

Anti-fake News Legislations and Free Speech: A Comparative Evaluation of the Trends in Germany, Malaysia, and Kenya

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Abstract: Fake news is intended to misinform, deceive, or manipulate the public. It may create tension and potentially crisis of untold proportions. It may also scare people from expressing themselves for fear of becoming a source of fake news. Consequently, national regulators have resorted to regulating fake news especially on the social media, to prevent an impending and imminent catastrophe that it could lead to. The idea behind the regulation of fake news is not in itself blameworthy, it may be used to suppress free speech by wide and subjective definitions of fake news. Using doctrinal as well as comparative methodologies, this paper appraises the trend between states of passing laws or proposing laws to regulate fake news. It appraises the contents of such laws from Germany, Malaysia, and Kenya, to show how they affect free speech. It finds that though some provisions of the legislations considered may negatively affect free speech in those jurisdictions, some measures were taken to restrict such effects. The paper concludes that textually, the German legislation made more strained efforts to avoid negative impacts on free speech, while the Malaysian law looks procedurally sound by subjecting decisions to judicial review. The Kenyan law categorically derogated from the constitutional guaranty of free speech.

1 INTRODUCTION

The new millennium ushered in unprecedented advancements in information technology making communication much easier and almost instantaneous. As a result, what amounts to news is not restricted to that which comes from the mainstream media, so individuals and groups can easily publish stories that gets to millions of people, notwithstanding its veracity.

Such stories are often fake and can have devastating social and security consequences on societies. Because of the explosion of fake news on social media, calls have been made at both national and international levels to curb the trend seen as an imminent and clear danger to society. Such calls have been heeded by several states in the form of legislations and regulations, imposing penal and civil liabilities for expressing, promoting, or providing the platform for fake news. Several nations have either promulgated or attempted to promulgate legislations aimed at regulating fake news. Such legislations come in various forms, mostly penalising the

publication of fake stories, restricting the freedom with which individuals and organisations publish news items and stories. Though the regulation of fake news is not in itself a wrong trend, the nature of such legislations is such that they may lead to unintended consequences.

Primary among such unintended consequences is unnecessary restriction on the freedom of expression. In such circumstances, fighting the scourge of fake news online would have provided the perfect opportunity to gag not only the media, but even private individuals from expressing themselves. This paper therefore, critically analyses and compares Anti-Fake News legislations and policies in Malaysia, Germany, and Kenya, with petty reference to other jurisdictions. The aim is to show how these laws and policies meant to curb the scourge of fake news undermine free speech. It finds that anti-fake news legislations in some states undermine free speech.

2 THE FREEDOM OF EXPRESSION OR FREE SPEECH

Free speech has become synonymous with democratic societies as an essential enabler for discussing varied views. This underscores the need to protect and promote freedom of expression among all and sundry to develop democratic foundations (Tsesis, 2015, p. 1). The inevitability of free speech has generally been viewed from the natural human yearning for self-actualization, the spread of truth, and societal involvement aimed at developing “the whole culture” which ultimately leads to the formation of a firm society (Emerson, 1970, p. 6-7). It should therefore, be conscientiously protected and cherished, for it reflects the person’s logic of uniqueness and individual goals, self-sufficiency and advancement of knowledge, in addition to communal values. The freedom of expression stems equally from the individual requirement to express thoughts, and the communal right to parity. Hence, advancements in information and communication technology (ICT), especially the internet presented the perfect prospect for such a notion to thrive unhindered. This was made even better by the eruption of social media platforms such as Facebook, Twitter, YouTube, and the like, all of which facilitated and eased communication. The gigantic benefits of such advancements notwithstanding, they have also been used to peddle fake news at an unprecedented level.

In a democratic setting, contending entitlements are tested through continuous discourse which promotes the procurement of varied contribution aimed at shaping political conclusions: Free speech facilitates such a process. As a result, democratic societies are beholden to protect personal freedom of expression: at the same time, the society is bound to encourage values of equality designed to prevent against impairing others' security and self-esteem. Consequently, to ensure parity, governments are generally deprived of the authority to regard the speech of equally positioned individuals contrarily (Tseis, 2009, p. 497). The promotion of individual freedom and democratic heterogeneity therefore underlie the need for all and sundry to freely express their thoughts.

Thus, the concept of free speech originates from the framework of a broader notion of freedom and parity preserved as core human aspiring values. The primary purpose of establishing democratic societies may therefore be seen in the need to articulate

guidelines aimed at achieving these aspirations (Tsesis, 2015, p. 4). As a result, legal instruments, be they national or international have been endorsed primarily to facilitate and ensure the enjoyment of this right. This is good for the individual as well as the society for it identifies the need for all persons to explore their inimitable life strategy, which may be reflected in our expressions, devoid of unwarranted fetters (Wilkinson III, 2012, p. 4).

Restraints on freedoms, if any, should be reasonably planned towards the common good, deprived of subjective favouritisms in the direction of any set of people. In many societies, the freedom of expression is essential, not only for historical purposes, but also to aid in moving away from undesirable historical antecedents. It promotes a commitment towards the advancement of equality and human rights, as it serves as a vent to persons dedicated to societal transformation; it is an indispensable tool for nurturing communal discourse around issues which hitherto were unmentionable (Goldstein & Feldman, 2010, p. 830). Because of the equality of all human beings, disagreements are inevitable on almost all aspects of social life; the freedom of expression is an essential predicate for all individuals to express their distinct views leading to concessions for the common good (Schauer, 2012, p. 97). Free speech is therefore an essential element of any society dedicated to the common good as opposed to a few. A diverse civilization is not expected to express itself in agreement: hence the need to protect varied persons’ resolve to scrutinize notions alike as within the society they all belong to. This explains the protection of the individual’s right to freedom of expression under domestic constitutions and bills of rights and international legal instruments to ensure a global framework towards global fortification.

2.1 Fake News

Fake news is complex, multifaceted, and represents real threat to society. For one thing, it has become widespread with grave damaging effect on both persons and the society at large. Fake news can effectively disrupt the validity equilibrium of the news environment, deliberately convince its patrons to uphold predisposed or dishonest views, as it is typically wrought by polemicists to send dogmatic communications or impact. It also has the potential to prompt misgivings and confusion among individuals, hindering their aptitude to discern truth from falsehood (Shu, Sliva, Wang, Tang, & Liu, 2017, p. 1). The idea of Fake news is not a new phenomenon;

yet, the expansion of the social media facilitated by the internet has made fake news a more prevailing power that contests conventional reporting standards.

The lingo ‘fake news’ presents a novel platform for persistent deliberations in relation to reporting practices and integrity, state regulation, preconceived information and suppression. It underscores the place and function of social media and the internet in contemporary public domain. It has become one of the most famous terms in universal lexicon, yet its true connotation remains distorted to possible meaninglessness. It is frequently applied as a smear flung at the media or partisan adversaries. It is often used interchangeably with such expressions as “propaganda, disinformation, and misleading information” (WiltonPark, 2017, p. 2), the application and understanding of which can be relative, thus hindering consensus. As a result, it has become difficult to arrive at a harmonized meaning of ‘fake news’, or if the term is suitable, bearing in mind that it is used under several contexts. Notwithstanding, the term “fake news” and its upshots may be viewed as the modern-day depiction of news items or information seemingly untrue or erroneous yet designated as realistic or accurate. Because the community supposes, correctly so, that the information they get from news outlets was professionally collected and confirmed by an impartial correspondent, it is expected that such neutrality be reflected in news reporting. Thus, sentiments or points of view should be clearly disclosed and identified as such. Consequently, fake news is not restricted to false stories from unknown or unverifiable sources: it includes deliberately biased, or clothed reporting from reliable media (Farsetta& Price, 2006).

It is noteworthy though, that the expression ‘fake news’ has of recent become an instrument used by politicians to discredit critical information or assessments by the media (BBC News, 2017). Along the same line, certain media outlets might be partial or discriminatory in reporting facts as it pertains to their beliefs or ideals. In such situations, whether it amounts to fake news will depend on the perspective of the listener, and to a large extent, if the audience were misinformed. Be it from the presentation or the material of the news, where the audience or readers are cuckolded due to the appearance or appeal of the story or the real erroneousness of information, it fits into contemporary understanding of fake news. This trend has been intensified with the advancement in ICT guaranteeing little control over dissemination of information that can easily reach millions irrespective of its accuracy. For example, fake or false

information once presented on social media may be shared by innocently or ignorantly believing individuals millions of times, thereby strengthening its appeal and credibility. In certain situations, however, individuals share these pieces of information not necessarily because they were ignorant of its veracity, but simply because it appeals to their sentiments, or it serves some personal drive. Accordingly, it has become even more problematic for individuals and the global community at large to discern ‘fake news’ from genuine stories online. To complicate matters, whereas ‘fake news’ and ‘substitute details’ were hitherto restricted to the tabloids, contemporary reality pinpoint to their acceptance and manipulation at the uppermost heights of politics, producing ethical crisis of sorts, with universal reach. Though fake news spreads fast and easily online, its effects offline might be huge, leading to moves by governments to proscribe it.

3 THE NEED FOR REGULATION

There is no doubt that fake news has become prevalent over the years, especially on social media, driven by individuals, institutions, and even states, for various objectives which may include a deliberate attempt to delude the public. (The United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, 2017). Such fake stories have the tendency to cause serious damage to reputations of both individuals and organisations. They may also provoke crisis, discrimination and antagonism against specific individuals or groups (The United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, 2017). Bearing in mind the negative effects of fake news, coupled with its potential to unleash chaos and violence which may affect the security and welfare of individuals and states alike, there seems to be the need to regulate such behaviours. Consequently, over the years, there have been calls from within states, and at the international level, for states to regulate incidents of fake news. On the national front, individuals and groups have called on governments to proscribe fake news to prevent the possible effects it may have on security and peaceful coexistence. In 2006, after a thorough study into the use of Video News Reporting (VNRs) by US television stations, the Centre for Media and Democracy recommended more stringent policies on how media outfits present publicity videos disguised as news items (Farsetta& Price, 2006, p. 27). As result, several countries have either enacted laws

meant to curb the scourge of fake news or are considering such measures.

On the other hand, there have also been several expressions against regulation of fake news. The fear is that any attempt to regulate fake news may have the effect of eroding the freedom of expression. Indeed, attempts to regulate speech is seen as a deliberate attempt by certain regimes to clamp down on free speech, opposition, and the mass media (WiltonPark, 2017, p. 5). Moreover, there is also the fear that some punitive legislations introduced by states to regulate fake news might be too broad, ambiguous, or inadequate, thereby open to ill use and abuse. The application of such legislations is also a point of worry for human rights activists, especially in states where institutions are not well developed and independent to ensure equitable and fair enforcement (OHCHR, 2013). To others, legislating against fake news will only amount to superficial scrabbling of the profounder complications reflecting human prejudice and failure to find mutual positions on issues we have differences on. Thus, enacting laws to counter fake news could shadow its hullabaloo for a while; it will however, have a hypothetically unsettling consequence on free speech (Reventlow, 2017, p. 2). Simple or swift solutions to the problem of fake news are therefore not feasible. It would therefore, be better if attention is focused towards the fundamental problems with the aim of addressing it in all its ramifications, rather than proposing indicative solutions.

4 TRENDS ON REGULATIONS OF FAKE NEWS

Several instruments ranging from punitive laws, to code of conducts have been enacted over the years to address the problem of fake news. These instruments, legal or quasi-legal in nature, vary from state to state, though there might be some points of convergence or even similarities among some. Essentially, they all attempted to solve the problem of hate speech and fake news, especially online, considering the speed with which it spreads and the possible effects it may have.

On the national front, several countries have enacted laws proscribing fake news; at the same time, many others are either in the process of enacting such laws or have indicated moves towards that. Examples of such laws are discussed below.

4.1 Germany

Prominent among anti-fake news legislations is Germany's "NetzDG" which came into force on 1st October 2017, though compliance was differed to 1st January 2018 (BBC News, 2018). Specifically, the German law applies to social media companies having more than two million users in Germany. It specifically excludes mainstream media organisations providing 'journalistic or editorial content, the responsibility for which lies with the service provider itself', and stages meant for specific communication (Bundestag, 2017, ss. 1 (1)). This was clearly a thoughtful position meant to safeguard the media since contents on their websites are not subjected to this law. It therefore, shows the resolve of the German lawmakers to safeguard free Press, while regulating the problem of fake news. This is commendable because to points to how states may approach contemporary challenges such as fake news, without necessarily having to reverse earlier progress made on free speech. The wordings of section 1 (1) of the law also mean that it is not applicable to platforms such as WhatsApp and Messenger since communications on such platforms are not meant for public consumption. This again shows a resolve to protect the right of individuals to speech, deflating any attempt to relate the law with gagging the media or free speech.

In addition, though the law proscribed certain contents as unlawful, such contents were subjected to the provisions of the German Criminal Code (Bundestag, 2017, ss. 1 (3)). It therefore means that for contents to be considered unlawful and thus incur the wrath of the law, it must be shown that it was already illegal under the Criminal Code. As a result, the law cannot be said as having created new offences as such. What it did was to bring the contemporary problem of online hate speech and fake news within the existing legal purview. The law requires social media companies to delete hateful expressions, fake news and illegal contents on their sites within 24 hours or 7 days of receiving notice of such contents (Bundestag, 2017, ss. 1 (2), 3 (2)). Social media companies are also required to publish detailed half yearly reports about actions taken pursuant to complaints where they have received more than 100 complaints in a year (Bundestag, 2017, s. 2 (1)). In addition, social media companies should facilitate the complaining process by providing user friendly and enduring procedures, give notifications to both the complainant and the user on its decisions and reasons for such decisions.

Notwithstanding the detailed and precise provisions of the German law, several criticisms have been labelled against it for being perilous, defective, weakens free speech, and sets a dangerous model for other states to follow in confining speech online (Human Rights Watch, 2018). Clearly, one of the most glaring deficiencies of the German legislation is the requirement that complaints about unlawful contents online should be assessed by employees of the social media company. The same employees are also responsible for deleting such contents within the time specified, which could range between 24 hours, 48 hours, or a week (Bundestag, 2017, s. 2 (8)). The problem with this provision is manifest in the need for neutrality on the part of an arbiter. In this case, it is true that the employee of the social media company may not be a direct party to the existence or otherwise of the content. However, because the company is under pressure to avoid being made to pay huge penalty, the employee may not take a considered decision and is more likely to decide in favour of removing the content in any case. This will be an easier solution for the company than to risk leaving the content online and be found wanting. This is especially the case because the employees responsible for this decision are not necessarily trained judicial officers. Whatever little training they may receive also comes from the company. Responding to the criticisms, the German Government justified the law, stating that it was a necessary response to an alarming spread of detestable expressions, fake news, spiteful gossip, and defamation (Government of Germany, 2017, p. 1). Describing free speech as the foundation stone of a free nation, the government emphasised the need to respect criminal legislations why exercising the right to freedom of expression. It underlined the relationship between spoken sweeping positions and violence. It justified the need for the law on the inability of initial voluntary efforts to provide the results desired (Government of Germany, 2017, p 1-2).

4.2 Malaysia

Similarly popular among national legislations against fake news, is the Malaysian Anti-Fake News Act (The Parliament of Malaysia, 2018). The law which was published in April 2018, defines fake news as: "... any news, information, data, and reports, which is or are wholly or partly false, whether in the form of features, visuals or audio recordings or in any other form capable of suggesting words or ideas;" (The Parliament of Malaysia, 2018, S. 2). The law applies

to both online and conventional publications and re-publications, which might cover sharing on social media platforms. The extra-territorial application of the law to persons outside Malaysia so long as the fake news affects Malaysia, or a Malaysian citizen is perhaps, one of its most controversial provisions (The Parliament of Malaysia, 2018, s. 3). Under the Act, malicious creation, offering, publishing, printing, distributing, circulating, or disseminating fake news carries a fine of RM 500, 000, or six years imprisonment, or both, in addition to a fine of RM 3000 daily for continuous publication. The court may also order the issuance of an apology and the removal of such publications. As opposed to the German law, its Malaysian counterpart made no exceptions of mainstream media companies, nor individual communications platforms. It is therefore all encompassing. This position perhaps strengthened the belief among critics that the law was meant to gag the media, and to prevent citizens from criticising government. Thus, the law drew criticisms from several sectors of the international human rights movements. It was described as a nebulously worded legislation aimed at outlawing free speech (International, 2018). The law was widely viewed as a move to stifle free speech especially in relation to criticizing government as some said it was only meant to protect then Prime Minister, Najib Razak (Lourdes, 2018). The government justified the legislation on the need to curb the dissemination of false and malicious stories, adding that the law will protect both the government and opposition as it will be administered by the judiciary. This again, is perhaps one of the commendable innovations in the Malaysian law, because subjecting the decisions to the judiciary ensures some neutrality and fairness. In addition, it also ensures that contents will be assessed by judicial officers trained to carry out such functions. Their experience and training in assessing criminal laws and human rights violations will be the difference compared to what obtains under the German law. Thus, while the Malaysian law is textually more likely to result in eroding free speech, it seems to be procedurally better by entrusting the judiciary with the responsibility of enforcing the law. Following the 2018 general elections in Malaysia which saw the opposition taking over government, the law was set to be repealed as specified by the government (Zin, 2018).

4.3 Kenya

In Kenya, publishing fake news is punishable under a recent law, with both fine and imprisonment of

between two and ten years (The parliament of Kenya, 2018, Art. 22 and 23). The law applies to what is referred to as false publications, meaning one who “intentionally publishes false, misleading or fictitious data or misinforms with intent that the data shall be considered or acted upon as authentic, with or without any financial gain...” (The Parliament of Kenya, 2018, Art. 22 and 23). The law specifically curtailed the freedom of expression guaranteed under the Kenyan constitution in relation to ‘the intentional publication of false, misleading or fictitious data or misinformation that (a) is likely to — (i) propagate war; or (ii) incite persons to violence... (d) negatively affects the rights or reputations of others.’ (The Parliament of Kenya, 2018, Art. 22 (2)). With respect to free speech, the Kenyan legislation is likely to be of concern because of the overbroad use of terms such as ‘false, misleading, or fictitious information’. The problem is that these words may be liberally interpreted with an aim to gag the media or opposition or to prevent individuals from exercising their freedom of expression. The requirement that such information or data is likely to lead to violence and civil strife is understandable considering the history behind the legislation which is connected to the violence that followed the country’s prior elections. This is more so since the law was promulgated before the next elections after the crisis. However, how these far-reaching terms will be interpreted is decisive. More troubling though is the part that talks about ‘negatively affects the rights or reputations of others’ (The Parliament of Kenya, 2018, art. 22 (2) (d)). Here, it is not clear whether such information or data need first be shown to have been false in addition to damaging the reputation of individuals. If the two requirements and conjunctive, which seem to be the import of the law, then it may well be better. Otherwise, it may be too vague and clearly an unnecessary restraint to free speech. Again, the Kenyan law made no exceptions between journalistic publications and those on social media or even conventional publications (The Parliament of Kenya, 2018, art. 23).

4.4 Others

In China, the country’s Cyberspace Administration maintained that online media should not disseminate any news taken from social media sites without approval. “It is forbidden to use hearsay to create news or use conjecture and imagination to distort the facts,” (Reuters, 2016). It requires all echelons of Internet management to seriously accomplish their administrative obligations regarding internet content,

reinforce regulation and detection, strictly review and deal with fake and unverifiable news. Government in China, is known for deleting contents on social media platforms, insisting on the necessity of such measures to protect the rights and interests of nationals, and to encourage vigorous growth of the internet (Tambini, 2017, p. 13). Under this system, social media operators must remove what is considered rumour, and the authors may face jail terms of up to 3 years, in addition to suspension of their accounts (Tambini, 2017, p. 13).

In Italy, a 2017 proposed anti-fake news law aimed at criminalizing the posting or sharing of contents considered ‘false, exaggerated or tendentious news’. Offenders may face a fine of up to 5000 Euros, and a jail term where the news could lead to crime or violence. On failure of the Bill to pass through parliament, the government introduced operational protocols aimed at curbing fake news, under which citizens may report cases of fake news to the cyber police which may review such stories (Kaye, 2018, p. 1-2).

In Tanzania, the government issued new regulations it said was meant to protect the nation from lies. The move aimed at fighting fake news, involve the payment of the equivalent of \$920 by bloggers as license fee for placement of content online. It would also entail a fine of \$ 2000 and a jail term of up to one year (Olewe, 2018). In Uganda, the government proposed an anti-gossip tax which targets social media users in the country, to check gossip and lies (Olewe, 2018). A member of parliament in Indonesia had threatened to shut down Facebook if it fails to crackdown on fake news as the country approaches election (The star online, 2018). Other nations from France, to Philippines, India, Nigeria, Russia, Sweden, Jordan and many others have either enacted or muted the idea of enacting laws aimed at regulating hate speech and fake news especially on the social media.

5 THE IMPACT OF REGULATION ON FREE SPEECH

Fake news online defines the juncture of numerous strains: it reflects the manifestations of incongruities among diverse groups traversing societies. Nothing reveals the real effects of the revolution in ICT which could come along with both prospects and trials, like the menace of fake news. It indicates intricate harmonization between the freedom of expression

and the protection of human dignity (Gagliardone et al., 2015, p. 7). This has led nations to recommend legal limitations which may negatively affect free speech. The exact impact of these regulations on free speech will depend on the background of the person examining the laws. For instance, analysis from the USA seem to be more dogmatic about the inviolability of free speech, as the jurisprudence from the USA generally promotes the idea that speech, including hateful and false expressions are protected (Tseis, 2009, p. 498-9). This however, is not a unanimously supported position as some, even in the USA promote the understanding that free speech may be derogated from to protect other democratic values such as equality (Ronald J Krotoszynski Jr, 2005, p. 1326).

Be that as it may, the global scamper to regulate fake news are bound to result in certain consequences for free speech. While it is true that some countries would make strained efforts to ensure minimum derogation from the freedom of expression, others may take advantage of the situation to silent dissent, opposition, and the media (WiltonPark, 2017, p. 6). On the other hand, even those who may not be interested in silencing some voices cannot avoid placing some restrictions on the freedom of expression to curtail fake news. The laws and policies fashioned by several countries to fight fake news might have varying effects on the freedom of expression depending on the contents of the laws and the enforcement mechanisms. For instance, under the German law, contents might be deleted which some would consider an infringement of their freedom of expression, especially where it is not clearly illegal. This is reflected in cases where individuals had their statements deleted or their accounts suspended for what they considered protest, but viewed as hateful statements (The Economist, 2018). As a result, social media platforms are seen to have been subjected to censorship.

Therefore, even where the laws are not overbearingly restrictive, placing the burden of determining the desirability or otherwise of contents on the social media companies is bound to have multiple effects on the freedom of expression. First, because of the huge fines involved, these companies are bound to be more concerned about the revenue they will lose if they are found wanting. As a result, they are more likely to delete contents that might not actually have violated the law just to avoid the possibility of penalty. Therefore, the circumstances under which the social media operators decide whether to delete content or not motivate clampdown on debatably legitimate expression (Human Rights

Watch, 2018). This is even more disturbing when considered from the perspective that even judicial bodies, with all their expertise and experience find these decisions challenging because they require reasoned and informed assessment. Flowing from this is the fact that the decisions of the social media companies are not subject to judicial review which literally translates into having an unrestricted censorship. As a result, individuals may have their expressions censored, and their accounts blocked without recourse to any judicial process. Invariably, their freedom of expression has been left in the hands of non-judicial and privately paid individuals. On this aspect, the Malaysian law on fake news might be said to have established better checks on both government and the social media companies as it incorporates the judicial process (The Parliament of Malaysia, 2018, s.6-8). On the other hand, people having their statements censored and deleted will have the effect of restricting their expressive nature because they will be forced to subconsciously consider the possibility of having their expressions or even their social media accounts deleted. These worries are even more serious under the Chinese, and Ugandan legal regimes which specifically target false stories or rumours. The effect is that the space and freedom enjoyed by individuals on social media networks are gradually being eroded by often vaguely worded laws and policies which are chaotically enforced by profit driven private individuals. In addition, such moves might also have the effect of discouraging individuals from using such social medias, especially after an unfair experience which gives no room for appeal.

Looking at the other side of the problem however, the proliferation of fake news on social media may on its own have the negative effect of driving people off such platforms, hence restricting or diminishing their freedom of expression. For example, individuals who have been bullied, harassed, insulted, or intimidated online are less likely to freely express themselves on these mediums again. In fact, this is the essence of online incitements, hate speech, and false or fake negative stories – to prevent the opponent from airing his/her own point of view.

The regulation of fake news, as may also be seen from the trends discussed above might have had more straining effect on free speech as it requires what may amount to censorship of news and expressions. It is also more restricting on free speech because there is clear difficulty in defining what amounts to fake news, as well as in verifying the authenticity of statements. Consequently, several national courts have found legislations aimed at proscribing fake news inconsistent with the freedom of expression.

Some of these include the decision by a Zambian court which invalidated section 67 of the country's penal code law. The law broadly mandated the media to authenticate the truth of all information, be it theirs or from sources before going to press. In its ruling, the court found that the law was suppressive and an inhibition to free speech (Muchende, 2014). Just recently, the East African Court of Justice invalidated a decision by the Tanzanian government which banned a local newspaper for publishing a seditious story pursuant to an extant law. The court found that the action of the government contravened the country's constitution, the ICCPR, and the African Charter on Human and peoples' Rights on freedom of expression (The East African Court of Justice, 2018).

This however, does not mean that the freedom of expression has no limitations; there are always limitations to freedom especially when it affects the right of others or the peaceful coexistence of the society. As noted by the UN High Commissioner for human rights, regulating free speech within the confines of the law and international human rights standards "does not mean attacking free speech or silencing controversial ideas or criticism" ... it is rather a recognition that the right to freedom of expression carries with it special duties and responsibilities" (UN News, 2017).

6 CONCLUSIONS

Several governments across all regions of the globe have proscribed the spreading and sharing of fake news. In some jurisdiction, such prohibitions are often widely applied against all categories of users ranging from the everyday social media users to important dissidents or opposition, and the press. While some of these legislations may have a far reaching negative effect on the right of citizens to free speech, others have made efforts to limit such consequences. Hence, the German law categorically excludes the mainstream media from the applications of the law and directs its penalty at the social media companies whose platform are used for dissemination of the information. Notwithstanding, it leaves too much power to determine the right of individuals to freedom of expression in the hands of employees of private companies whose primary concern is profit. While the Malaysian legislation is textually overbroad and more likely to be abused, individuals are given the right to access the courts to determine the veracity or otherwise of their stories and their criminal liability. This position, if enforced by an independent judiciary, has the potential to ensure

protection for the citizenry. Similarly, the Kenyan law is to be enforced by the regular courts of the land, though it is textually more overbroad, and is likely to be interpreted negatively against the freedom of expression considering that the law specifically curtailed that right. In addition, the level of independence enjoyed by the courts will determine how these laws will be enforced, hence the need for the contents to be textually clearer bearing in mind the right of individuals to express themselves. It is necessary therefore, that in drafting legislations to counter the spate of fake news and the negative tendencies it has in societies, that governments should be cautious on how much free speech they must restrict or even prevent in the process. Such laws should be designed to ensure a genuine protection of free speech, while at the same time prevent the incidents of fake news, especially the kind that leads to chaos and violence. There is the need to strike a balance between the two competing demands: protection of free speech and the promotion of peaceful coexistence in societies. Clearly, nations can learn from each other and use the strengths in legislations from other jurisdictions to enhance the viability of theirs. For instance, a lot can be learnt from the German law which focuses more on the social media companies, saddling them with the responsibility to remove the contents in good time, rather than unnecessary obsession with penal provisions targeting individuals which may easily metamorphose into censorship. On the other hand, saddling employees of private firms with the responsibility to determine the right of others might not be a good idea because such persons are trained and paid by those firms primarily to help them maximise their profit.

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