FAKE NEWS, DANGEROUS SPEECH AND THE ELECTIONS

Talk to NCIC: KICTANet Community Engagement Report

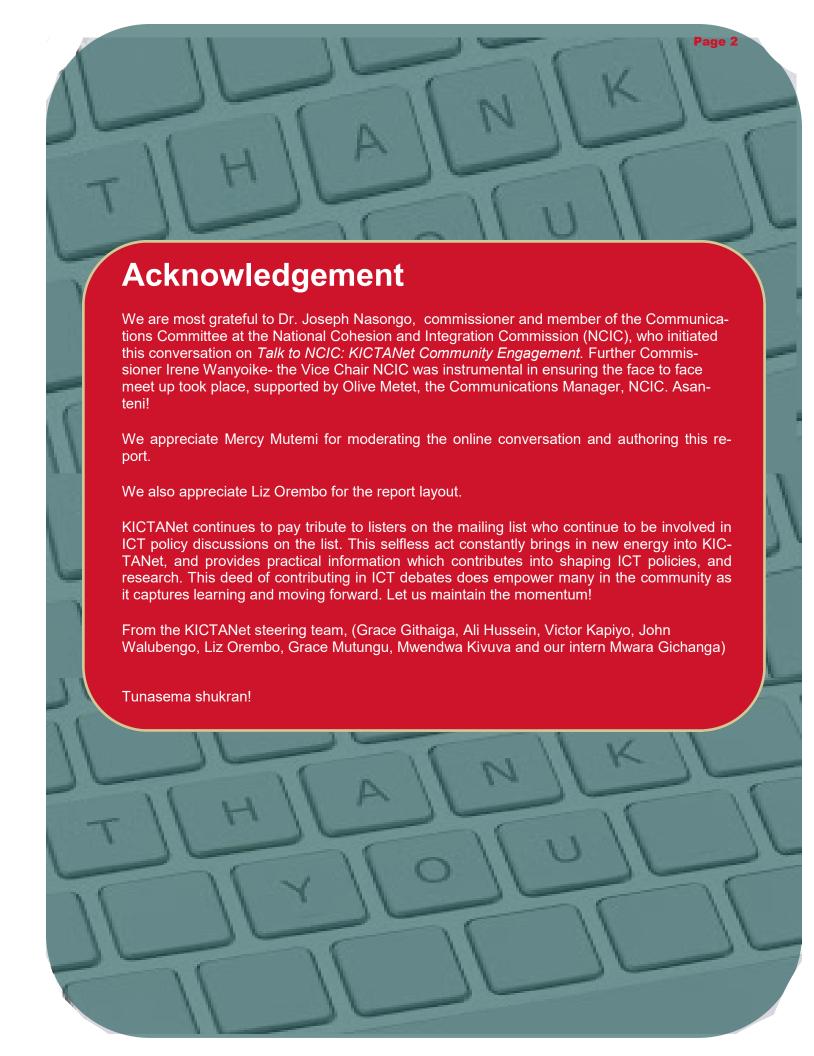# Acknowledgement

INTRODUCTION

The National Cohesion and Integration Commission (NCIC) is established under the National Cohesion and Integration Act to promote harmony, good relations and peaceful co-existence between different ethnic communities in Kenya.

KICTANet is a multi-stakeholder platform for people and institutions interested and involved in ICT policy and regulation. The network aims to act as a catalyst for reform in the ICT sector in support of the national aim of ICT enabled growth and development.

In the period leading to and after the 2017 general elections, there was a marked increase in the publication and sharing of fake news through social media. A lot of the fake news posts amounted to hate speech, ethnic contempt and inflammatory messages. The NCIC, in carrying out its role, has set out to define boundaries when it comes to social media use to advocate for responsible posting without compromising constitutional freedoms. The Commission invited KICTANet to make contributions on possible interventions in dealing with fake news. These could be in the form of proposed policy changes or ideas for self-regulation. This was a welcome initiative as it is in line with the constitutional principle of consulting the public whenever public officers make or implement public policy decisions.

KICTANet held a three day discussion on fake news on its mailing list from 16th to 18th August, 2017.

On Day 1 of the discussions, members of the mailing list were invited to give their perspectives on 'Users and Fake News guided' by the following questions:

1. Why is there an increase in the prevalence of fake news recently?

2. What is the role of different categories of users in combating fake news?

3. Have Kenyans given up or are there good practices in combating fake news.

4. We have bloggers who are seen as influencers. Do they have a higher duty when communicating?

Day 2 focused on 'Platform Responsibility'. The guiding questions for this day were:

1. What is the effect of fake news to the mainstream media?

2. What is the role of the Kenyan media in combating fake news?

3. Is the Kenyan media doing enough?

4. What should platforms such as Facebook and Google be doing to reduce the effect of fake news? Is there a need for localised solutions?

Day 3 questions centred on 'Government Regulation':

1. Should the spreading of fake news be a crime? How about when fake leads to incitement?

2. The NCIC and the CA (Communications Authority); do these agencies have the sufficient mandate to combat fake news?

Subsequently, NCIC and KICTANet held a breakfast meeting on 1st September themed: *Talk to NCIC: KICTANET Community Engagement on Fake News, Dangerous Speech and the Elections.* Participants were taken through a summary of the online debate after which the NCIC was given an opportunity to respond to the questions raised therefrom. There was a plenary session afterwards where participants sought NCICs response on a variety of issues. This report covers both the online engagement as well as the breakfast meeting.

CONTENT

SUMMARY OF THE DISCUSSIONS

The responses from the online discussions have been clustered into three key areas: understanding fake news and its impact, the legal framework on fake news and the role of various stakeholders in combating fake news.

Understanding Fake News

Fake news refers to fabricated news that has no basis in fact but is presented as being factually accurate. The spreading of fake news, disinformation, is done deliberately to deceive. Fake news is comparable to propaganda in its popularity as a tool during electioneering. It is therefore not a new phenomenon.

A surge in fake news production and consumption coincided with an increase in political rhetoric in the run up to the August 2017 elections and after the declaration of the presidential election results. One survey conducted right before the elections reported that 87% of its respondents had come across information that was deliberately false on social media platforms. This coincidence suggests a societal fixation on ascent to public office. Fake news is employed to achieve this goal at whatever cost.

Several reasons were given for the increase in fake news circulation. For one, the dissemination of information and content has become much easier and faster on the internet. Secondly, advertisers, data mining and analysis companies and bloggers have turned fake news production into a business model. Further, unlike traditional propaganda, the cost of distributing information over the internet is inconsequential. In addition, social media platforms provide ready audiences for this information. Anonymity online also provides a cover for the creators of fake news making any accountability efforts futile.

From the discussions, it was clear that there is a relationship between fake news and hate speech, although the two are not synonymous. Kenyan politics often takes ethnic dimensions. Political players, having noted the instantaneous efficiency of fake news, have invested in it to gain mileage. Anonymity online, the ease with which one can create a website and the *virality* of fake news posts makes them ideal for hate speech propaganda. Fake news creators take advantage of impressionable and already prejudiced audiences who are likely to share the same posts with their networks thus keeping the posts alive. This threatens the constitutional aspiration to live in peace and unity as one indivisible nation despite our ethnic diversity. It is therefore within NCICs mandate to consider ways in which fake news can be tamed.

The fake news euphoria also presents the government with a potent tool to silence critics and redirect social media rhetoric.

The Impact of Fake News

Participants spent some time exposing the negative impact of fake news. It was noted that fake news prevalence leads to the loss of trust in mainstream media, in social media platforms and detrimentally, the internet. Trust is necessary if we are to fully realize the benefits of the internet.

The Kenyan scenario suggests that where fake news has been employed as a tool, hate speech is almost always a likely consequence. Inevitably, these fake news posts become incitement to violence.

A further undesirable impact observed was that fake news caused panic and hampered humanitarian efforts after the August 2017 poll results. Posts on alleged instances of violence and of government action in parts of the country dominated social media platforms. A lot of these turned out to be fake news. Photos that were first presented as true accounts of the situation on the ground were later discovered to be old photos of past events. False reports of deaths and injuries side tracked efforts by the Kenya Red Cross at the most inopportune time as there were genuine cases elsewhere.

The fake news euphoria also presents the government with a potent tool to silence critics and redirect social media rhetoric. Reports critical of the government may easily be dismissed as fake news. For instance, in August 2017 the Cabinet Secretary, Ministry of Interior and Coordination of National Government dismissed reports that post-election protesters had been killed by police stating that this was fake news. This dismissal came at time when fake news posts were in abundance. Users thereafter treat any reports on police brutality, whether accurate or not, as fake news. This impacts the right to access information and obstructs transparency and accountability. There is a further risk of fake news being used as a justification for an internet shutdown as was the case in Uganda in 2016.

The Legal Framework on Fake News

Participants were categorical that all of these regulatory routes must be mindful of the human rights and freedoms guaranteed online.

The Constitution guarantees freedom of expression under Article 33. This right may be limited (through specific legislation) when it is exercised to front hate speech, advocacy of ethnic hatred, discrimination or incitement to violence. Section 13 of the National Cohesion and Integration Act, 2015 further criminalizes hate speech which is defined as speech where ethnic hatred is the desired or likely consequence. Therefore, in as far as a fake news post amounts to hate speech, this is actionable.

One school of thought from the discussions was that comprehensive legislation is required to make creation of fake news unlawful and compel social media platforms to pull down fake news posts. This is the direction taken by the Computer and Cybercrimes Bill, 2017 which criminalizes publication of fake news. This provision does not discriminate on the effect; it simply bans publication and sharing of fake news. This approach was critiqued. Foremost, such legislation would be difficult to enforce since most peddlers of fake news do so using pseudo accounts. Secondly, to implement such a provision, further interventions would be necessary such as the requirement for real name social media accounts, doing away with anonymity. Anonymity online ought to be protected as it allows for free expression of unpopular ideas and protects government critique. The greatest handicap of this approach is that it fails to meet the constitutional test set out in Article 24; legislation seeking to limit freedom of expression ought to be specific on the nature and extent of the limitation while being reasonable and justifiable in an open and democratic society.

The other approach, which was preferred by most participants, was to enforce existing legislation (for instance on hate speech) and guidelines. What is illegal offline should be illegal online without the need for additional legislation. Similarly, the same standards required of journalists ought to be extended to content creators online.

Domain and content takedowns were proposed as a possible solution to curb fake news. It was pointed out that this is one area that ought to be navigated carefully and with restraint. Blocking access to certain domains risks the fragmentation of the internet. Opening this avenue also risks further state control and abuse.

Participants were categorical that all of these regulatory routes must be mindful of the human rights and freedoms guaranteed online. Content control by the government inevitably restricts the freedom of expression, the freedom of the media, access to information, freedom of opinion and freedom of association. These rights are guaranteed under the Constitution. Limiting them must therefore be in accordance with the safeguards provided under Article 24. Previous attempts to regulate speech by criminalizing undesirable conduct have been held to be unconstitutional.

Policing social media was vigorously opposed. This would undermine the freedom of speech. It was felt that reporting individual posts and sites and massive user education would be more effective without risking fundamental freedoms.

ROLE OF DIFFERENT STAKEHOLDERS IN COMBATING FAKE NEWS

A. Users

Many contributors advanced that all internet users have a duty to call out fake news and its propagators. The first step is to take to the practice of fact checking. Once posts are identified as fake news, they should be labelled as such. Those who are quick to spot fake news should educate other users and equip them with the skills on how to spot fake news.

B. Mainstream Media

Mainstream media was singled out as one of the main casualties of fake news. Fake news compromises its credibility. On occasion, fake news posts have been cunningly passed off as genuine posts from established media outlets. In these cases, media houses should be quick to disown these posts. They ought to use the legal tools available to fight such encroachment e.g. intellectual property protection and rules against passing off and unfair competition. This calls for vigilant monitoring of social media chatter. Over and above, mainstream media has a duty to expose fake news posts as done by Nation's Newsplex.

The Code of Conduct for the Practice of Journalism in Kenya requires that reporters only write accurate stories on matters of public interest. The Code also prohibits the use of 'negative ethnic' terms. Journalists must therefore desist from publication and sharing of fake news and instead invest in well researched and accurate reporting if they are to maintain their niche as trustworthy sources of information. Citing their sources is one of the ways of discouraging idle posting.

C. Civil Society, ICT4D and Academia

Civil society organizations and actors involved in Information and Communications Technologies for Development (ICT4D) initiatives were encouraged to embark on awareness campaigns disabusing internet users of fake news consumption and dissemination. These campaigns should focus on the impact of fake news, how to spot it and how to stop it.

Educators were urged to expose their students to media and information literacy and teach them about responsible online behaviour.

D. Bloggers

Bloggers are not only users but also influencers in today's society. The term blogger is loosely used to refer to frequent writers of content on social media. They enjoy wide readership and are often the propagators of fake news. As users, it was opined that they have a duty to check the veracity of posts before sharing them. As bloggers, they ought to use their platforms to call out fake posts. They have an additional duty as influencers to abstain from peddling fake news. Enforcing this duty is however difficult given the monetization of fake news and that the more likes they get for controversial content, the more money they make.

E. Social media Platforms and Search Engines

Search engines and social media platforms have a role to play as well, given that their platforms are the main avenues of fake news exchange. So far, Google's Fact Check tool enables publishers to show a 'Fact Check' tag. This tag identifies news stories that have been fact checked by news publishers and fact-checking organizations.

Facebook has focused on three areas; disrupting economic incentives for fake news posters, building new products to curb the spread of fake news and helping its users make more informed decisions through its 'Tips to Spot False News' educational tool and its reporting tool.

It was felt that localised solutions are required to complement these efforts and address scenarios outside the scope of Google and Facebook. Local independent initiatives such as PesaCheck, AfricaCheck were lauded. Proposals are needed on how to address fake news posts shared via WhatsApp.

The technical community was urged to carry out research and come up with ingenious solutions to this problem for instance on automated content control.

WAY FORWARD

Stakeholders should develop a National Value System to entrench ethical values into the Kenyan culture.

During the discussions, several proposals were made on the way forward:

1. NCIC, in consultation with social media platforms and other stakeholders, ought to develop a Best Practice Manual on fake news.

2. NCIC should involve bloggers in the fight against fake news. Using their platforms to call out fake news posts will certainly reach a wider audience.

3. NCIC ought to carry out comparative studies with other jurisdictions to find out what measures they have put in place to curb fake news and whether these measures have been fruitful.

4. All the different categories of stakeholders should intensify awareness campaigns.

5. KICTANet should engage with KENIC on the issue of takedowns, especially on the feasibility of a content policy.

6. It was proposed that the internet community should reach out to the Ministry of Education and the Kenya Institute of Curriculum Development to incorporate Media and Information Literacy into the curriculum.

7. Many participants were of the opinion that fake news is a manifestation of deeper societal issues, key among them being greed for public office and divisive politics. It was proposed that there be developed a National Value System to entrench ethical values into the Kenyan culture.

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