prevalent in Kenya, ranking higher than other influential figures and generating discourse during election periods.⁴²

ii. Secondary liability

The second category of liability relates to the platform. Social media platform providers are generally categorized as online service providers (OSPs).⁴³ As such, so long as the platform does not actively monitor user content, the platform is commonly afforded the safe harbour provisions that apply to other OSPs such as search engines.⁴⁴ Safe harbour laws typically have notice and take-down provisions, requiring an OSP to remove offensive content once notified of its

⁴⁰ Robert Gorwa and Douglas Guibeault, ‘Unpacking the Social Media Bot: A Typology to Guide Research and Policy’ (2018) *Policy & Internet*, 1, 1-2.

⁴¹ Notwithstanding the growing importance of bot activity to the democratic process, we have elected to explore this topic further in a future article.

⁴² Social Media Lab Africa (n 15) 50.

⁴³ Communications Decency Act 1996 (US), section 230.

⁴⁴ Communications Decency Act 1996, section 230 and Digital Millennium Copyright Act 1998 (US), section 512.

existence.⁴⁵ OSPs that fail to remove offending content risk liability for the content. The offending content can be material that incites violence or tortious material such as libellous statements. In Kenya, for example, a recently enacted Copyright (Amendment) Act created safe harbours similar to laws first created in the United States at the turn of the 21st century.⁴⁶ However, not all countries have or make use of these safe harbour provisions.

B) Insufficiency in Regulation

The difficulty in governmental regulation of social media has been attributed to the fact that the internet has a dual nature: a global commons and a privately owned and operated space.⁴⁷ Practically, it is also difficult to adopt laws that can keep up with the rapid developments that are characteristic of these platforms. However, some believe that it is not the place of government to regulate content on these platforms; that such a task lies with the platforms themselves.⁴⁸

⁴⁵ Digital Millennium Copyright Act 1996 (US), section 515 and e-Commerce Directives, 2000 (EU), sections 12-15.

⁴⁶ Copyright (Amendment) Act No 20 of 2019 (Kenya).

⁴⁷ Paulina Wu, 'Impossible to Regulate: Social Media, Terrorists, and the Role of the U.N.' (2015) 16(1) *Chicago Journal of International Law*, 281, 292.

⁴⁸ John Samples, 'Why the Government Should Not Regulate Content Moderation of Social Media' (Cato Institute, Policy Analysis No. 865, 9 April 2019) < <https://www.cato.org/publications/policy-analysis/why-government-should-not-regulate-content-moderation-social-media> > accessed 9 July 2019.

It would suffice that these platforms have their own regulatory mechanisms in the way of policy guidelines and terms of use. However, the interests of the private entities that own and operate these platforms (e.g., profit, goodwill, political gain) may often stand in contradiction to the interests of the state.⁴⁹ Even where these interests may be aligned, enforcement that may call upon a private entity to make decisions that would affect users' rights is problematic at best. In the face of liability, social media platforms would be more likely to err on the side of caution and censor their users where the legality of content is in dispute.⁵⁰ Fagan proposed viewing government interference as supplementary to self-regulatory efforts i.e., where the interests of both parties align, platform effort suffice as regulations and state intervention would only be suitable where these interest diverge.⁵¹

In Africa, the difficulty of the situation is compounded by the fact that these platforms are often owned and operated by foreign entities. Existing laws within African countries rarely contemplate social media usage as is the case in countries such as the US where safe harbour provisions are included in legislation.⁵² It is no surprise then, that when faced with rampant use of social media to oppose government policy or

⁴⁹ Frank Fagan, 'Systemic Social Media Regulation' (2018) 16(1) Duke Law & Technology Review 393, 396.

⁵⁰ Rachel Pollack (ed), *World Trends in Freedom of Expression & Media Development – Special Digital Focus* (UNESCO 2015) 105.

⁵¹ Fagan (n 50) 396-397.

⁵² Communications Decency Act 1996 (US).

action, a number of African governments have opted to clamp down on social media by blocking, taxing, or making it difficult to access such platforms.⁵³

Keeping in mind the increasing use of social media in elections, is it possible and/or desirable to regulate the content on social media directly?

A problem with discussing the insufficiency of the regulations surrounding social media is the difficulty in proposing a definitive solution. Social media is ever changing and the problems that abound are always markedly different. However, the need for regulation is salient from the nature of the problems faced in a majority of democracies. These problems are rooted in the nature of social media as an unfiltered forum where user generated content can be disseminated to millions of people. At face value, the fact that content reaches a wide audience is not necessarily problematic: it is the type of the content that is often the issue.⁵⁴ Indirect application of tort law (defamation etc.) or criminal law may not suffice to regulate some of the content shared due to the seemingly benign nature and the anonymity offered by the internet. In fact, a lot of what

⁵³ Abdi Latif Dahir, 'African strongmen are the biggest stumbling blocks to internet access on the continent' (*Quartz Africa*, 20 March 2019) <<https://qz.com/africa/1576745/african-dictatorships-shut-down-the-internet-the-most/>> accessed July 5 2019.

⁵⁴ As has been canvassed in this Article, fake news and hate speech easily become prevalent.

would be deemed ‘problematic’ content for purposes of this Article does not necessarily violate any laws (with the exception of hate speech). Indirect application also fails to address the way platforms work. These platforms effectively act as ‘norm entrepreneurs’, deciding what content users are exposed to – often for commercial purposes.⁵⁵ Problematic content may have a far-reaching effect, not because of the concerted efforts of persons seeking to disseminate it on a wide scale, but because of the architecture of platforms. Aside from this, the large volume of content makes regulation particularly challenging or impossible.

In a majority of legislative responses, states have sought to address two particular problematic uses of social media: hate speech (inclusive of incitement to violence) and disinformation (more popularly known as fake news). It is believed that these pose a danger to electoral legitimacy and political stability, hence attempts at reigning them in. However, exercising control over platforms with a view to curbing this problematic content is not as straightforward as simply enacting legislation, as will be discussed in the following Sections.

a) Hate Speech

Most, if not all, African countries have laws prohibiting hate speech and criminalising actions or words that may amount to incitement to violence. For example, in Kenya, the Penal

⁵⁵ Fagan (n 50) 395.

Code prohibits incitement to violence and disobedience of the law.⁵⁶ Within the Constitution, hate speech and incitement constitute an exception to the freedom of expression.⁵⁷ In the context of an election or political campaign, this provision is particularly important owing to the background of ethnic violence in Kenya during elections.⁵⁸ In Kenya's case, traditional media (mainly communal radio) was believed to have been used to fuel ethnic tensions following a contested election in 2007/8.⁵⁹ As social media has been proliferating, there is the concern that its versatile and borderless nature can provide an avenue for hate speech and incitement.⁶⁰

The problems of hate speech and incitement are not novel, therefore social media has not necessarily brought about the issue. However, it has been cited as magnifying an already

⁵⁶ Penal Code (Kenya), section 96.

⁵⁷ Article 33(2), Constitution of Kenya (2010).

⁵⁸ Jennifer Cooke, 'Background on the Post-Election Crisis in Kenya' (Center for Strategic & International Studies, 6 August 2009) <www.csis.org/blogs/smart-global-health/background-post-election-crisis-kenya> accessed July 8 2019.

⁵⁹ Sam Howard, 'Community Radio and Ethnic Violence in Africa: The Case of Kenya' (MA Thesis, University of East Anglia, 2009).

⁶⁰ Mutuma Ruteere, 'The State must deal firmly with ethnic incitement on internet and social media' (*Daily Nation*, 13 July 2014) <<https://mobile.nation.co.ke/blogs/Internet-Social-Media-Ethnic-Incitement/1949942-2382538-format-xhtml-uyfq7/index.html>> accessed 8 July 2019.

existing vice.⁶¹ The problem is also not continent specific: social media has been used to incite violence and hatred in Germany, the US, India, Myanmar, and Sri Lanka, effectively showing that, while it is a powerful tool for political participation, it can equally be used to sow discord.⁶² The use of social media by persons with nefarious intentions raises the concern that its use ought to be regulated. In particular, the persons using these platforms for these ends ought to be held accountable.

This concern is exacerbated by the difficulty of applying the existing, non-specific laws to social media. For example, while the wording of the Kenyan Penal Code includes 'publishes' as an actus reus— an act one may argue includes social media posting – it may be difficult to identify offenders due to the anonymity offered by social media. It may also be difficult to decide where charges lie in instances where posts are generated by bots. Even where identified, the ambiguity of these non-specific laws in relation to social media leave room for malicious prosecution.⁶³

⁶¹ Zachary Laub, 'Hate Speech on Social Media: Global Comparisons' (Council on Foreign Relations, 7 June 2019) <www.cfr.org/background/hate-speech-social-media-global-comparisons> accessed July 8 2019.

⁶² *ibid.*

⁶³ Juliet Nanfuka, 'New Year, Old Habits: Threats to Freedom of Expression Online in Kenya' (*CiPESA*, 27 January 2016) <<https://cipesa.org/2016/01/new-year-old-habits-threats-to-freedom-of-expression-online-in-kenya/>> accessed 8 July 2019.

Attempts at remedying this by 'digitising' these non-specific laws by extending their application to platforms often fail to appreciate the technical and often nuanced nature of the internet.⁶⁴ While they target users for content posted, some problematic content may gain traction as a result of the systems in place set up by the platforms. For example, the commercial models of these platforms generate engagement by facilitating the formation of idea bubbles and reinforcing circles that are then targeted by advertisers; they literally generate revenue from social networks centred around ultra-specific ideas, whether illicit or not.⁶⁵ Some problematic content may not even be illegal, just harmful.

In the home countries of some of these platforms, the laws have developed to accommodate these roles played in the form of liability regimes that offer exemptions in certain instances.⁶⁶ However, in many democracies in Africa, it is increasingly difficult to impose control on these platforms, particularly where there aren't any social media specific laws. However, even in these countries with laws catering to such platforms, there are difficulties of free speech, privacy, private enforcement of rights, and censorship that arise. These problems often arise due to the fact that the 'digitised' laws do not appreciate the contribution of platform design to the spread of problematic content. This is more salient with fake news as is discussed below.

⁶⁴ Select Committee on Communications (n 11) 47.

⁶⁵ Laub (n 62)

⁶⁶ Communications Decency Act, 1996 (US).

b) Fake News

In recent years, global trends have shown an uptick in the proliferation of misinformation and disinformation through social media.⁶⁷ Some academics have argued that these have had an impact on recent elections in the US.⁶⁸ While disinformation is the deliberate act of spreading false information with the intent to deceive, the inaccuracy in misinformation is often accidental or innocent in nature.⁶⁹ Nonetheless, both are believed to contribute to the erosion of basic truths which are essential for democracies; for electorates to make decisions, there needs to be a consensus on basic truths.⁷⁰

The effects of the un-edited content that dominates social media are profound, particularly in the political context.⁷¹ Algorithmically, a majority of social media platforms facilitate the creation of echo chambers (i.e. where users are

⁶⁷ Hunt Allcott et al, 'Trends in the Diffusion of Misinformation on Social Media' (2016) NBER Working Paper No 25500 <<https://www.nber.org/papers/w25500> accessed 9 July 2019.

⁶⁸ *ibid.*

⁶⁹ Caroline Jack, 'Lexicon of Lies: Terms for Problematic Information' (Data & Society Research Institute, 2019) <https://datasociety.net/pubs/oh/DataAndSociety_LexiconofLies.pdf> accessed 9 July 2019.

⁷⁰ Abdulmalik Sugow, 'The Right to Be Wrong: Examining the (Im)possibilities of Regulating Fake News while Preserving the Freedom of Expression in Kenya' (2019) 4(1) *Strathmore Law Review* 19, 21-22.

⁷¹ Open Society European Policy Institute (n 4) 3.

only confronted with content they are likely to agree with) through suggestions of posts and targeted advertisement.⁷² By itself, this is to some extent harmless, however, where the content is problematic (i.e., deliberately or accidentally false), it is dangerous as users tend to easily accept content that is in line with their world view as true.⁷³ Various aspects of human psychology reinforce this tendency: the repetition of content by different sources may impute truth in one's mind⁷⁴, and the reaffirmation of pre-existing beliefs (i.e. homophily) furthers the acceptance of information regardless of veracity.⁷⁵ Platforms therefore act as norm entrepreneurs – instead of simply being an avenue for speech, their level of involvement rises to curation of what speech users get exposed to and in what order.⁷⁶

The impact of fake news is not exclusive to Africa. In Kenya, during the 2017 general elections, fake news is believed to have been circulated through social media.⁷⁷ In Nigeria, the President was forced to publicly refute claims that he had

⁷² Seth Flaxman et al, 'Filter Bubbles, Echo Chambers, and Online News Consumption' (2016) 80 *Public Opinion Quarterly* 298, 299.

⁷³ Claire Wardle, 'Fake news. It's complicated' (*Medium*, 16 February 2017) < <https://medium.com/1st-draft/fake-news-its-complicated-d0f773766c79> > accessed 9 July 2019.

⁷⁴ *ibid.*

⁷⁵ Miller McPherson et al, 'Birds of a Feather: Homophily in Social Networks' (2007) 27 *Annual Review of Sociology* 415, 416-417.

⁷⁶ Fagan (n 50) 395.

⁷⁷ Portland Communications (n 5).

passed on and was replaced by a clone.⁷⁸ Interestingly, a study found that in Sub-Saharan Africa (compared to the global north), there was a significantly higher amount of perceived exposure to fake news, a perception that led to a declining trust in the media.⁷⁹

The application of non-specific laws to address problematic content propagated by users is somewhat of a last resort method in the absence of specific laws. In recognition of this, various countries have adopted laws that seek to directly criminalise the online publication of false information. For example, Kenya recently enacted the Computer Misuse and Cybercrimes Act, which contains such provisions.⁸⁰ Due to the novelty of these laws, it is – at the time of writing this Article – too early to judge their efficacy. However, it is worth noting that the constitutionality of the Kenyan Act was unsuccessfully challenged in court by an association of local bloggers.⁸¹ This outcome was upheld notwithstanding the

⁷⁸ Stephanie Busari, 'How fake news was weaponized in Nigeria's elections' (*CNN*, 15 February 2019) <<https://edition.cnn.com/2019/02/15/africa/fake-news-nigeria-elections-intl/index.html>> accessed 9 July 2019.

⁷⁹ Dani Madrid-Morales and Herman Wasserman, 'Fake News', Disinformation and Media Trust in Africa: A Comparative Study of Kenya, Nigeria and South Africa' (ICAfrica Biennial Conference, 2018) <https://danimadrid.net/research/2018_icafrica_fakenews.pdf> accessed 9 July 2019.

⁸⁰ Computer Misuse and Cybercrimes Act, No 5 of 2018 (Kenya).

⁸¹ Bloggers Association of Kenya (Bake) v Attorney General & 3 others (Petition 206 of 2018).

existing critiques of the potential effects on the freedom of expression.⁸²

In light of the two types of problematic content discussed herein, it is prudent to note that in a majority of African democracies, there exists relatively minimal regulation of campaign messaging. Mandating transparency may do more to inhibit the spread of problematic content that isn't necessarily illegal. In the United States and elsewhere, political campaigning is regulated to provide a certain level of transparency – particularly in funding and messaging.⁸³ For example, regulations may exist to ensure that a campaign ad for a particular candidate identify that candidate and, in some cases, include a message that the candidate endorses the ad. Also, for example, regulations may require identification of the source of funds used to pay for a campaign ad. Such regulations may be platform dependent and, where the regulation is old and has not been recently updated, may not apply to social media ads. In other cases, regulations may not apply to social media ads because such ads are not widely/indiscriminately broadcasted as is the case for ads on traditional media platforms.

⁸² Sugow (n 71).

⁸³ For example, in the US, these regulations are administered by the Federal Electoral Commission. See <https://www.fec.gov/legal-resources/regulations/> accessed 9 July 2019.

In Africa, few if any examples exist of regulations that require transparency in campaign advertising⁸⁴, and no laws or court cases have sought such transparency for ads on social media. This is highly problematic as it allows campaigns to discreetly produce and distribute ads that are controversial, likely to incite violence, and/or based on false information. In the 2017 general election in Kenya, for example, various websites and social media channels carried messages that were highly disparaging of one presidential candidate or the other, and although such messages were not endorsed by political parties or candidates, they were clearly meant to stir ethnicity-based distrust.⁸⁵

Faced with the complexity resulting from insufficient regulation, it may appear that attempts at governmental control of social media ought to be negated by the existence of self-regulatory mechanisms adopted by platforms (e.g. the use of platform guidelines). The allure of this argument is clear: self-regulation would ease the pressure on the judiciary and prosecutorial bodies⁸⁶, platforms are often protected by free speech laws therefore regulating content on their

⁸⁴ For example, Party Elections Broadcasts and Political Advertisements Regulations (South Africa).

⁸⁵ Nanjala Nyabola, 'Texts, Lies, and Videotape' (Foreign Policy, 1 August 2017) <<https://foreignpolicy.com/2017/08/01/texts-lies-and-videotape-kenya-election-fake-news/>> accessed 9 July 2019.

⁸⁶ Article19, 'Self-regulation and 'hate speech' on social media platforms' (2018) <https://www.article19.org/wp-content/uploads/2018/03/Self-regulation-and-%E2%80%98hate-speech%E2%80%99-on-social-media-platforms_March2018.pdf> accessed 9 July 2019.

platforms isn't as straightforward⁸⁷, and platforms are often best placed to self-regulate.⁸⁸ However, these mechanisms have been faulted by various stakeholders in relation to different content. By and large, the most salient concern is the chilling effect self-regulation would have on the freedom of expression.⁸⁹ Platforms, being operated by private entities, lack sufficient mandate to make decisions on the legality of content.⁹⁰ It is also difficult for them to pass such decisions in the absence of laws that directly address social media. Therefore, according to those making the counterargument, it would not be appropriate to leave the task of regulation of such content to platforms. This is especially the case where sanctions incentivise platforms to comply. Censorship of users would dramatically increase in a bid to avoid liability.⁹¹ Existing self-regulatory models have been found to be deficient of accountability and consistency in stakeholder engagement, among other issues.⁹² Content curation, deployment of algorithms, and enforcement of take down requests have been cited as lacking transparency.⁹³ This is compounded by the fact that interests of states and of platforms can often be at odds.⁹⁴

⁸⁷ Samples (n 49)

⁸⁸ *ibid.*

⁸⁹ Article19 (n 87).

⁹⁰ *ibid.*

⁹¹ Pollack (n 51)

⁹² Article19 (n 87).

⁹³ Select Committee on Communications (n 11) 59.

⁹⁴ Fagan (n 50) 396.

In summary, social media has been shown to be a potent force in political processes – both for good and for nefarious intent. Faced with the widespread use of social media and the dissemination of hate speech and disinformation thereon, a number of countries currently lack sufficient regulations in place to address these issues. Attempts to make use of existing laws have proven futile in addressing the unique design of platforms which often enable problematic content to take root. Further, the reliance on self-regulatory mechanisms is also problematic, both in failing to address the core issue and in creating new issues around freedom of speech and censorship by private individuals and companies. For these reasons, there is an urgent need to develop suitable regulation that addresses social media directly in such a context. Over the past few years, there have been a number of developments in Kenya and around the world. In the next Section, the Article discusses the ongoing developments in social media regulation.

IV. Ongoing Developments in Regulation

Over recent years, a number of jurisdictions have grappled with the effects of social media and this has resulted in various approaches to its regulation. More recently, the conversation regarding the regulation of online content was reignited by the alleged manipulation of the 2016 US

elections through social media.⁹⁵ Following revelations that a British consulting firm, Cambridge Analytica, used citizens' data gathered from Facebook to micro target and interfere in the US elections, concerns were heightened around the world.⁹⁶ As is noted in this Article, Kenya was not immune to the operations of Cambridge Analytica and had similar impetus to enhance its cybersecurity and data privacy. A notable outcome of these concerns around the world was legislation aimed at securing privacy or stemming the spread of specific online content. These laws often centred on problematic content i.e. they sought to criminalise or prohibit problematic content like fake news or hate speech, essentially 'digitising' offline laws on such content. In this Section, the Article discusses these trends, finding that they generally raise more concerns than they address. Content-centric regulations are inadequate for two main reasons: they do not address the design of platforms that enable the spread of the content they seek to control and in attempt to control such content, they often lead to violations of free speech and privacy. For purposes of this analysis, this Section begins by canvassing regulations around the world aimed at imposing liability on platforms and those aimed at users. The Section

⁹⁵ Article19, 'Free speech concerns amid "fake news" fad' (2018) <<https://www.article19.org/resources/free-speech-concerns-amid-fake-news-fad/>> accessed 12 July 2019.

⁹⁶ Emma Graham-Harrison and Carole Cadwalladr, 'Revealed: 50 million Facebook Profiles Harvested For Cambridge Analytica in Major Data Breach' (*The Guardian*, 17 March 2018) <www.theguardian.com/news/2018/mar/17/cambridge-analytica-facebook-influence-us-election> accessed 13 July 2019.

then concludes by discussing the situation in Kenya in light of these global trends.

A. Platform-targeted approaches at regulation

In Germany, the Bundestag enacted the Network Enforcement Act ('NetzDG'). Through this law, the government sought to regulate hate speech online by imposing a burden on platforms to expeditiously take down 'manifestly unlawful' content within 24 hours or risk facing a fine of up to 50 million euros.⁹⁷ The law also imposes bi-annual reporting obligations on platforms.⁹⁸ The context of this law is the increasing danger of nationalist sentiments in the wake of a migrant crisis.⁹⁹ The law has been criticized for leading to over-removal by platforms, privatization of enforcement and in general, having a chilling effect on the freedom of expression.¹⁰⁰ Recognising that the concern of over-removal was not unfounded, the government sought to

⁹⁷ Network Enforcement Act 2017 (Germany), sections 3-4.

⁹⁸ *ibid* section 2.

⁹⁹ Article19, 'Germany: Responding to Hate Speech. Country Report' (2018) <<https://www.article19.org/wp-content/uploads/2018/07/Germany-Responding-to-%E2%80%98hate-speech%E2%80%99-v3-WEB.pdf>> accessed 12 July 2019.

¹⁰⁰ Heidi Tworek and Paddy Leerssen, 'An Analysis of Germany's NetzDG Law' (2019) Transatlantic Working Group Working Paper <https://www.ivir.nl/publicaties/download/NetzDG_Tworek_Leerssen_April_2019.pdf> accessed 12 July 2019.

make amendments to the law to enable the restoration of wrongfully removed content.¹⁰¹

Prior to its enactment, Article 19, a free speech advocacy group, raised the concern that expeditious take downs may bring about the Streisand effect (i.e. the content would be circulated further due to the notoriety it received after being taken down).¹⁰² This concern proved true when a post that had been taken down attracted media coverage that also included the post's content – essentially defeating the purpose of expeditious take downs.¹⁰³ Thus far, Facebook has been one of the platforms affected by this law with a recent fine of 2 million Euros for failure to comply with its reporting obligations.¹⁰⁴

In Australia, the government enacted the Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act, 2019 in the wake of the Christchurch shooting in New

¹⁰¹ Emma Thomasson, 'Germany Looks to Revise Social Media Law as Europe Watches' (*Reuters*, 8 March 2018) <<https://www.reuters.com/article/us-germany-hatespeech/germany-looks-to-revise-social-media-law-as-europe-watches-idUSKCN1GK1BN> > accessed 12 July 2019.

¹⁰² Tworek and Leerssen (n 101), 3.

¹⁰³ *ibid.*

¹⁰⁴ Lucinda Southern, 'What to Know About Europe's Fight on Platform Hate Speech' (*Digiday UK*, 12 July 2019) <<https://digiday.com/media/what-to-know-about-europes-fight-on-platform-hate-speech/> > accessed 13 July 2019.

Zealand.¹⁰⁵ The law criminalises the failure to expeditiously remove or cease hosting abhorrent violent material.¹⁰⁶ This would mean that executives of these platforms could face penal sanctions for content on their platform – a fact that may lead to over-removal. In other jurisdictions, governments have sought to target the users themselves.

B. User-centred approaches at regulation

In response to recent disinformation campaigns, Malaysia enacted the Anti-Fake News Act which criminalises the creation, offering, or publishing of fake news.¹⁰⁷ The law primarily targets the persons responsible for authoring or sharing the content as opposed to the role and contribution of the platform.¹⁰⁸ However, it also imposes a burden of expeditious content removal on persons having the ability to remove such content.¹⁰⁹ This appears to be specifically applied to the platforms, particularly because no penal sanctions are contemplated in the provision. The Act has

¹⁰⁵ Evelyn Douek, 'Australia's New Social Media Law is a Mess' (*Lawfare Blog*, 10 April 2019) <<https://www.lawfareblog.com/australias-new-social-media-law-mess>> accessed 13 July 2019.

¹⁰⁶ Provision 474.34, Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019 (Australia).

¹⁰⁷ Article19, 'Malaysia: "Anti-Fake News Act"' (*Legal Analysis*, 2018) <<https://www.article19.org/wp-content/uploads/2018/04/2018.04.22-Malaysia-Fake-News-Legal-Analysis-FINAL-v3.pdf>> accessed 13 July 2019.

¹⁰⁸ Anti-Fake News Act 2018 (Law 803) (Malaysia), section 4.

¹⁰⁹ *ibid* section 6.

been criticized for its ambiguity in enacting legal duties of ‘truth’ and for its potential to lead to over-removal by platforms in a bid to comply.¹¹⁰ This has led to the Act being repealed altogether.¹¹¹ A primary concern with most of these regulations, has been their effect on freedom of expression, and the potential for their misuse. For example, in enacting a duty of ‘truth’, it has been argued that the government effectively retains the ability to control content that is contrary to its interests.¹¹²

Similarly, in Singapore, the government enacted the Protection from Online Falsehoods and Manipulation Bill which criminalises the communication of false statements of fact.¹¹³ Interestingly, the burden imposed on platforms in the case of this law differs. The law provides that internet intermediaries may be required to issue correction notices where the government has deemed speech to be false (i.e., indicate to end-users that the content has been deemed false).¹¹⁴ This is in addition to the requirement of disabling access by end users, which requirement can also be

¹¹⁰ Article 19, ‘Malaysia: “Anti-Fake News Act”’ (n 109).

¹¹¹ Anisah Shukry, ‘Malaysia to Scrap Anti-Fake News Law Once Used Against Mahathir’ (*Bloomberg*, 10 October 2019) <<https://www.bloomberg.com/news/articles/2019-10-10/malaysia-to-scrap-anti-fake-news-law-once-used-against-mahathir> accessed 13 March 2020.

¹¹² Article 19, ‘Malaysia: “Anti-Fake News Act”’ (n 109).

¹¹³ Protection from Online Falsehoods and Manipulation Act 2019 (Singapore), section 7.

¹¹⁴ *ibid* section 23.

mandated by the government. The law has also been criticized for its apparent requirement of platforms to keep records of what users view.¹¹⁵

C. Kenya's approach

These global trends have, to a larger extent, influenced legal and policy developments in Africa. In 2018, it was revealed that Cambridge Analytica, a British consulting firm, harvested the data of millions of users without their consent and used that information for political advertising.¹¹⁶ The effects of this were not exclusive to the US elections; it is believed that Cambridge Analytica also played a role in the Kenyan elections in 2017.¹¹⁷ As has been discussed earlier in this Article, social media's impact is often borderless and countries in Africa have been grappling with the same issues as other democracies: fake news, hate speech and even

¹¹⁵ Jennifer Daskal, 'This 'Fake News' Law Threatens Free Speech. But It Doesn't Stop There' (*The New York Times Privacy Project*, 30 May 2019) <www.nytimes.com/2019/05/30/opinion/hate-speech-law-singapore.html> accessed 13 July 2019.

¹¹⁶ Graham-Harrison and Cadwalladr (n 97)

¹¹⁷ Larry Madowo, 'How Cambridge Analytica Poisoned Kenya's Democracy' (*The Washington Post*, 20 March 2018) <www.washingtonpost.com/news/global-opinions/wp/2018/03/20/how-cambridge-analytica-poisoned-kenyas-democracy/?noredirect=on&utm_term=.ba663902da68> accessed 13 July 2019.

terrorism in some instances.¹¹⁸ In fact, these situations are often exacerbated owing to the fact that, according to a recent report, social media is used for political conversations in Africa more than it is in other continents.¹¹⁹

In a bid to control social media, African governments have responded in various ways. In general, these responses range from internet shutdowns to the detention of online critics.¹²⁰ More recently, Uganda, Benin, Tanzania, and Zambia adopted social media taxes¹²¹, although Benin repealed the law recently following protests.¹²² The taxation of social media has been criticized as unnecessarily stifling the freedom of expression.¹²³ An alternative approach adopted in

¹¹⁸ Kate Cox et al, 'Social Media in Africa – a Double-Edged Sword for Security and Development' (UNDP-RAND 2018) <www.undp.org/content/dam/rba/docs/Reports/UNDP-RAND-Social-Media-Africa-Research-Report_final_3%20Oct.pdf> accessed 13 July 2019.

¹¹⁹ Portland Communications, 'How Africa Tweets 2018' (Portland Communications, July 2018).

¹²⁰ Babtunde Okunoye, 'In Africa, A New Tactic to Suppress Online Speech: Taxing Social Media' (*Council on Foreign Relations*, 10 January 2019) <www.cfr.org/blog/africa-new-tactic-suppress-online-speech-taxing-social-media > accessed 13 July 2019.

¹²¹ *ibid.*

¹²² Fatima Moosa, 'Benin Repeals Social Media Tax After Protests' (*Mail & Guardian*, 25 September 2019) <<https://mg.co.za/article/2018-09-25-benin-repeals-social-media-tax-after-protests> > accessed 13 July 2019.

¹²³ Article19, 'Eastern Africa: New Tax and Licensing Rules for Social Media Threaten Freedom of Expression' (2018)

Kenya and Tanzania has been the revision of licensing requirements for bloggers and other content generators, although this approach has received similar criticisms.¹²⁴ In Nigeria, the Cybercrimes (Prohibition, Prevention Etc) Act, 2015 was introduced to regulate general cybercrimes. In Ethiopia, the Computer Crime Proclamation was enacted in June 2016 to deal with, inter alia, hacking, child pornography, and dissemination of spam.¹²⁵ Although none of these efforts are specifically directed at election or other political processes, the resulting laws are certainly available in such contexts.

More particularly, in Kenya, the Computer Misuse and Cybercrimes Act was enacted in 2018 and provides for the regulation of problematic content by imposing penal and monetary sanctions on persons involved in false publication, child pornography, and computer forgery.¹²⁶ Prior to its enactment, critics proposed a revision or removal of a number of the law's provisions owing to human rights concerns i.e. there existed a potential for abuse due to their broad nature and the punitiveness of the penalties provided.¹²⁷ More recently the government proposed

<www.article19.org/resources/eastern-africa-new-tax-and-licensing-rules-for-social-media-threaten-freedom-of-expression/> accessed 13 July 2019.

¹²⁴ *ibid.*

¹²⁵ 958/2016 (Ethiopia).

¹²⁶ No 5 of 2018 (Kenya).

¹²⁷ Article19, 'Kenya: Computer and Cybercrimes Bill 2017' (*Legal Analysis*, 2018) <<https://www.article19.org/wp->

amendments to the Kenya Information and Communication Act which directly aim to regulate social media.¹²⁸ The amendments provide for, among other things, licensing of social media platforms, control of user behaviour with restrictions on the formation of social media groups, and registration of bloggers.¹²⁹ Interestingly, the amendments require that in order to be licensed, platforms ought to establish a physical office in Kenya, maintaining the stipulated information at said office.¹³⁰ The impracticality of these amendments cannot be overstated and they have been criticized for posing a threat to privacy of users while at the same time stifling free speech.¹³¹

It is difficult to know precise motivations for the passage of these laws. In the Kenyan example, it is believed that some parts of the Computer Misuse and Cybercrimes Act were

content/uploads/2018/04/Kenya-analysis-April-2018.pdf
accessed 13 July 2019.

¹²⁸ Kenya Information and Communication (Amendment) Bill 2019.

¹²⁹ *ibid* section 84IA – Section 84ID.

¹³⁰ *ibid* Section 84IA.

¹³¹ Jackline Akello, 'The Social Media Bill: Proposed Amendments to KICA to Regulate Use of Social Media Platforms' (*CIPIT*, 21 November 2019) <<https://blog.cipit.org/2019/11/21/the-social-media-bill-proposed-amendments-to-kica-to-regulate-use-of-social-media-platforms/>> accessed 13 March 2020.

influenced by nude photos sent to parliamentarians while the corresponding bill was being debated.¹³²

From these occurrences, it is possible to infer that social media regulation faces a specific difficulty: balancing the freedom of expression with other individual rights and state interests. Some have suggested that in the development of the internet, certain norms have been adopted. These norms include transparency, openness, and accountability.¹³³ Social media platforms are often based on these norms, of free speech and privacy. Self-regulatory efforts have often been lauded for respecting these norms.¹³⁴ Some platforms even specifically state that they seek to adhere to and respect these norms.¹³⁵ In adopting regulations, states must mind the effects such regulations have on freedom of expression and the economic interests of platforms, all while achieving the specific objectives of lawmakers and government policies. In light of this difficulty, there have been varied suggestions for more effectively reaching an appropriate balance. Such suggestions include governmental management of social media platforms or shifting the commercial model of these

¹³² Dickson Olewe, 'Kenya, Uganda and Tanzania in 'Anti-Fake News Campaign' (BBC, 16 May 2018) <www.bbc.com/news/world-africa-44137769> accessed 13 July 2019.

¹³³ Alexandra Paslawsky, 'The Growth of Social Media Norms and the Governments' Attempt at Regulation' (2017) 35(5) *Fordham International Law Journal* 1485, 1535.

¹³⁴ *ibid*, 1526.

¹³⁵ Samples (n 49).

platforms away from data-driven ads.¹³⁶ Some have also proposed a combination of policy and legislative tools to address problems such as fake news.¹³⁷

However, this Article posits that attempts at social media regulation which focus on inhibiting certain content will inevitably encounter the problems discussed herein. In the final Section, the Article discusses a potential model for regulation that could largely obviate the free speech and privacy concerns plaguing current trends.

V. Principles-Based Regulation: A Possible Solution for Kenya

In the preceding Sections, this Article discussed the unique challenges posed by social media use in political settings. These challenges were exemplified by the examples of fake news and hate speech. The Article also discussed attempts at regulation and the resultant difficulties. A common thread identified in regulations adopted around the world has been the focus on content as opposed to the design of platforms that enable such content to proliferate. This is despite the fact that the architecture appears to be more of a problem than the content – in fact, the content in some instances is clearly legal, and in many other cases is arguably legal. This content-

¹³⁶ Blayne Haggart & Natasha Tusikov, 'It's time for a new way to regulate social media platforms' (*The Conversation*, 2019) <<https://theconversation.com/its-time-for-a-new-way-to-regulate-social-media-platforms-109413>> accessed 13 July 2019.

¹³⁷ Sugow (n 71), 45-46.

centric approach engenders concerns over free speech and accountability. In this Section, by way of example, we propose a principles-based approach that would inspire co-regulation. This is in light of the cogent argument that platforms are often best placed to regulate content.

In the enactment of content-centric legislation, Kenya is not lagging behind. The Computer Misuse and Cybercrimes Act criminalised false publication among other dissemination of problematic content. The Kenya Information Communication (Amendment) Bill proposed restrictions on the formation of social media groups.¹³⁸ As numerous set out in this Article, the constitutionality of such an approach is often questioned in light of the inevitable infringement upon fundamental rights.¹³⁹

From the Cambridge Analytica Scandal¹⁴⁰, to the dissemination of ethnically charged content on social media platforms during Kenyan elections, an argument may be made that the country ought to (or would at least like to) address the structures in place that enable such content to proliferate. This would not be in the form of the existing laws. It would be more suitable to make use of a principles-based approach at the level of Executive-branch regulation. Such an approach has been proposed by policy analysts and committees, as described below.

¹³⁸ Kenya Information and Communications (Amendment) Bill, 2019, section 84IC.

¹³⁹ See for example, Sugow (n 71).

¹⁴⁰ Madowo, (n 118)

Despite the possibility of conflicting interests between platforms and governments when the former engages in self-regulation, some believe that platforms are the appropriate authorities to moderate content.¹⁴¹ Noting that the primary concerns abounding from self-regulation include transparency, accountability, and the violation of fundamental rights, there have been proposals of state adoption of principles to guide regulators in enforcing compliance and platforms in self-regulating.¹⁴² A seminal example of such a proposal is contained in a report presented to the House of Lords by the Select Committee on Communications.¹⁴³ The report notes that a principles-based approach would be adaptive and would safeguard the interoperability of the internet (bearing in mind that multiple jurisdictions could have radically different rules-based laws).¹⁴⁴ Recognising the appeal of such an approach, the report proposed ten principles to guide regulators and the regulated. These include accountability, parity, transparency, openness, ethical design, and privacy among others.¹⁴⁵ Salient in these principles is the implicit attempt at addressing the architecture of platforms as opposed to content. By fostering ethical design, these principles would address concerns of data privacy, content curation (which plays on heuristics and homophily), algorithms, and the opaque enforcement of

¹⁴¹ Samples (n 49). See also Fagan (n 50) (generally).

¹⁴² Select Committee on Communications (n 11), 15.

¹⁴³ *ibid.*

¹⁴⁴ *ibid.*, 10 and 15.

¹⁴⁵ *ibid.*, 15.

terms of service and guidelines.¹⁴⁶ The approach would ensure ethical design by imposing a duty of care on platforms to comply with the principles.¹⁴⁷ This is contrasted with the direct attempt at classifying certain conduct as illegal – an approach found to be wanting in the report¹⁴⁸ and in this Article. To operationalise these aspirations, the report proposed the formation of a central Digital Authority, tasked with *inter alia* coordination of regulation, assessing existing regulations, and mandating disclosures to vet compliance.¹⁴⁹

Following this report, a similar approach was proposed in France. Through an interim report on the regulation of social networks submitted to the French Secretary for Digital Affairs, a social network services law was proposed.¹⁵⁰ The proposed approach is similar to that detailed in the Select Committee's Report, i.e. it also recognises the optimal positioning of platforms as regulators of content and the government's larger role of nudging platforms towards the adoption of certain architecture.¹⁵¹ The French report also proposes that regulations ought to be guided by three conditions: focus on compliance by platforms as opposed to the illegality of content; focus on systemic actors with larger

¹⁴⁶ *ibid* 23-33.

¹⁴⁷ *ibid* 53-55.

¹⁴⁸ *ibid* 23.

¹⁴⁹ *ibid* 61-63.

¹⁵⁰ Interim Mission Report, 'Regulation of Social Networks – Facebook Experiment' (State Department, Digital Affairs, France, May 2019).

¹⁵¹ *ibid* 2.

impact; and a flexible approach foreshadowing rapid developments in the sector.¹⁵² To that end, it proposes regulations based on five pillars: a grounding in fundamental freedoms and economic interests of platforms, prescriptive regulation focused on compliance (to engender transparency and accountability), dialogue between stakeholders, vesting of authority in a singular independent authority, and regional cooperation.¹⁵³

These approaches have been echoed by academics with Fagan finding that architecture ought to be the appropriate focus of regulators, as opposed to content.¹⁵⁴

These approaches are transferable. In Kenya, the perceived effects of social media on elections/electoral processes can be traced to platform architecture (e.g. the Cambridge Analytica scandal relied on targeting through the use of data). Therefore, adopting an approach Fagan termed ‘Systemic Social Media Regulation’ may prove beneficial to Kenya and similar jurisdictions. Through focusing on the design of platforms, states obviate human rights concerns, address problematic content that is not illegal, and remain agile in responding to developments in technology.

¹⁵² *ibid* 2-3.

¹⁵³ *ibid* 3.

¹⁵⁴ Fagan (n 50) 438-439.

VI. Conclusion

In this Article, we have posited that social media platforms contribute a great deal to political processes. We further argued that these contributions are not always positive, with fake news and hate speech being highlighted as particularly problematic content in need of regulation. In view of the difficulty of applying non-specific laws to online interactions we subsequently mapped out attempts at enacting legislation to address this type of content. These laws were found to be deficient in balancing fundamental rights with the objectives sought. At the heart of this deficiency, was the focus on content as opposed to structure. As a response, the Article discussed trends towards principles-based regulations that put more emphasis on platform design as opposed to material content. This was found to be a suitable approach for Kenya and other similarly positioned democracies.

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