



Lessons for Regulating Campaigning on Social Media

Election Case Law Analysis Series

ELECTION ✓ **JUDGMENTS**

CASE LAW SERIES | PART 2 | December 2021

Lessons for Regulating Campaigning on Social Media

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ELECTION JUDGMENTS

Election Case Law Analysis Series

With support from the United States Agency for International Development (USAID), in 2021, the International Foundation for Electoral Systems (IFES) launched [ElectionJudgments.org](https://electionjudgments.org), a curated global database that makes judicial decisions on election cases of all types more transparent and accessible. It is a resource for judges, election professionals, policymakers and researchers who are working to resolve disputes and prevent violations for more credible elections around the world.

Intended to facilitate the exchange of sound precedents across jurisdictions, IFES has used this database to conduct an initial analysis of critical judgments on a variety of topics, represented in a new 'Election Case Law Analysis Series.' This paper is the second in this series, focused on critical judgments related to regulating campaign activities on social media.

The [ElectionJudgments.org](https://electionjudgments.org) database is updated on a periodic basis. To contribute judgments or resources, please use the appropriate form [here](#) or [contact us](#).

This paper is made possible by the generous support of the American people through the United States Agency for International Development (USAID) under the Global Elections and Political Transitions (GEPT) Program. The opinions expressed herein are those of the authors and do not necessarily reflect the views of USAID or the United States Government.



About IFES

IFES advances democracy for a better future. We collaborate with civil society, public institutions and the private sector to build resilient democracies that deliver for everyone. As a global leader in the promotion and protection of democracy, our technical assistance and applied research develops trusted electoral bodies capable of conducting credible elections; effective and accountable governing institutions; civic and political processes in which all people can safely and equally participate; and innovative ways in which technology and data can positively serve elections and democracy. Since 1987, IFES has worked in more than 145 countries, from developing to mature democracies. IFES is a global, nonpartisan nonprofit organization based in Arlington, Virginia, and registered as a 501(c)(3).

IFES By The Numbers



Reached 205M+
people with civic and
voter education



Trained 759,326
election officials
in fiscal year 2019



Worked in 145+
countries

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Executive Summary

With support from USAID, in 2021, the International Foundation for Electoral Systems (IFES) launched ElectionJudgments.org, a curated database of national election judgments from around the world that facilitates the exchange of sound precedents across jurisdictions.¹ IFES has drawn on the database to conduct an initial analysis of cases involving online campaign violations so we can better understand the challenges that arise when applying regulations designed for offline campaigns to online conduct.

A review of the litigation in this space, from France to Moldova and New Zealand to Mexico, found that new and tailored approaches that go beyond extending existing regulations that were designed for “traditional media” are needed for regulation of online campaigning to be effective. The cases in this analysis illustrated several important ways in which social media platforms differ from traditional media outlets, including a lack of an editorial process and the involvement of new actors, from citizens to social media influencers. The cases also highlight the need for a careful consideration of proportional remedies and more nuanced provisions that avoid imposing overly broad restrictions on speech.

While this paper identifies some important considerations for policymakers in this space, it also acknowledges that changes in technology will likely continue to exceed the pace of regulation - leaving courts responsible for ruling in the gray areas. It is therefore imperative for judges to understand how platforms work in practice. Training and tailored resources could be useful to help judges understand the unique aspects of social and digital media and how they may clarify the types of conduct that might constitute online campaign violations.

Introduction

Social media’s influence over all aspects of life, including the political process, has grown tremendously over the last decade. The ability to access virtual platforms and engage with global communities of users has made our world more interconnected than ever before. However, the advance of social media can be a double-edged sword, especially during an election cycle. On the one hand, social media can enable candidates to communicate more directly with voters in real-time, but on the other, disinformation, hate speech, and censorship online are seen as fundamental threats to the integrity of elections worldwide.

In its [Countering Disinformation Guide](#), CEPPS shares extensive research and analysis about some of social media’s negative impacts on the democratic process and what can be done to promote information integrity. In assessing the legal and regulatory environment, the Guide notes significant variation in the extent to which legal and regulatory

¹ The Elections Judgments database is supported by the United States Agency for International Development (USAID) under the Global Elections and Political Transitions (GEPT) Program.

frameworks have been adapted to regulate campaigning online and via social media platforms.² Some states have reformed their legal frameworks to directly regulate social media. In 2020, Germany drafted new definitions of media to include different modes of digital media; for example, broadcast-like mediums, media platforms, user interfaces, and “. . . search engines, smart TVs, language assistants, [and] app stores.”³ In June of 2021, the House of Commons in Canada passed Bill C-10, a sweeping new law to regulate social media companies like Facebook and YouTube.⁴ Other jurisdictions have introduced broad new legislation prohibiting “fake news” that present concerning implications for free speech and expression.⁵ However, most countries have not updated their legal and regulatory frameworks to account for the increasingly sophisticated digital tactics used by campaigns.⁶

Some of the challenges in regulating digital conduct stem from the conflict of competing rights familiar to other parts of the electoral framework – balancing protection from harms or electoral equity against the freedom of expression, for example. Social and digital media also alter the modes of campaigning in unique ways. There is no legal consensus around fundamental definitional considerations, such as what range of technologies constitute digital or social media; how to define the boundaries between organic and paid engagement on social media; or what constitutes an online advertising expenditure. The development of regulation moves at a slower pace than the evolution of technology, creating a bias toward regulation that addresses well-understood challenges of yesterday rather than anticipating the challenges of tomorrow. Enforcement is also difficult, given the challenges of monitoring online content and advertisements, as well as insufficient transparency around, for example, the use of personal data or undisclosed paid relationships between political actors and online content created or posted by third parties.

“We sympathise with the Commission, which has a difficult mandate and must work with patchwork legislation that is difficult to make sense of and only partly adapted to the disruptive, unruly and increasingly powerful medium of communication that is the internet. We will take interpretation so far as we can, acknowledging . . . that there comes a point where the legislature must be left to change the law if it thinks fit.”

² Lisa Reppell, *Legal and Regulatory Responses to Disinformation* in **Countering Disinformation: A guide to promoting information integrity**. CEPPS (updated Apr. 1, 2021), available at <https://counteringdisinformation.org/node/2704/>.

³ Id. at <https://counteringdisinformation.org/topics/legal/1-definitions#DigitalSocialMedia>. See Osborne Clark, *New State Treaty on Media to replace Treaty on Broadcasting and to create legal framework for a changed media landscape* (June 24, 2020), available at <https://www.lexology.com/library/detail.aspx?g=e50f9bb5-95bb-4293-b3d5-3fc4d0b3e84c>.

⁴ Bill C-10 (June 21, 2021) (Canada), available at <https://parl.ca/DocumentViewer/en/43-2/bill/C-10/third-reading/#ID0E0CC0AA>.

⁵ Reuters, *Factbox: ‘Fake News’ laws around the world* (Apr. 2, 2019), available at <https://www.reuters.com/article/us-singapore-politics-fakenews-factbox/factbox-fake-news-laws-around-the-world-idUSKCN1RE0XN>; Research Office, Legislative Council Secretariat of Hong Kong, *Information Note: Measures to tackle disinformation in selected places* (2021), available at <https://www.legco.gov.hk/research-publications/english/2021in14-measures-to-tackle-disinformation-in-selected-places-20210623-e.pdf>; Lisa Reppell, Beata Martin-Rozumilowicz & Vasu Mohan, *Preserving Electoral Integrity During and Infodemic*, IFES COVID-19 Briefing Series (2020), p. 15, available at https://www.ifes.org/sites/default/files/ifes_covid19_briefing_series_preserving_electoral_integrity_during_an_infodemic_june_2020.pdf.

⁶ Lisa Reppell, *supra* note 2, <https://counteringdisinformation.org/node/2704/>.

– Court of Appeal of New Zealand in [The Electoral Commission v. Watson and Jones](#)

As policymakers grapple with effective regulation of these issues, many EMBs and courts must rely on the legal and regulatory frameworks designed for “traditional media” – print, radio, and television. In the electoral context, these might include campaign and media regulations as well as laws on discrimination, libel, slander, and defamation. IFES’ recently launched [ElectionJudgments.org](#) houses a collection of national election judgments from courts around the world. Intended to facilitate the exchange of sound precedents across jurisdictions, this curated database enables judges, election professionals, and researchers to filter and search cases by topic or thematic area, including “social media.”

In this paper, IFES offers an initial analysis of the judgments available in the database that include allegations of campaign violations on social media. A comparative look at the types of violations that have been brought before courts and an examination of how existing legislation is applied to the use of social media yields insights for legal and regulatory reform. The next section examines allegations of campaign violations by candidates or political parties, while the following section looks at cases brought in response to content shared by a wider range of social media users, further blurring the line between protected free speech and regulated campaign activity.

Taking the Campaign to Social Media: Challenges in Applying and Enforcing Offline Regulations to Online Spaces

Applying campaign regulations to content disseminated via social media platforms can be challenging, particularly when regulations have been designed for traditional media and not adequately adapted to online campaigning. Two judgments regarding alleged campaigning before designated campaign periods, one from 2012 in [Mexico](#) and another from 2010 in [Brazil](#) illustrate some of these challenges and the differing ways in which courts have distinguished social media from “traditional media” to inform the types of online conduct that would be considered campaign violations.

In the Mexican case, the Federal Election Tribunal held that a Presidential candidate tweeting a YouTube clip of an interview he had conducted prior to the designated campaign period was not a premature campaign act and was instead a personal opinion on current social issues.⁷ On the other hand, the Superior Electoral Court of Brazil ruled that a candidate announcing their run for President via Twitter prior to the campaign period was illegal electoral propaganda.⁸ It should be noted that the campaign regulations of each country differ, and the facts of these cases are not directly comparable – particularly the fact that the Brazilian candidate directly solicited votes in his Twitter

⁷ Institutional Revolutionary Party v. Andrés Manuel López Obrador (SUP RAP 0268 2012) (May 24, 2012) (Mexico), *available at* <https://electionjudgments.org/en/entity/4xu3lhvt9su>.

⁸ Antonio Pedro de Siqueira Indio da Costa v. Public Electoral Ministry (No. 1825-24.2010.6.00.0000) (June 4, 2020) (Brazil), *available at* <https://electionjudgments.org/en/entity/93tllk9zp6>.

posts, while the Mexican candidate spoke more broadly of opinions on a variety of social issues (even if some seemed to overlap with his policy platform).

As part of its analysis, the Federal Election Tribunal of Mexico differentiated online content from traditional broadcast media, explaining that audiences on the internet must have intent and take action to seek out information based on their interests, while on radio or television, advertisements are presented spontaneously without the explicit will or interest of the consumer. In the Court's analysis, this evidence pointed to the fact that the posts at issue would not be considered an anticipated campaign act by Mexican legal standards, but rather personal ideas and opinions shared with an interested audience that had signed up to receive the content. However, the Superior Electoral Court of Brazil came to the opposite conclusion in response to a similar argument made by an appellant, who asserted that because access to content on Twitter depends on users actively seeking it out, it cannot be considered campaigning. The Court disagreed, noting that content posted on Twitter can reach any internet user that accesses the site, extending even beyond the poster's direct followers given the ability to "retweet" content and the interconnected nature of social media services and internet communication tools, particularly when there was no effort made to make content private. The lower Court's decision (which was affirmed by the Superior Electoral Court of Brazil) also distinguished social media posts from content that might be provided in interviews on traditional media by emphasizing that while traditional media outlets report on information that they determine is of interest to society, on Twitter, "the user selects what he considers to be interesting and makes its messages known to society." In emphasizing that social media platforms lack the editorial processes of traditional media, the Court hits on an important function of social media—that of dissemination, rather than social interaction and debate—which has unique utility when it comes to campaigning.

While these two cases are now nearly a decade old, the different conclusions reached by the courts highlight the importance of adopting tailored approaches to effectively regulate online campaigning⁹ as well the need for the judiciary to understand how different social media platforms function in practice so they can render meaningful judgments. While the former represents an ongoing challenge for the field, training and resources designed to help judges understand the functional underpinnings of social media platforms and the strategies that political actors use to campaign online could be one way to help courts bridge the gap while good practice emerges for regulation in this area.

"Though most countries have established norms and rules to govern the flow of information via print and broadcast media during campaigns and elections, the democratic principles that inform these laws and regulations – freedom of expression, transparency, equity, and the promotion of democratic information – have not been consistently extended to social media and online campaigning."

– Lisa Reppell in the [Countering Disinformation Guide](#)

⁹ Lisa Reppell, *supra* note 2, <https://counteringdisinformation.org/node/2704/>.

Adapting and tailoring regulation to the realities of online campaigning extends to a consideration of appropriate remedies. In a more recent case in [France](#), a mayoral candidate was alleged to have violated the electoral silence law after posting a photo on Facebook that showed him delivering a speech at an official ceremony, reflecting his mayoral duties.¹⁰ In addition, a deputy mayor was also alleged to have posted electoral propaganda on Facebook in violation of the silence period by telling voters to “choose experience over adventure,” an implied appeal to vote for the incumbent mayor. The Constitutional Council ruled that the messages disseminated on Facebook did not have a private character and were intended to reach a wider audience. In addition, the Council found that such posts were likely to alter the election results and ordered the cancellation of the 2017 local elections. While the Council did not provide much detail about the factors that were considered to determine that the election results were likely impacted, given that the margin of victory in the municipal election was just seven votes, the burden may not have been particularly high. A separate French case regarding political advertising of a candidate list on Facebook sheds light on some potential factors that could be examined by the court.¹¹ In this case, the Council found that while it was unlawful political advertising it did not alone violate the integrity of the polls due to the low impact of the publication (limited views on Facebook) and the non-controversial nature of the post.¹² Regardless of the factors used to make the determination that the violation has impacted the results, it should be emphasized that annulment is considered an extreme remedy with a high risk of political manipulation.¹³

In a similar case in [Moldova](#), the Supreme Court upheld a decision to annul the 2018 mayoral election in Chisinau due to violations of the electoral silence period on election day.¹⁴ In this case, both parties were alleged to have violated the campaign silence period, including by posting messages encouraging voters to go to the polls. The lower court found that these irregularities were sufficient to have influenced the results of the elections, and therefore the results should be invalidated – a decision that was ultimately upheld. This assessment was based primarily on the finding that the social media posts reached tens of thousands of individuals, more than the margin of victory, and that the voter turnout was substantially higher than in previous rounds and elections. The decision to annul the results of the election was considered by many to be disproportionate to the offense and controversial because the second-place candidate had strong ties to the ruling party.¹⁵ This highlights the importance of the consideration of proportional remedies for online campaign violations, including standard criteria or methods of evaluating the impact of violations

¹⁰ Harle v. France (Décision n° 2017-5092 AN) (Dec. 18, 2017) (France), available at <https://electionjudgments.org/en/entity/k0vzxtsspak?page=1>.

¹¹ Conseil d'État (CE), 6ème chambre, 28 May 2021, N° 445567 (unpublished in Lebon collection) (France), available at <https://electionjudgments.org/en/entity/fqurl25x98d>.

¹² *Id.*

¹³ See, Chad Vickery, David Ennis, Katherine Ellena & Alyssa Kaiser, *When Are Elections Good Enough? Validating or Annuling Election Results*, IFES (October 2018).

¹⁴ Appeals declared by the Political Party "Dignity and Truth Platform" and the electoral candidate Andrei Năstase, by Political Party "Party of Socialists of the Republic of Moldova" and by the Electoral Council of the Chisinau Municipal Electoral District No. 1, (Nr. 3ra-998/18) (June 25, 2018) (Moldova), available at <https://electionjudgments.org/en/entity/5hmve441cp>.

¹⁵ See, Radio Free Europe/Radio Liberty, *Moldovans Protest Nullification Of Chisinau's Mayoral Election Results* (June 24, 2018), available at <https://www.rferl.org/a/moldovans-protest-nullification-chisinau-mayoral-election/29316498.html>; Radio Free Europe/Radio Liberty, *Moldovan Supreme Court Upholds Decision To Void Chisinau Mayoral Election Amid Protests* (June 25, 2018), available at <https://www.rferl.org/a/moldovan-supreme-court-upholds-decision-chisinau-mayoral-election-voided-protests/29318960.html>.

on the results – something that might consolidate through the evolution of case law or be clarified as regulations are further adapted to common campaign practices on social media.

When jurisdictions do establish regulations for online campaigning, courts may be called on to determine their constitutionality. This can be especially critical when regulations place restrictions on online speech. For example, in [South Korea](#), the Constitutional Court was called on to rule on the constitutionality of a legal provision that prohibited candidates from publishing a column, comment, contribution, or writing on online media within 90 days of the election.¹⁶ In this case, the Court acknowledged that while the restriction was intended to avoid unfairness in election news reporting online and the circumvention of campaign rules, it was overly broad since it prohibited the online publication of information that may not necessarily be political speech or otherwise tied to an election campaign. Thus, the Court found that the provision was an unconstitutional restriction on the complainant's freedom of speech.

In 2018, **France** took a unique approach to regulating misinformation and disinformation around elections, adopting a new law aimed at combatting fake news during campaign periods that gives judges the responsibility to determine whether content should be blocked if it meets three criteria – is manifestly fake, disseminated deliberately on a massive scale, and disrupts public order or affect the outcome of an election.¹⁷ It also requires news and social media platforms to establish transparent mechanisms for users to report disinformation and to disclose sources of funding of sponsored content in the 90 days ahead of an election and inform users about how their information is being used to promote sponsored content.¹⁸ The adoption of this law was highly controversial, with many criticizing the 48-hour time frame for judicial decisions to be insufficient and highlighting risks to the freedom of the press.¹⁹ Critics also fear that it may create incentives for platforms to block more content than necessary to avoid liability, eroding freedom of expression.²⁰

A similar provision in the Electoral Code targeted at political parties and candidates was raised in a recent case in [France](#).²¹ This provision makes it an electoral offense subject to a 15,000 Euro penalty and a year in prison for “those who, with the help of false news, slanderous rumors or other fraudulent maneuvers, have caused one or more voters to abstain from voting.”²² A candidate on the party list for the 2020 municipal elections was accused of publishing fake news when they posted on Facebook to inform voters of the special measures of voting under COVID-19 (proxy voting) and encourage voters to take their ballot to the polling station in person. While the complainant argued the

¹⁶ *Case on Restricting Online Media from Publishing Columns, etc. Written by Candidates for Public Official Election* (016Hun-Ma90) (Nov. 28, 2019) (South Korea), available at <https://electionjudgments.org/en/entity/6q3i67x1phf>.

¹⁷ France, Organic Law no. 2018-1201 and Law no. 2018-1202 of 22 December 2018 relating to the fight against disinformation. These laws led to the insertion of two new articles in the French Electoral Code: Article 163-1 and 163-2. Research Office, Legislative Council Secretariat of Hong Kong, *Information Note: Measures to tackle disinformation in selected places* (2021), available at <https://www.legco.gov.hk/research-publications/english/2021in14-measures-to-tackle-disinformation-in-selected-places-20210623-e.pdf>

¹⁸ *Id.*

¹⁹ Adam Nossiter, *Macron Pushes Bill Aimed at 'Fake News' as Critics Warn of Dangers*, *The New York Times* (June 6, 2018), available at <https://www.nytimes.com/2018/06/06/world/europe/macron-france-fake-news.html>.

²⁰ Research Office, Legislative Council Secretariat of Hong Kong, *supra* note 15.

²¹ Conseil d'État (CE), 6ème chambre, 28 May 2021, N° 445567 (unpublished in Lebon collection) (France), available at <https://electionjudgments.org/en/entity/fqurl25x98d>. *Article 97 of Electoral Code*.

post constituted false or misleading information that dissuaded voters from voting, the Council of State upheld the lower Court's finding that the content of the message was not false and cannot be considered as dissuading voters from casting their vote. The impact of this criminal provision is however limited by the jurisprudence in France, which requires to prove the impact on the sincerity of the election.²³

As more jurisdictions adopt legislation to combat the corrosive impact of misinformation and disinformation on elections, the implementation of provisions like these that give judges a central role in determining what should be considered “fake news” will need to be closely examined to determine the potential for negative impacts on judicial independence – or the public perception of independence – as they are asked to wade deeper into issues that have the potential to be deeply political and divisive. In these cases, it will be especially important that courts are equipped with clear legal criteria to make these determinations. As noted in the Countering Disinformation Guide, “The proportionate application of such law[s] [are] dependent on an independent judiciary insulated from political pressure, well-trained judges capable of understanding the digital information ecosystem, and a well-resourced judiciary capable of expediting the review of such claims, including any appeals.”²⁴ Additionally, in many instances, countries that lack adequate democratic safeguards are mimicking measures adopted by European democracies, representing a high risk of selective enforcement that could be used to silence political opposition and the press. For instance, this has been the case with Germany's Network Enforcement Act, which establishes “intermediary liability” for social media platforms of a certain size to remove “manifestly unlawful” content within 24 hours and other unlawful content within seven days with penalties of up to 50 million Euros for failing to comply.²⁵ While the Network Enforcement Act itself is accused of violating international human rights standards, it has been used as a model for similar laws in at least 13 other countries, including Venezuela, Vietnam, India, Russia, Malaysia, and Kenya, which have expanded the scope of content from unlawful to other vague categories, such as “fake news” or “anti-government propaganda.”²⁶

Finally, another **French** case highlights the significant challenges in capturing online content as evidence to substantiate electoral complaints or allegations of criminal conduct.²⁷ In this case, a mayoral candidate purchased an advertisement on Facebook for the candidate's official profile, hoping to reach current and new subscribers.²⁸ The advertisement commenced forty days before election day, which was before the designated campaign period began, and was to continue throughout the election period. However, Facebook took the advertisement down a few days later after it was posted. Due to Facebook taking down the advertisement, the Court of Nîmes was not able to establish the likelihood that it reached enough voters to have had an impact on the results of the election. As a result, the court dismissed the complaint. As this case illustrates, when social media platforms detect wrongdoing, they often remove the accounts or content. While this is a positive development, often the evidence of the accounts or posted contents are not preserved once they are removed, which can stifle efforts at enforcing existing regulations through

²³ Romain Rambaud. *Droit des Elections et des Référendums politiques*, para.1317, p.702. (2020).

²⁴ Lisa Reppell, *supra* note 2, <https://counteringdisinformation.org/topics/legal/1-definitions>.

²⁵ Jacob Mchangama & Joelle Fiss, *Germany's Online Crackdowns Inspire the World's Dictators*, *Foreign Policy* (Nov. 6, 2019), available at <https://foreignpolicy.com/2019/11/06/germany-online-crackdowns-inspired-the-worlds-dictators-russia-venezuela-india/>.

²⁶ *Id.*

²⁷ Lisa Reppell, *supra* note 2, <https://counteringdisinformation.org/topics/legal/6-enforcement>.

²⁸ Conseil d'État (CE), 4ème chambre, 31 May 2021, N° 441849 (unpublished in Lebon collection) (France), available at <https://electionjudgments.org/en/entity/ivj19exegc>.

investigation or legal processes. Although there is a need to balance this issue with the protection of personal data, this case raises the importance of considering obligations for platforms to preserve and provide information as evidence when content may violate local laws.²⁹

“But I’m not a politician!”: What if the poster isn’t a political player?

When applying campaign regulations to social media content, judges have an important role to play in protecting an individual’s right to free speech and political expression.³⁰ This can be particularly challenging as legislatures aim to regulate online speech which does not always fit into clearly defined categories, and when changes in the social media environment can quickly outpace legislative processes. Balancing fundamental rights—freedom of speech, the equal treatment of candidates, and the protection of voters from undue influence and intimidation—can also be particularly challenging when applying the law to the broad range of actors that are active online.

From the review of cases on ElectionJudgments.org, public officials emerged as one category of user whose online activity can raise legal questions about the balance between free speech protections and preventing the abuse of state resources – including the use of official accounts or online content – in election campaigns. For instance, in [Kosovo](#), the Prime Minister was accused of using a photo of the Director of Kosovo Police, without their permission, in a Facebook video promoting his campaign for public office.³¹ In this case, the Election Complaints and Appeals Panel found that the candidate took advantage of a public employee to advance his political campaign. In a case brought in [South Korea](#), a public-school teacher, considered a “public official” under the country’s Public Official Election Act, was charged with violating election campaign laws by posting a news article that asserted that a particular candidate was lying.³² The Constitutional Court suspended the prosecution in this case, finding that posting political content alone was not enough to establish that a public official was illegally campaigning.

In the South Korea case, the Constitutional Court stated that the contents of the post as well as other circumstances must be examined to determine whether there was intent and strategy to help a certain candidate win or lose in the election or simply spontaneous political speech. In making this determination, some of the circumstances examined by the Court included the volume of related posts on the social media account, whether the account was created close to election day, and whether an excessive number of people were added as friends during the period that political content was being posted. Identifying standard legal criteria regarding the circumstances of online speech in

²⁹ Lisa Reppell, *supra* note 2, <https://counteringdisinformation.org/topics/legal/6-enforcement>.

³⁰ Article 19 of the Universal Declaration of Human Rights states that everyone has the right to freedom of opinion and expression; this right includes “the freedom to hold opinions without interference and to seek, receive, and impart information and ideas through any media and regardless of frontiers.” Freedom of expression is especially important in the context of elections, along with the right to freedom of association with others, and the right and opportunity to be elected in genuine, periodic elections. UN High Commissioner for Human Rights, International Covenant on Civil and Political Rights C/21/ Rev.1/Add.7s, 7 December 1996, General Comment No. 25, arts. 22 and 25.

³¹ Kosovo Police v. Mustafa (A.nr. 216/2019) (May 10, 2019) (Kosovo), *available at* <https://electionjudgments.org/en/entity/tom4qelcafa>.

³² Case on Election Campaign by Teacher via Social Networking (2016Hun-Ma1071) (Feb. 27, 2020) (South Korea), *available at* <https://electionjudgments.org/en/entity/9y5oipp06du>.

addition to an analysis of the substantive content can aid in distinguishing between political campaigning and protected political speech, and when applied uniformly, could help insulate courts from allegations of political bias.

Regulations of online content can also unintentionally regulate content of “non-participants,” or those who are not actively participating in politics as official parties or candidates or other organized groups, highlighting the important role that Courts can be called on to play in protecting free speech and expression. In one such case, the Court of Appeal of [New Zealand](#) was called on to determine whether the Electoral Commission correctly classified a satirical song and video about the prime minister as electoral advertisements, subject to disclosure and transparency requirements as well as other regulation.³³ Even though the song, which was posted to YouTube, Vimeo, and iTunes during the campaign period, was created by individuals who were unaffiliated with a political party or organization, the Commission advised them that the content would not be exempt under the law (as individual political views published on the internet) because it was available for paid download on iTunes and was a collaboration between two people and therefore could not be considered to be protected “individual political views.” However, the Court held that this classification was incorrect. The Court noted that the content denigrated the prime minister, but that it had clear entertainment value and did not encourage voting implicitly or explicitly, though it may have that effect. In addition, the Court highlighted that the purpose of the provisions at issue was to regulate “parallel campaigners,” or “persons or organizations that are not themselves candidates or parties but commit resources to campaign in cooperation with them.” The Court found that the creators of this content were not parallel campaigners and as such there “was no public interest in knowing who they were since they represented no group or vested interest whose identity voters might want to know when assessing the song and video.”³⁴ In this decision, the Court also pointed out challenges with the legal definitions and a need for reform, noting particularly that the provisions designed to regulate parallel campaigners and political participants, were so broad that they also had the potential to violate the freedom of expression of non-participants.

Finally, the National Electoral Institute (INE) and the Federal Elections Tribunal in [Mexico](#) have grappled with social media influencers posting content supporting candidates or political parties in violation of campaign regulations. In 2015, a case was appealed to the Superior Chamber of the Federal Electoral Tribunal of Mexico in which the Green Party of Mexico and various famous people, including athletes, musicians, and actors, were accused of violating the campaign silence period by posting electoral propaganda on Twitter throughout the three days before elections.³⁵ In its decision, the Tribunal recognized the importance of upholding rights to freedom of expression for citizens, particularly during elections, but also emphasized that these rights are not absolute and that there is a real risk of political parties abusing an individual’s fame to evade campaign restrictions and impact the fairness of an election. While the Tribunal ultimately found that the individuals did not have a close enough connection to the political party to be held liable under the electoral code for a campaign violation, it did find that the political party was indirectly liable for evading the silence period. Even though the Tribunal did not find sufficient evidence of a contract or formal agreement between the party and the famous persons, it held that the fact that the party was the sole beneficiary of

³³ Electoral Commission v. Watson (2016 NZCA 512) (Oct. 20, 2016) (New Zealand), *available at* <https://electionjudgments.org/en/entity/u08118t18p>.

³⁴ *Id.*

³⁵ SUP-REP-16/2016 Y SUP-REP-22/2016 ACUMULADOS (Apr. 20, 2016) (Mexico), *available at* <https://electionjudgments.org/en/entity/jhhffkqh88>.

what appeared to be an atypical and coordinated communications strategy that tied directly to the party's platform was sufficient to establish liability, particularly as the party made no effort to distance itself from the posts. As a penalty, the Tribunal upheld a \$150,000 peso fine for the Green Party.

Similar cases have come up around Mexican elections in the past year that have resulted in imposition of penalties by the INE that are likely to be appealed. In one case, the Green Party is accused of hiring social media influencers to promote their candidates during the campaign silence period ahead of election day.³⁶ In another, a gubernatorial candidate is accused of violating campaign finance rules through promotion on his wife's social media accounts. These were considered by INE to be in-kind contributions, as his wife is an influencer, and the INE considers her social media accounts as a business.³⁷ While rulings in these cases had not yet been passed down at the time of publication, they both illustrate a campaign tactic that is increasingly common across the globe and remains largely unregulated: the degree and nature of disclosure required regarding paid or otherwise beneficial relationships between political actors and third party online influencers.

Conclusion: What do these cases tell us about efforts to regulate campaigning on social media?

One of the main themes identified in this analysis is the importance of developing campaign regulations that go beyond extending provisions for traditional media. Legislators and regulators need to consider the important ways in which social media platforms differ from traditional media outlets, and what rules are needed to ensure that they contribute to an equal playing field for all candidates. Several of these differences have been identified by the courts in these cases – such as the lack of an editorial process and the involvement of new actors, from normal citizens to social media influencers – as has the need for a careful consideration of proportional remedies and more nuanced provisions that do not impose overly broad restrictions on speech.

However, even as more is done by legislators and regulators to create tailored rules for digital campaigning, technology will likely continue to outpace the introduction of new regulations. As a result, courts will continue to be called upon to rule in gray areas, playing an important role in protecting fundamental rights and ensuring fair and level campaign environments. Given this reality, it is important for courts to understand how platforms work in practice. While needs will differ depending on the country context, training, education, and resources could be useful to help judges understand the unique aspects of social and digital media and how they may clarify the types of conduct that might constitute online campaign violations. For instance, the Observatory on Social Media, a working group under the Global Network for Electoral Justice, is developing some of these resources – first up, a forthcoming Glossary on Digital Media and Elections that is being designed specifically for judges.

³⁶ Entrepreneur, *Influencers sold? Agency that hired the figures who spoke during the electoral ban changes its name* (June 9, 2021), available at <https://www.entrepreneur.com/article/374111>.

³⁷ Mexico News Daily, *Party hit with 55mn peso fine for Instagram support by candidate's wife* (July 23, 2021), available at <https://mexiconewsdaily.com/news/party-hit-with-55mn-peso-fine-for-instagram-support/>.

It will also be important to continue exchanging comparative experience across jurisdictions. ElectionJudgments.org provides one opportunity to do so – enabling judges and practitioners to find and share relevant decisions and contribute to the transparency of judgments and legal standards in this area, which can in turn play a role in improving online campaign regulation by bringing to light gaps and challenges in enforcement.

“...[N]ew information technologies have created a novel “public sphere” for the democratic debate, with new actors and conflicting rights that cannot be correctly addressed with the current understanding of human rights and democracy as an issue only between citizens and governmental institutions, or even as an exclusively national problem. Therefore, we require a different model based on principles of co-responsibility and international cooperation to regulate, adjudicate and solve fundamental rights collisions, to simultaneously protect social and individual freedoms in the era of e-democracy.”

– Justice José Luis Vargas Valdez, Chief Justice of the High Chamber of the Electoral Tribunal of Mexico³⁸

³⁸ José Luis Vargas Valdez, *Study on the Role of Social Media and the Internet in Democratic Development*, European Commission for Democracy Through Law (Venice Commission), Nov. 21, 2018, available at [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-LA\(2018\)001-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-LA(2018)001-e).