

# **Lessons on Disinformation and Election Disputes**

Election Case Law Analysis Series

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International Foundation  
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# About IFES

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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 organization based in Arlington, Virginia, USA, and registered as a non-profit organization [501(c)(3)] under the United States tax code.

## IFES By The Numbers



**Reached 25M+**  
people with  
civic and voter  
education in 2021



**Supported 30**  
elections in 2021,  
training 300K+  
election officials



**Worked across 58**  
countries in 2021

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## Executive Summary

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 database for national election judgments from around the world. IFES has used this database to conduct an initial analysis of select judgments that involve bad actors propagating disinformation during and after elections. These cases show that the rise in disinformation campaigns around the world affect not only election processes, but also have expanded to threaten judges and the judiciary as an institution. Disinformation campaigns originate domestically and from foreign countries, targeting election management bodies (EMBs) and judiciaries in attempts to delegitimize their powers to announce and certify or rule on results. By attacking judges' credibility, these disinformation threats may undermine citizen trust in judgments and lead to chaos.

This paper analyzes several cases from countries where disinformation campaigns have been litigated as part of the electoral dispute resolution process. Drawing on case law from Africa, Asia, Europe, Latin America, and the United States, we present an initial analysis of how courts are grappling with the disinformation issue. Key findings include the following:

**Defining and consistently addressing what constitutes disinformation has proved difficult for policymakers globally.** With no internationally agreed-upon legal definition, democracies across the world are confronted with the difficult problem of how to minimize harms caused by what might potentially be considered disinformation attacks while respecting citizens' rights of freedom of expression. At no time is this balance more important than during the pre-election period and election campaigns, when the right to criticize government and engage in robust policy debate is a core feature of the democratic process. When supported and driven by malign foreign and domestic actors, however, disinformation campaigns carry the very real possibility of undermining trust in democratic institutions, causing conflict and ultimately strengthening authoritarian rule in countries across the world.

**In general, courts are proving adept at balancing human rights concerns in this area** in their reviews of new laws that regulate speech and in their adjudication of election disputes. This is partly because the quality of cases brought before courts to date has been so low. Often, limited evidence is presented to a court to support the allegations disseminated through disinformation campaigns, or the claims are so egregious that they are clearly defamatory or otherwise addressed by legislation that deals with elections and rules of evidence. Where courts have been asked to rule on disinformation cases, many can rely on existing rules of procedure and national jurisprudence, adopting strict interpretations of the existing laws to avoid unreasonable restrictions on free speech. **What is concerning in the cases, however, is the extent to which EMBs, judges, and the judiciary are caught up in and becoming the center of disinformation campaigns** that play out before, during, and

after cases are filed in courts. The direct threat to many judges who work on these issues is very real. **In some jurisdictions, courts push back robustly against these threats.** They have increasingly turned to fines and other sanctions against both lawyers and political actors who have been part of these campaigns and attacked the courts directly.

**Responding in a timely and effective manner is critical to countering campaigns that seek to sow disinformation about the electoral process or the judiciary.** This can include adjudicating cases as soon as possible after an election, dealing summarily with issues of disinformation in the run-up to Election Day, or engaging in dialogue with social media platforms to ensure quick access to evidence or enforcement of the removal of harmful content. Where courts can respond quickly, the oxygen fueling a disinformation campaign often can be removed, leaving those advancing campaigns with nothing to show for their efforts. In particularly tense political environments, these judgments must be visible and communicated widely through the media to civil society, citizens and, of course, the political actors themselves.

Despite some positive lessons, however, disinformation will not go away, and **judiciaries need to work faster and more collaboratively to share good practices** about how they can adapt their processes quickly and nimbly to counter such disinformation. Drawing from a series of strategic and innovative practices around elections, opportunities exist to deepen the dissemination of lessons at the global and regional levels via networks of judges that meet to share good practices, along with other actors, including other independent oversight institutions and civil society organizations.

**Democratic backsliding around the world continues to accelerate, fueled in large part by disinformation campaigns.** The judiciary can act as a bastion for democracy in those moments, slicing through disinformation campaigns and upholding the rule of law in times of crisis. This is the very essence of democracy and people-centered justice – ensuring that votes cast at the ballot box truly express the will of the people and how they choose to be governed.

# Introduction

Increasingly, election officials must grapple with attacks on the integrity of information around the election process. Such “degradation of the election information environment sows doubt and preconditions public support for a possible fight in the courts, or on the streets, if the candidate or party in question is dealt a loss at the polls.”<sup>1</sup> Moreover, “manufactured integrity attacks are increasingly sophisticated and are starting earlier in the election process – a ‘lie early and often’ approach that is insidious and difficult to counter. But the capacity to effectively counter these hedges is critical to maintaining democratic resilience.”<sup>2</sup>

Across jurisdictions, courts are increasingly caught up in this dynamic and are seeing more cases built on disinformation campaigns by political opponents during the election process. Either in anticipation of a judgment going against a party or in reaction to a judgment post-election, such campaigns attack the courts as an institution. Many recent elections also show aggressive attempts to politicize and weaken the electoral justice institutions that will adjudicate future contests, with such “politically expedient or self-serving initiatives often drain[ing] strength and dynamism from the democratic system, diminishing its ability to withstand future political shocks.”<sup>3</sup>

Jurisprudence surrounding disinformation during elections is still evolving. In the courtroom, judges grapple with complex legal issues that bridge human rights law, constitutional matters, public administration law and election law. These cases also come at a time when ever more countries are adopting new laws and regulations and imposing restrictive legal frameworks, government censorship is increasing, and malign foreign and domestic influence in the information environment is exacerbating existing problems. Opposing parties, civil society organizations, and journalists also face increasing intimidation or even prosecution for allegedly making false statements while engaging in political campaigns, reporting, or covering campaign events. These events may extend to judiciaries as well. In Nigeria, for instance, Yiaga Africa, a non-profit organization that promotes participatory democracy, human rights, and civic participation, has observed a surge in attacks on the judiciary that actively cause harm and impugn the credibility of judges. Speaking about this phenomenon, Yiaga Africa Executive Director Samson Itodo noted that, due to increased litigation of cases during the 2023 Nigerian election “it is not surprising that politicians and other actors have focused attention on [the] judiciary, both in the pre-election and in the post-election period.”<sup>4</sup>

This paper’s analysis of select jurisprudence reveals the need for election judges to have the resources and opportunities to familiarize themselves with evolving threats – whether foreign or domestic – to uphold electoral integrity and build resilient judicial institutions in advance of elections.<sup>5</sup> It presents an analysis of disinformation

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<sup>1</sup> Lemargie, K. (2022). [“Beware of Disinformation That Puts Democracy on the Line.”](#) *Foreign Policy*.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> African Electoral Justice Network meeting webinar, May 23, 2023.

<sup>5</sup> *Ibid.*

cases from IFES' database, [ElectionJudgments.org](https://electionjudgments.org), and discusses emerging challenges for judges in adjudicating these cases and the application of timely and effective remedies.

## What Do We Mean by Disinformation?

Deliberately spreading false information about political opponents is not a new phenomenon, although the amplification and potential mass impact of such information via the internet is newer and has been at the forefront of concerns and debate by state actors, politicians, civil society, the media, and the public. IFES and its partners in the Consortium for Elections and Political Process Strengthening (CEPPS) use the term **information disorder**<sup>6</sup> to create a conceptual framework for understanding the information ecosystem and its implications for democracy. The information disorder framework “describes how **misinformation ... disinformation ... and malinformation ...** are all playing roles in contributing to the disorder, which can also be understood as contributing to the corruption of information integrity in political systems and discourse.”<sup>7</sup>

Within the information disorder framework, the issue of what might be classed as *disinformation* is subject to significant debate. There is no internationally accepted legal definition of disinformation, although practitioners and academics globally engage in ongoing discussions around the benefits and problems of coining a singular, all-encompassing definition. Various definitions have been advanced. For example, the European Commission's High-Level Expert Group on Fake News and Online Disinformation defines disinformation as “all forms of false, inaccurate, or misleading information *designed, presented and promoted to intentionally cause public harm or for profit*” [emphasis added].<sup>8</sup> Facebook defines disinformation as

**Disinformation and misinformation are distinct from one another.** Like disinformation, misinformation contains false, inaccurate, or incomplete information. It is spread mistakenly or unintentionally. Misinformation may also be amplified via the internet and can reach a significant audience. This difference between understanding the intent behind the spread of information, as well as identifying the harm caused by that information, is important when courts are faced with cases that fall within the wide remit of what might be considered disinformation.

“inaccurate or manipulated information content that is spread intentionally. This can include false news, or it can involve more subtle methods such as false flag operations, feeding inaccurate quotes or stories to innocent intermediaries, or knowingly amplifying biased or misleading information.”<sup>9</sup> Academics define disinformation as “intentional falsehoods spread as news stories or simulated documentary formats to advance political goals” and also refer to it as “... systematic disruptions of authoritative

<sup>6</sup> Arnaudo, D., Barrowman, B., Brothers, J., Reppell, L., Scott, V., Studdart, A., Wainscott, K., and Zakem, V. *Countering Disinformation: The definitive guide to promoting information integrity: Introduction to the Guide*. Consortium for Elections and Political Process Strengthening. <https://counteringdisinformation.org/introduction>. The term “information disorder” is not original to CEPPS but is built on the work of Data and Society, First Draft and the Oxford Internet Institute's Computational Propaganda Project, as outlined in the cited resource.

<sup>7</sup> Ibid.

<sup>8</sup> Directorate-General for Communication Networks, Content and Technology (2018). [A multi-dimensional approach to disinformation](#). High Level Expert Group on Fake News and Online Disinformation (2018, March 12). [Final Report of the High Level Expert Group on Fake News and Online Disinformation](#).

<sup>9</sup> Weedon J., Nuland W., and Stamos, Aa (2017). Information operations and Facebook. *Facebook*.



information flows due to strategic deceptions.”<sup>10</sup> Furthermore, some speech that is intended to deceive or cause harm (thereby meeting the definitions outlined above) is still legally permissible. Establishing the boundaries between what constitutes harmful but legal speech and speech that is legally violative is a core contention in many of the cases considered in this paper.

The lack of legal definitions means that the way disinformation cases come before courts is not necessarily uniform, as the case law demonstrates. Our case analysis demonstrates three broad types of disinformation issues that come before the courts:

1. Cases that allege harm to electoral processes, contestants, or officials as a result of prohibited speech upon which the court must issue a judgment (whether on grounds of hate speech, defamation, electoral disinformation, etc.). Examples include *Dominion Voting Systems, Inc. v. Fox News*, *Senior Advocate Dinesh Tripathi v. Election Commission of Nepal (#NoNotAgain Campaign)*, Decision no. 2018-773 DC of France’s Constitutional Council, and *2016Hun-Ma90 (Case on Restricting Online Media from Publishing Columns, etc. Written by Candidates for Public Official Election)*.
2. Unfounded cases alleging irregularity in electoral processes – which is a disinformation tactic in and of itself. These are not cases that deal with disinformation; rather, they deal with election processes in a way that is meant to deceive or manipulate public perception of the integrity of the processes. Examples include *Presidential Election Petition E005, E001, E002, E003, E004, E007 & E008 of 2022 (Consolidated)* (Kenya), Appeal No. CA/PEPC/03/2023; CA/PEPC/04/2023; and CA/PEPC/05/2023 (Nigeria).
3. Overt or covert disinformation campaigns directed at the courts to undermine their credibility. This challenge is unrelated to cases that need to be decided by the court; rather it is a separate discussion about how courts can engage in reputation management and preserving public trust. Examples include *Civil Petition No. 0601958-94.2022.6.00.0000* (Brazil), *Matter of Giuliani*, *King v. Whitmer*, and *O’Rourke v. Dominion Voting Systems*.

In efforts to understand the notion of disinformation as a justiciable issue, our case law analysis consistently shows that the concept of “disinformation” always contains some element of intentionality (i.e., that actors or adversaries spread the information with knowledge of what they are doing and in a deliberate manner), and they do it to cause harm.

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<sup>10</sup> Bennett, W. L., & Livingston, S. (2018). [The disinformation order: Disruptive communication and the decline of democratic institutions](#). *European Journal of Communication*, 33(2), 122–139.

# Applicable Principles and International Standards

## International Human Rights: Freedom of Expression and Opinion

Disinformation can have serious consequences in undermining the right to free and fair elections. The broad disinformation campaign by foreign actors during the 2016 U.S. presidential elections,<sup>11</sup> for instance, brought disinformation front and center for policymakers. Similarly, concerns around information integrity during the COVID-19 pandemic further illustrated the need for more robust frameworks for States to counter harmful information.<sup>12</sup> For most States, the most significant legal discourse on this issue has been about balancing human rights around freedom of expression and opinion with restrictions on such actions to avoid harm to citizens and democratic processes.

The recent Report on Disinformation by the Special Rapporteur on Freedom of Opinion and Expression of the United Nations High Commissioner on Human Rights (UNHCR)<sup>13</sup> provides a succinct overview of the current state of freedom of expression and gaps related to international standards in addressing the problem of “disinformation.” The two main international standards are the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR). As the UNHCR Special Rapporteur noted, “[t]he right to freedom of

### Principles for How States Can Impose Restrictions on Freedom of Expression in Response to Fake News and Disinformation

On March 3, 2017, the United Nations Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe Representative on Freedom of the Media, the Organization of American States Special Rapporteur on Freedom of Expression, and the African Commission on Human and Peoples’ Rights Special Rapporteur on Freedom of Expression and Access to Information acknowledged the threat of fake news dissemination and adopted a Joint Declaration on Freedom of Expression and “Fake News, Disinformation and Propaganda.”<sup>1</sup> It included the following general principles:

- a. States may only impose restrictions on the right to freedom of expression in accordance with the test for such restrictions under international law, namely that they be provided for by law, serve one of the legitimate interests recognized under international law, and be necessary and proportionate to protect that interest.
- b. Restrictions on freedom of expression may also be imposed, as long as they are consistent with the requirements noted in paragraph 1(a), to prohibit advocacy of hatred on protected grounds that constitutes incitement to violence, discrimination or hostility (in accordance with Article 20(2) of the International Covenant on Civil and Political Rights).

<sup>11</sup> See Dilanian, K. & Popken, B. (2019, June 5). [Russian trolls who interfered in 2016 U.S. election also made ad money, report says](#). Nbcnews.com; ABC News (2016, December 15). [Officials: Master Spy Vladimir Putin Now Directly Linked to US Hacking - ABC News](#). Go.com

<sup>12</sup> See [IFES COVID-19 Briefing Series: Preserving Electoral Integrity During an Infodemic | IFES - The International Foundation for Electoral Systems](#)

<sup>13</sup> OHCHR Special Rapporteur on freedom of opinion and expression (2021). [Report on disinformation](#)

opinion and expression is not part of the problem, it is the objective and the means for combating disinformation.”<sup>14</sup>

Article 19 of the **Universal Declaration of Human Rights** and Article 19 of the **ICCPR** both guarantee the rights to hold opinions without interference and to seek, receive and impart information and ideas of all kinds, regardless of frontiers and through any media. Freedom of opinion is absolute, but freedom of expression may be restricted under certain circumstances. States have both a duty to refrain from interfering with this right and an obligation to ensure that others, including businesses, also do not interfere with it. The United Nations Special Rapporteur on Freedom of Opinion and Expression notes that freedom of expression is fundamental to a functioning democracy, and human rights law has traditionally afforded strong protections in this area, especially in terms of criticism of government and political leaders and speech by politicians and public figures and in the media.<sup>15</sup>

Regional instruments echo this balance. In **Europe**, Article 10 of the **European Convention on Human Rights** (ECHR) protects freedom of expression but allows for tailored restriction in defense of national security, territorial integrity or limiting hate speech. While we have not seen any cases at the European Court of Human Rights dealing with Article 10 and disinformation related to elections, there is important jurisprudence related to Article 10 and hate speech in elections, particularly where the internet is concerned.<sup>16</sup> In *Nikula v Finland*, the court noted the special status of lawyers as intermediaries between the public and the courts and ruled that legitimate restrictions may be part of their professional codes of conduct, given the expectation of the members to “contribute to the proper administration of justice, and thus to maintain public confidence therein.”<sup>17</sup>

In **Central and South America**, Article 13 of the **American Convention on Human Rights** expressly protects the right to freedom of thought and expression from censorship except when necessary to ensure “a. respect for the rights or reputations of others; or b. the protection of national security, public order, or public health or morals.”<sup>18</sup> Similarly, in **Africa**, Article 9.2 of the **African Charter on Human and Peoples’ Rights** provides that “every individual shall have the right to express and disseminate his opinions *within the law*” [emphasis added].<sup>19</sup>

Consensus has emerged at the international level that there are likely to be legitimate reasons to restrict the publication of materials that might be classed as disinformation and that existing human rights instruments have the space to accommodate the necessary balance around defending this right. As the case law in this paper shows, when confronted with the facts of specific cases, courts have been able to draw on some longstanding principles to navigate their way through the emerging phenomenon of disinformation in the internet age.

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<sup>14</sup> *Id.* at p. 17.

<sup>15</sup> *Id.* at p. 8.

<sup>16</sup> See Application No 45581/15, *Sanchez v. France* 2023 E.C.R. The confluence of hate speech and freedom of expression is explored in significant legal jurisprudence and Article 4 of the ICCPR on the “Elimination of All Forms of Racial Discrimination.” It is not the intention of this paper to repeat that analysis.

<sup>17</sup> Application no. 31611/96, *Nikula v Finland* 2002 E.C.R. 12.

<sup>18</sup> [American Convention on Human Rights](#), Art. 13, November 22, 1969. Disinformation also cannot be used to promote propaganda for war or to advocate for national, racial or religious hatred that incites violence.

<sup>19</sup> [African Charter on Human and Peoples’ Rights](#), Art. 9.2., June 1981.

## Timely, Effective and Proportional Remedies

IFES' *Election Investigations Guidebook*<sup>20</sup> analyzes how EMBs, electoral judges, and investigators may need to adapt their methods of fact-finding and analysis to clearly delineate the roles, responsibilities and criteria used by those who receive complaints, conduct investigations, and make decisions on disinformation cases. IFES has identified six core principles of effective investigation that are useful in the context of disinformation cases (see text box).<sup>21</sup>

### An effective remedy:

1. Ensures that the letter and spirit of the law is realized in practice;
2. Is provided in a timely manner;
3. Is proportional to the violation or irregularity in question;
4. Is enforceable;
5. Leads to deterrence or a change in the behavior in question; and
6. Reinforces the perception of fairness and credibility of the process.

Judges must balance implementing timely, effective, and proportional remedies to address disinformation cases with the common struggles surrounding these types of cases. Deterring future dishonest behavior is paramount and can be achieved successfully via such avenues as defamation lawsuits. However, judges also should consider:

1. The timeliness of court cases, which often occur post-election, when disinformation campaigns have already taken place and the harm has already been done.
2. The difficulty in measuring the impact of post-election remedies on the election process.
3. How to impose proportional remedies and sanctions on litigants and deter people from filing frivolous complaints.

As the case law in this paper will show, courts around the world have used a wide range of remedies available to them under the applicable law to address the harm (or potential for harm) caused by disinformation campaigns. The ability of courts to find practical solutions within short deadlines when cases with complex facts are brought before them is a significant finding from the case law analysis.

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<sup>20</sup> Vickery, C., and Ellena, K. (2020, December 17). [Election Investigations Guidebook](#). International Foundation for Electoral Systems.

<sup>21</sup> Ellena, K., and Vickery, C. (2016). [Measuring Effective Remedies for Fraud and Administrative Malpractice](#). International Foundation for Electoral Systems.

# Issue Area 1: Balancing Free Speech with Appropriate Restrictions at the National Level

## A. New Issues, Old Laws

Despite the development of international human rights principles, States struggle to balance the right to freedom of expression with restrictions in accordance with legitimate interests that are recognized under international law. States have long used discrete laws dealing with defamation, elections, consumer protection, and financial fraud to address the harm done by false information. Even in exceptionally charged political environments, courts have been able to rely on these frameworks to adjudicate election disputes.

The **United States**, for example, historically has employed a very broad interpretation of free speech. The First Amendment to the U.S. Constitution states unequivocally that “Congress shall make no law ... abridging freedom of speech,” a right that has grown to encompass many forms of citizen speech. However, defamatory statements, which are defined as “false statements of fact about a person,” incitement, fraud, obscenity, child pornography, fighting words, and threats are not protected speech under the First Amendment.<sup>22</sup> In defamation cases, the party alleging defamation must “demonstrate that the speaker acted with a certain level of intent ... or to prove certain injuries.” Certain federal laws regarding elections also prohibit false statements about voter eligibility and “fraudulent misrepresentation of authority to act for a federal political candidate.”<sup>23</sup>

*Dominion Voting Systems, Inc. v. Fox News Network, Fox Corporation*<sup>24</sup> illustrates how U.S. courts have grappled with issues of free speech and defamation in the context of elections. Prior to the 2020 U.S. presidential election, analysts, including New York-based Fox News, predicted that early vote counting would favor the incumbent, Donald Trump, and that later counting would favor his opponent, Joseph Biden. This was indeed how the election proceeded, with Biden eventually securing the presidency. Infuriated by Fox News’ projections and a potential loss of the presidency, Trump and his supporters adopted a narrative that widespread fraud had tainted the election. As Fox News’ viewership dropped, the network suddenly began to amplify Trump’s false narrative, presumably in hopes of boosting its ratings.<sup>25</sup> Shortly after the election, Fox News began stating publicly that Dominion Voting Systems, Inc., a private supplier of election and voting technology that operated many of the voting machines used during the election, had used those machines to “rig” the election in favor of Biden.

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<sup>22</sup> Case law has helped establish the various categories of unprotected speech. Some prominent examples include *Brandenburg v. Ohio* (incitement); *Virginia v. Black* (true threats); *Chaplinsky v. New Hampshire* (fighting words); *Miller v. California* (obscenity). See [Defamation](#). | Constitution Annotated | Congress.gov | Library of Congress (outlining a more detailed definition of defamation); [Unprotected Speech Synopsis](#). The Foundation for Individual Rights and Expression (thefire.org) (defining unprotected free speech); United States Courts (n.d.) [What Does Free Speech Mean? | United States Courts](#) (uscourts.gov); [fighting words](#). Wex | US Law | LII / Legal Information Institute (cornell.edu) (detailing the extensive case law behind “fighting words”).

<sup>23</sup> 52 USC 30124: Fraudulent misrepresentation of campaign authority.

<sup>24</sup> U.S. Dominion Inc., Dominion Voting Systems, Inc., and Dominion Voting Systems Corporation v. Fox News Network, LLC, C.A. No.: N21C-03-257 EMD (Del. Sup. Ct., 2023) and U.S. Dominion Inc., Dominion Voting Systems, Inc., and Dominion Voting Systems Corporation v. Fox Corporation, C.A. No.: N21C-11-082 EMD (Del. Sup. Ct., 2023) (the cases were merged).

<sup>25</sup> Id. at Sec. I. FNN'S ELECTION COVERAGE AND RISING BRAND CONCERNS.

Dominion, in turn, alleged that Fox News' statements were false and defamatory<sup>26</sup> and sought punitive and economic damages. Fox News asserted various defenses, chief among them that the network's reporting of newsworthy events was protected under the First Amendment, statements were not published with actual malice (i.e., intended to cause harm, which Fox stated that Dominion did not show with "clear and convincing evidence"), and Dominion did not suffer any damages. In fact, Fox News argued specifically that a reasonable viewer would understand the network was simply "fulfilling its journalistic duty to present newsworthy allegations made by others."<sup>27</sup> The network also asserted that New York case law had established that, when the press repeated allegations later found to be false, a reasonable viewer would understand the allegations as "claims" rather than "facts."

In rejecting these lines of defense from Fox News, the Superior Court of Delaware<sup>28</sup> found that the statements were defamatory *per se*<sup>29</sup> because the network claimed that Dominion committed election fraud, among other key issues, and that "[n]o First Amendment protection enfolds false charges of criminal behavior." Relying on longstanding jurisprudence around defamation in the State of New York, the Court was able to resolve this significant case. Its finding of defamatory statements *per se* and no defenses of freedom of speech led Dominion and Fox News to settle the case out of court for over USD \$750 million.

## B. National Legal Frameworks

A prescriptive legal framework directed at controlling the flow of information can often generate more challenges before a court. In some African jurisdictions (such as Uganda, Zambia, and Zimbabwe), laws dating to European colonization criminalized the spread of loosely defined "false information" on issues of public interest and have been found to be both unconstitutional and unjustified in modern democratic societies.<sup>30</sup> In the last decade, the number of laws prohibiting "false news" has also risen most notably in Asia and across the Pacific. Though many of these laws remain in effect, they ultimately fail the "necessity and legitimacy" tests set out under the ICCPR.<sup>31</sup>

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<sup>26</sup> Dominion contended that: "i) [(Fox News Network)] FNN and [(Fox Corporation)] FC intentionally provided a platform for guests that FNN's hosts knew would make false and defamatory statements of fact on the air; ii) FNN and FC, through FNN's hosts, affirmed, endorsed, repeated, and agreed with those guests' statements; and iii) FNN, with the participation of FC, republished those defamatory and false statements of fact on the air, FNN's websites, FNN's social media accounts, and FNN's other digital platforms and subscription services." *Id.* at p. 3.

<sup>27</sup> *Id.* at p. 31.

<sup>28</sup> Both parties are incorporated in Delaware, and Fox News has its headquarters in New York. *See id.* at Footnote 230, which states "[t]he Court made comments at the March 21–22 hearing that Delaware law may control on punitive damages. After a review of the case law, the Court agrees with the parties that New York Law applies to the issue of punitive damages."

<sup>29</sup> Under New York State law, Dominion needed to establish: 1) a false statement; 2) publication without privilege or authorization to a third party; 3) constituting fault as judged by the actual malice standard; and 4) that causes special harm or constitutes defamation *per se*, which includes accusations of a serious crime or business harm. *See id.* at p. 37.

<sup>30</sup> *Op. cit.*, UNHCR Special Rapporteur p. 11.

<sup>31</sup> For instance, Vanuatu and Tonga adopted new criminal defamation laws in 2021, contrary to good practice which typically sees defamation as a civil matter. This appears to be part of broader backsliding around governments' protection of human rights in the region. *See* Lee, K., and Natalegawa, A. (2021, June 11). [Fake News Crackdowns Do Damage Across Southeast Asia During Pandemic](#). Center for Strategic & International Studies (CSIS). Public Media Alliance (2019, December 6). [The rise of "fake news" laws across South East Asia](#). CIVICUS. (2021). [State of Civil Society Report 2021](#).

Countries navigate the problem of disinformation in various ways. In **Brazil**, the Brazilian Criminal Code contains three provisions dealing with an attack on a person's "honor,"<sup>32</sup> but no current law specifically addresses disinformation. As of the writing of this paper, however, Brazilian Congressional Bill No. 2630, the Law on Freedom, Responsibility and Transparency on the Internet, is pending before Congress, already having been approved by the Senate.<sup>33</sup> Although **Nepal** does not have a specific law addressing information integrity, the Libel and Slander Act, 2016, grants people the right "generally to maintain their prestige, honor and dignity,"<sup>34</sup> the Electronic Transactions Act, 2063 (2008) prohibits the publication of material in electronic form "which may be contrary to the public morality or decent behavior or any types of materials which may spread hate or jealousy against anyone or which may jeopardize the harmonious relations subsisting among the peoples of various castes, tribes and communities,"<sup>35</sup> and the Election Commission Nepal (ECN) Code of Conduct prohibits the transmission of "disinformation, misinformation and hate speech in social networks."<sup>36</sup> In **Kenya**, several articles of the Kenyan Constitution address freedom of expression and its limitations, and certain sections of the Computer Misuse and Cybercrimes Act make the publication of false information a crime.<sup>37</sup> In **Nigeria**, a section of the Criminal Code addresses the publication of false news, including in instances when the person disseminating the news does not know it is false.<sup>38</sup> Furthermore, Nigeria's proposed Hate Speech Bill (which, after sustained public backlash, did not pass) would have criminalized any actions a person took to stir up ethnic hatred, engage in ethnic harassment, or discriminate.<sup>39</sup> Such broad language would have granted the government arbitrary power to clamp down on free speech, including "critical opinion, satire, public dialogue and political commentary" – a serious problem, especially during election periods.<sup>40</sup>

Supreme/apex courts often must determine whether newly introduced legislation regarding information around elections aligns with constitutional provisions by following their jurisdiction's appropriate test for limiting free speech. Recently, supreme and constitutional courts globally have struck down a variety of "false information"

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<sup>32</sup> The three provisions include 1) slander, or the false imputation of a crime to another person (Article 138); 2) defamation, or the imputation of something offensive to a person's social reputation (Article 139); and 3) injury, or imputation of something offensive to someone's dignity. Brazil Media Law Guide (n.d.) [Defamation, Privacy and Data Protection Law in Brazil](#). Carter-Ruck.

<sup>33</sup> The bill itself is quite controversial, with no guarantee of becoming law. Often referred to as the "Fake News Bill" by its supporters and the "Censorship Bill" by its opponents, it would require technology companies and social media platforms to be much more transparent with their users about their content recommendations and take on more responsibility for third-party content being displayed on their platforms. See Martins, L., and Spagnuolo, S. (2023, April 28). [A General Review on the Brazilian Congress Bill Regarding Fake News](#). Núcleo; Al Jazeera. (2023, May 2). ["Brazil's 'fake news' bill sparks outcry from tech giants."](#)

<sup>34</sup> Libel and Slander Act, Preamble, 2016 (1959) (Nep.).

<sup>35</sup> The Electronic Transactions Act, 2063 Sec. 47 (2008) (Nep.). Such illegal conduct is punishable by a fine or imprisonment or both. Critics of Nepal's disinformation policies claim this provision does not do enough to combat disinformation. See also Shrestha, P. (2023, February 19). ["No policy to counter disinformation."](#) *The Kathmandu Post*.

<sup>36</sup> The Election Code of Conduct, Para. 4j (2022) (Nep.)

<sup>37</sup> The Computer Misuse and Cybercrimes Act, Para. 22 (2018) (Ken.)

<sup>38</sup> Criminal Code, Sec. 59 (1990). Under this provision, a person found guilty of disseminating false news is guilty of a misdemeanor, punishable by up to three years' imprisonment. Not knowing the information is false is not a defense unless the accused can show that they took reasonable measures to verify the information before publishing.

<sup>39</sup> A Bill for an Act to Provide for the Prohibition of Hate Speeches and for Other Related Matters. (Nig.). Under the proposed bill, any person could file a written complaint with the Independent National Commission for the Prohibition of Hate Speeches, which could lead to conciliation or a hearing (or a dismissal, if the Commission determined the complaint to be lacking). The Hate Speech Bill was eventually dropped after intense public backlash. See Opejobi, S. (2019, December 4). ["We won't pass hate speech bill – Senate President, Ahmed Lawan."](#) *Daily Post*.

<sup>40</sup> Amnesty International (2019, December 4). [Nigeria: Bills on hate speech and social media are dangerous attacks on freedom of expression - Amnesty International](#). See also Okegbile, J. (2023, July 18). [Nigeria: Revisiting Nigeria's Legal Framework On Hate Speech And Fake News Post 2023 General Elections](#). Mondaq. In recent years, Nigeria has grappled with the issue of hate speech and fake news, particularly in the context of elections. "The use of certain 'foul' and 'hateful' language and strategic misinformation can be highly divisive and can fuel violence, leading to significant harm to individuals, communities, and the country as a whole."

laws, arguing that the provisions of those laws did not meet the tests of necessity and legitimate aim to restrict freedom of speech and freedom of the press during elections. 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 an election. In this case, *2016Hun-Ma90 (Case on Restricting Online Media from Publishing Columns, etc. Written by Candidates for Public Official Election)*, the Court acknowledged that, while the restriction was intended to avoid unfairness in online election news reporting and the circumvention of campaign rules, it was overly broad because it prohibited the online publication of information that might not necessarily be political speech or otherwise tied to an election campaign. The Court found that the provision placed an unconstitutional restriction on the complainant's freedom of speech.<sup>41</sup>

During **Nepal's** 2022 elections, voters created an online campaign expressing disenchantment with mainstream politics and career politicians. A member of one political party filed a complaint against the campaign, causing the ECN to warn the campaigners to cease campaigning or face fines, imprisonment, or both. The ECN relied on a broad provision of its Election Code of Conduct ("false or incorrect statement") and referred the case to the Cyber Bureau, requesting that the police take down the campaign's web pages. Responding to this warning, Senior Advocate Dinesh Tripathi filed a writ petition at the Supreme Court of Nepal, *Senior Advocate Dinesh Tripathi v. Election Commission of Nepal (#NoNotAgain Campaign)*, arguing that the warning to cease campaigning violated the campaigners' rights. The Supreme Court ordered the ECN and Cyber Bureau not to take any actions against the campaigners, stating that the campaign was an example of freedom of thought and expression. On November 6, 2022, the Supreme Court issued an interlocutory interim order against the decision of the ECN to refer the case to the Cyber Bureau until the final decision. Despite a lack of time to adjudicate this case on the merits, the Supreme Court's quick actions nevertheless ensured that free speech would not be undermined during the election campaign.

In **France**, the Constitutional Council reviewed French Law No. 2018-1202 on the "fight against the manipulation of information" prior to its adoption in 2018.<sup>42</sup> Unlike many supreme/apex courts that previously struck down provisions of the law, the Council dismissed the allegations that certain provisions of the law were in breach of freedom of expression. The Council acknowledged the legislature's responsibility "to bring an end to the abuse of the right to exercise freedom of expression and communication which infringe on public order and the rights of others" and found that the wording of the law was necessary, suitable, and proportional to the legislature's aim of fighting manipulated information. Indeed, an interlocutory proceeding under this law has a limited scope, wherein only "incorrect or misleading allegations or accusations which have the effect of altering the honesty of the upcoming elections" fall within its purview. The law excludes opinions, parodies, partial inaccuracies, or simple exaggerations and only allows for three cumulative conditions for spreading such allegations or accusations: "they must be artificial or computerized, deliberate and spread by mass distribution."

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<sup>41</sup> Constitutional Court, November 28, 2019, [2016Hun-Ma90 \(Case on Restricting Online Media from Publishing Columns, etc. Written by Candidates for Public Official Election\)](#) (S. Kor.).

<sup>42</sup> Constitutional Council, December 20, 2018, Decision no. 2018-773 DC (Fra.).



However, the Council also found that, “given the consequences that proceedings may have the effect of stopping the spread of certain information content, the allegations or accusations in question can only justify such a measure if the incorrect or misleading nature is apparent, without infringing on the freedom of expression and communication. Likewise, for the risk of having an effect on the sincerity of elections, which must also be apparent.”<sup>43</sup> In light of the legislation’s limited scope and its strict definition of what constitutes manipulated information, the Council upheld the law as constitutional.

In **Switzerland**, the legal framework does not provide for strict regulations relating to disinformation, but general principles and a strong body of jurisprudence guide election judges in their application of the laws.<sup>44</sup> For instance, the judges of the Federal Supreme Court have adopted a narrow interpretation of disinformation and determined that a court’s duty to intervene in disinformation cases can only happen when the influence of private actors seriously hinders or prevents the voters’ process of forming an opinion (see text box). Such conduct can lead to the annulment of a vote.<sup>45</sup> Case law led to the use of the following test, relying on four criteria: “1) Erroneous information

#### Guidance for Swiss Election Judges

“The case-law has made it clear that only inaccurate and essential facts, which are available to the administration alone and which are not called into question by public debate, are capable of distorting the free formation of the will of the electorate. Information that may be erroneous, but which is the subject of the public discussion before the vote, is not enough. Similarly, imprecise estimates by the administration, but qualified as such, do not distort the democratic debate.” —Judge François Chaix, of the Swiss Federal Supreme Court

must first be based on facts (objective). 2) The facts must then relate to an important circumstance of such a nature as to seriously mislead the elector. 3) The disclosure of erroneous facts must take place at a late stage of the campaign, at a time when rectification would no longer have any effect on the voter. 4) Finally, the judge must satisfy himself that the misleading influence exerted on the electorate is without doubt or at least appears highly probable.”<sup>46</sup> These four criteria echo the strict criteria adopted in the French law on manipulation of information and the rulings of other countries preventing unreasonable restrictions of freedom of expression.

## Issue 2: Provision of Remedies

### A. Rapid or Summary Judgments Can Be Very Effective

Other cases demonstrate how bad actors can sow disinformation via frivolous claims meant to cast doubt on the integrity of the election process itself. Much like the facts around the United States’ *Dominion* case, for instance, Kenya’s presidential election was highly contested and was conducted in an environment of widespread disinformation attacks. When presenting lessons learned from Kenya at a global election event in July 2023, for

<sup>43</sup> Id. at para. 23.

<sup>44</sup> Switzerland has a strong tradition of direct democracy as, in addition to regular elections, the Federation also holds regular referenda or citizen initiatives (*votation*), where citizens make decisions on governance.

<sup>45</sup> Federal Supreme Court, judgment 1C\_665/2018 of January 16, 2019 at 30, p. 5.1.

<sup>46</sup> Federal Supreme Court, judgment 1C\_662/2019 of June 10, 2020. In adopting this test, the judge relies on the standard of evidence, which is below the criminal standard but above a balance of probabilities.

instance, Justice Daniel Isokolo Musinga, President of the Court of Appeal in Kenya, mentioned disinformation as the main issue in the 2022 elections. Justice Musinga noted that judges experienced strong political pressure, fake allegations of bribery on social media, and the creation of fake accounts on X (formerly known as Twitter). The Kenyan case discussed below is a significant example of how courts dealt rapidly with a campaign on information integrity that made its way into the courtroom to underpin wider societal trust in the election results and likely help avert wider conflict.

William Ruto was declared the winner of Kenya's presidential election by a margin of less than 2 percent of the vote. Shortly before the Chairperson of the Independent Electoral and Boundaries Commission (IEBC) officially announced the result, four IEBC commissioners held a press conference and called into question the credibility of the entire election. Based on the press conference, the losing candidates and other petitioners then filed numerous lawsuits challenging the results. The cases claimed that "irregularities" and "interference," including technology failures and "opaque" verification processes, caused an inaccurate vote count, and called for cancellation of the election.<sup>47</sup> The Supreme Court joined these petitions into a single case, *Presidential Election Petition E005, E001, E002, E003, E004, E007 & E008 of 2022 (Consolidated)*.

In its judgment, the Court systematically dismissed the petitions, citing lack of evidence for the various claims and noting in particular that illegalities and irregularities in the vote count must be of such magnitude as to affect the final result of the presidential election: "[T]he four Commissioners had not placed before the Court, any information or document showing that the elections were either compromised or that the result would have substantially differed from that declared by the chairperson of IEBC."<sup>48</sup> Given petitioners' reliance on the public declarations of the four commissioners for their

#### Live-Streaming Judgments in Nigeria

The detailed judgment by the Supreme Court of Kenya echoes a transparent delivery of a judgment by election judges in Nigeria. A major disinformation campaign impacted the Nigerian elections early in 2023 and was followed by attacks on the integrity of judges on the Election Petition Tribunal. The election judges dismissed allegations of tampering with technology in the results transmission process via an 11-hour, livestreamed reading of their ruling.

cases, the Court's observation represented an insurmountable obstacle for the petitions. Issuing a point-by-point refutation of the petitioners' arguments built a case for strong, well-reasoned judgments dismantling the narratives that fueled the post-election results process (see text box for similar case in Nigeria<sup>49</sup>).

Significantly, the Court delivered its judgment less than one month after the results of the election, and within the legal deadline of 14 days from the filing. This swift resolution of the dispute was a crucial element in countering the attacks on the integrity of the elections and bolstering citizens' trust in the democratic process – but it required a well-resourced court to meet the short deadline. In its judgment, the Court specifically cited the "inappropriate and insulting language" that counsel and parties used against the Court and that "... insults or vitriolic attacks"

<sup>47</sup> Supreme Court of Kenya, September 5, 2022, [Presidential Election Petition E005, E001, E002, E003, E004, E007 & E008 of 2022 \(Consolidated\)](#) [2022] KESC 54 (KLR) (Ken.)

<sup>48</sup> Id. at para. 25.

<sup>49</sup> Court of Appeal, September 6, 2023, [Appeal No. CA/PEPC/03/2023; CA/PEPC/04/2023; CA/PEPC/05/2023](#)

were not helpful. After citing previous Kenyan case law, the Court summarized its robust response to these insults, noting:

“To the Oath of Office we shall remain faithful and defend the Constitution with a view to upholding the dignity and the respect for the Judiciary and the judicial system of Kenya. We shall dispense justice without any fear. We do this to protect the Institution not only for the present but also for the future: Judges serve their term and leave, but the institution of the Judiciary is there to serve today and for posterity.”

While the Kenyan judgment shows the benefit of swift and robust post-election judgments, courts must often rule quickly on these issues in the run-up to an election. Various states have developed summary proceedings that provide a framework for courts to adjudicate rapidly on issues that come before them during the election period. However, such swift adjudication processes should not come at the expense of fair administration of justice, complete with a thorough investigation and adequate due process guarantees.

Under **France’s** 2018 false information laws,<sup>50</sup> a summary judge can stop the spread of false information being disseminated online in a “deliberate, artificial or automated and massive manner” during the three-month election campaign period for certain national general elections if the information is “likely to alter ... the sincerity of the upcoming election.”<sup>51</sup> In the interest of combatting false information, the oversight body for media content, the French Audiovisual Council (Conseil Supérieur de l’Audiovisuel), also has investigative and administrative sanction powers and can temporarily suspend broadcasting in France (or broadcasting by a television channel controlled or placed under the influence of a foreign State) for the duration of the electoral period. However, these proceedings taking place under extreme deadlines will require adequate resources to ensure the laws can be enforced.

In its 2019 decision *VIEU et OUZOULIAS v. Twitter International* relating to European Parliament elections, the High Instance Tribunal ruled that it could not order Twitter to remove a misleading tweet under France’s false information laws. A government minister tweeted about demonstrators violently assaulting personnel in a public hospital, although it was established that the demonstrators had not engaged in any violence on the premises. The Tribunal found that the minister’s message, although exaggerated, related to actual events; thus, it was not manifestly inaccurate or false. Moreover, there was no proof of artificial or automatic dissemination of the tweet, and news outlets quickly published statements and interviews refuting the violence alleged by the tweet, enabling voters to remain informed.<sup>52</sup> The summary judge ruled on the need for an urgent measure to stop the dissemination of a tweet, but this was not a specialized election judge and they did not act as an arbiter of the fairness of the electoral campaign. While this new civil summary judicial procedure can provide for an effective and quick remedy during a campaign or close to Election Day, critics also questioned its potential misuse, its

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<sup>50</sup> Electoral Code, Art. L. 163-2-I. (2020) (Fra.).

<sup>51</sup> Judges have 48 hours to decide whether to issue an interim order to stop the violation if they choose to do so.

<sup>52</sup> Tribunal de Grande Instance de Paris, Référé [Judicial Court of Paris, Emergency Interim Proceedings], May 10, 2019, *Vieu et Ouzoulias v. Twitter International*, N° RG 19/53935 (Fra.).

implementation and enforcement, and whether a summary judge would have time to make such a determination within 48 hours.

Rapid and summary judgment can be effective to remove harmful content or sanction responsible actors and ultimately protect the integrity of elections. But these proceedings require preparation and adequate financial and human resources to provide such remedies expeditiously.

## B. Courts Pushing Back – Imposing Significant Sanctions

In some jurisdictions, courts have been so concerned about the potential impact of disinformation campaigns that, in cases brought before them, they have imposed significant sanctions against the individuals behind those campaigns. For instance, the controversial 2022 Brazilian presidential election gave rise to several legal challenges on the results. Even before the election period began, former President Jair Bolsonaro claimed, without evidence, that **Brazil's** electronic voting machines were vulnerable to hackers and fraud. After losing his campaign for re-election, Bolsonaro began claiming publicly that the system was “rigged”, and the election had been stolen from him.

The Superior Electoral Court ruled in *Civil Petition No. 0601958-94.2022.6.00.0000* that Bolsonaro's claims lacked sufficient evidence and therefore held that they had been made in “bad faith.” The Court also pointed to Bolsonaro's conduct, stating that it was “extremely serious, with wide repercussions, including ... several narratives ... that questioned the fairness of the electoral process before this Superior Court, which irresponsibly boosted criminal and anti-democratic movements.” The Court enforced a fine of R \$22.9 million (about USD \$4.3 million) against Bolsonaro's political party coalition for litigation in bad faith. Additionally, the Court held that “the challenge to the vote appeared aimed at incentivizing anti-democratic protest movements and creating tumult”<sup>53</sup> and ordered an investigation of the party's president.<sup>54</sup>

After continued claims of a rigged, stolen election and attacks by Bolsonaro's supporters in Brazil's National Congress, Supreme Court, and Presidential Palace on January 8, 2023, the Superior Electoral Court barred Bolsonaro from running for office for eight years. Referring to Bolsonaro's claims, President of the Court Alexandre de Moraes stated in *Electoral Judicial Investigation Action 0600814-85.2022.6.00.0000*, “These are not possible opinions, they are fraudulent lies.” Minister Benedito Gonçalves was the first to vote against Bolsonaro; he noted that the former president was directly and personally responsible for practicing “illegal conduct for the benefit of his candidacy for re-election.”<sup>55</sup>

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<sup>53</sup> Reed, B. (2022, November 24). [“Brazil judge fines Bolsonaro allies millions after ‘bad faith’ election challenge.”](#) *The Guardian*

<sup>54</sup> Superior Electoral Court, December 15, 2022, Civil Petition No. 0601958-94.2022.6.00.0000 (Bra.).

<sup>55</sup> Superior Electoral Court, June 30, 2023, Civil Petition No. 0600814-85-94.2022.6.00.0000 (Bra.).

## C. Deterring Frivolous Cases

Lawyers have brought a significant number of cases before the courts without any supporting evidence; some have involved insulting language and attacks by courts and lawyers against each other. In the **United States**, this proved particularly problematic in a series of cases following the 2020 presidential elections. Much like the Kenyan Supreme Court, U.S. courts have pushed back against such attacks on them. The cases discussed below illustrate how courts sanction attorneys who bring frivolous lawsuits in hopes of deterring similar cases in the future.

Influential lawyer and former New York City Mayor Rudolph Giuliani made numerous false and misleading statements to courts, lawmakers, and the public regarding the legitimacy of the 2020 election results after his client, Donald Trump, lost to Joseph Biden. In light of those statements, the Attorney Grievance Committee for the First Judicial Department in **New York State** opened an investigation into Giuliani's conduct. During the investigation, the Grievance Committee made a motion for Giuliani's interim suspension from the practice of law – a “serious remedy” available only when it is “immediately necessary to protect the public from the respondent's violation of the [New York] Rules [of Professional Conduct].”<sup>56</sup> Giuliani argued that there was no immediate threat to the public because he would no longer discuss the subject in public or make statements about the election as an attorney.

The Supreme Court of New York, Appellate Division, agreed with the petitioner in *Matter of Giuliani*, holding that Giuliani made the false statements to “improperly bolster respondent's narrative that due to widespread voter fraud, victory in the 2020 United States presidential election was stolen from his client.” Pointing to Giuliani's “persistent and pervasive” dissemination of false claims, the Court stated that “[t]he seriousness of respondent's uncontroverted misconduct cannot be overstated.” The Court held that an interim suspension of Giuliani from the practice of law was warranted, given that his conduct was ongoing and posed an “immediate threat of harm” to the public by “corroding public trust in democracy.” The holding did not implicate Giuliani's freedom of speech because attorney speech is subject to regulation to protect the public from potential reliance on a legal professional engaging in knowing misconduct.<sup>57</sup>

Relatedly, in July 2023, a **District of Columbia** Bar Association disciplinary committee recommended Giuliani's disbarment because of his efforts to overturn the 2020 election results. The Bar Association relied heavily on the *Matter of Giuliani* case when filing this disciplinary charge. The committee decided unanimously that Giuliani's misconduct “sadly transcends all his past accomplishments” and that it was “unparalleled in its destructive purpose and effect.”<sup>58</sup>

Similarly, lawyers representing a Michigan voter in the 2020 U.S. presidential election made false and misleading statements in *King v. Whitmer*, a case challenging the election results in **Michigan**. Petitioners claimed that the

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<sup>56</sup> [In the Matter of Rudolph W. Giuliani, 2021-00506](#) (2021).

<sup>57</sup> *Id.* at pp. 6-7.

<sup>58</sup> [In the Matter of Rudolph W. Giuliani, No. 22-BD-027](#) (2023).

defendant, Governor Gretchen Whitmer (among others), “fraudulently and illegally manipulate[d] the vote count to make certain the election of Joe Biden as President of the United States.” The United States District Court for the Eastern District of Michigan held that the suit represented a “historic and profound abuse of the judicial process” and the claims were “intended to deceive” without regard to law or evidence. The Court determined that sanctions were warranted for advancing those claims, failing to conduct proper inquiry or investigation, and improperly delaying proceedings even after acknowledging that it was too late to attain the relief sought.<sup>59</sup> The Sixth Circuit Court of Appeals later overturned the sanctions for improper purpose, ruling that contesting election results is not an improper reason to bring suit, but it upheld the sanctions for false and misleading statements.<sup>60</sup>

In a purported class action lawsuit on behalf of 160 million registered voters, lawyers representing a Virginia voter (among others) in the 2020 presidential election promoted claims of a “vast conspiracy” between state governors, secretaries of state, other election officials, Facebook, non-profit organizations, and Dominion Voting Systems to “interfere” with the election. The U.S. District Court for the District of **Colorado**, in *O’Rourke v. Dominion Voting Systems*, dismissed the suit for lack of standing and later enforced sanctions against the plaintiffs’ attorneys. The Tenth Circuit Court of Appeals upheld sanctions totaling USD \$186,922.50, citing “intentional or reckless disregard of the attorney’s duties” where the attorney(s) “continu[ed] to pursue claims after a reasonable attorney would realize they lacked merit.” The Court of Appeals further stated that the attorneys “unreasonably and vexatiously multiplied the proceedings ... without showing that the Plaintiffs had standing to bring their claims.”<sup>61</sup>

At the July 2023 [Electoral Integrity Project Summer Conference](#), when asked about the type of sanctions imposed for frivolous claims in the United States, one judge explained that:

“Disciplinary actions against lawyers is a good thing ... If you don’t have evidence, don’t bring it to the courts ... Lawyers need to have facts behind them before bringing a lawsuit ... We are not going to encourage the state to respond to frivolous case[s].”<sup>62</sup>

Those words echoed throughout the rulings in the four cases mentioned above and strengthened the argument for sanctioning lawyers who have continued to advance attacks on the integrity of information in election cases.

Sadly, lawyers and other officers of the court have also been central to many disinformation campaigns directed at the judiciary. This means outreach and coordination by judiciaries with bar councils and other ethics bodies will be increasingly needed. As noted by Jennifer Rubin, a lawyer and Washington Post columnist, in a webinar on disinformation for the National Center for State Courts (NCSC), actors attempt to weaken trust in the judiciary in many ways, often by spreading disinformation, and:

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<sup>59</sup> [King v. Whitmer, 556 F.Supp.3d 680](#) (2021).

<sup>60</sup> [King v. Whitmer, No. 21-1786](#) (6th Cir. 2023).

<sup>61</sup> [O’Rourke v. Dominion Voting Sys., 552 F.Supp.3d 1168](#) (2021).

<sup>62</sup> Tunheim, J. (2023, July 5). [Court Litigation over Technology in Elections](#). In IFES (Chair), iEIP-2023 3rd Annual Virtual Electoral Integrity Conference [panel presentation].

“It really requires a very robust response, not only in the context of some kind of prosecution or civil lawsuit but in terms of the professions themselves that have to insist upon a level of accuracy, of honesty, and really need to impress upon people who are part of their profession that their role in leading the public discourse is absolutely vital to our national health, to our democratic health, and without it, we really devolve into chaos.”<sup>63</sup>

Rubin added that, to combat disinformation in court, “every profession has to police their own.” Courts should hold litigants and lawyers accountable for initiating cases involving baseless and frivolous claims by imposing sanctions and, therefore, deterring future violations while simultaneously guaranteeing the proportionality of remedies. Additionally, bar associations should remind their lawyer members of the legal code of ethics and consequences in cases of misconduct.

In **England**, the Bar Standards Board (BSB) in September 2023<sup>64</sup> revised its 2017 guidance for barristers using social media. The guidance updates the types of behavior<sup>65</sup> that would be breaches of barristers’ professional ethics, specifically citing comments on social media that would be of “... indecent, obscene, or menacing character or which are *gratuitously abusive* [emphasis added]”<sup>66</sup> and further “[c]omments about judges, the judiciary, or the justice system which involve gratuitous attacks or *serious criticisms that are misleading and do not have a sound factual basis*. [emphasis added].”<sup>67</sup>

As the case law discussion demonstrates, courts are moving to impose serious fines and other sanctions on lawyers who bring frivolous cases to court. If justice is to function smoothly, good relations between lawyers and judges are absolutely vital. While professional bodies will continue to revise and update professional codes of conduct, judges likely will have to continue delivering stern sanctions to lawyers who act outside the bounds of professionally expected conduct, particularly when supported by powerful political actors.

## Issue 3: Innovations and Institutional Reforms for Courts to Consider

As the cases in this paper illustrate, judges must be prepared to tackle attacks on the integrity of information both in election petitions and as part of wider campaigns against the courts and individual judges before, during, and after elections. In the new information environment, judges may need to reconsider traditional legal ideals of not engaging publicly in political debates for fear of demonstrating bias or conflicts of interest. Speaking through case

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<sup>63</sup> National Center for State Courts. (2022, September 22). [Today’s Disinformation Threats](#) [webinar][select from dropdown menu]. The National Center for State Courts is an independent, non-profit organization that promotes the rule of law and improves the administration of justice in state courts and courts around the world. It is based in Williamsburg, Va., with its International Division in Arlington, Va.

<sup>64</sup> Bar Standards Board. (2023, September 20). [BSB guidance for barristers using social media](#).

<sup>65</sup> It is of interest to note that, in the guidance, the BSB recognizes that there is a balance between Article 10 of ECHR and “other rights and values protected by the ECHR (such as the rights and reputations of other members of the profession or consumers of barristers’ services).” *Id.* at p. 2.

<sup>66</sup> *Id.* at p. 5.

<sup>67</sup> *Ibid.*

law – with which the majority of the public is unlikely to engage – may be insufficient in many jurisdictions. Rather, reforms to court administration and support for outreach activities to the media, civil society, and the public likely will become increasingly required.

Losing parties may feel aggrieved after losing important cases and lash out, seeking to discredit the courts. In recent years, this problem has evolved as foreign actors amplify domestic voices. In the United States, the NCSC identified four new, specific themes related to disinformation and elections that foreign actors often use when seeking to discredit a judicial system:

- The justice system ignores voting irregularities and fraud, allowing elections to be stolen from certain candidates.
- The justice system tips the electoral map in favor of a particular party.
- The justice system is unaccountable. Therefore, judges should be subject to threats of violence to keep them in line.
- Decisions by the court are political and can be leaked for political purposes.<sup>68</sup>

As the case law has shown, many of these themes are echoed in jurisdictions other than the United States – for instance, in the recent Kenya elections. While the nature of these threats evolves constantly, we can draw from the selected cases and discussion the following emerging lessons learned on institutional reforms that can support the courts in countering disinformation campaigns against them.

## A. Foster Preventive Measures Ahead of the Elections

Given that widespread disinformation campaigns during elections can severely undermine public trust in the judiciary, maximum planning and transparency is vital to enable judges and EMBs to respond quickly to such threats. This requires the courts to adopt a communication strategy during elections to counter attacks against judges and to conduct training on communication in crisis and any useful digital tools at the judiciary's disposal to combat disinformation. It also requires EMBs to communicate as much information as possible to all stakeholders before an election.<sup>69</sup> Sometimes this might be as simple as inviting cameras into the courtroom to ensure the hearing process is livestreamed with decisions summarized for the media, as judges did in Kenya during the 2017 and 2022 elections or in Nigeria during the 2023 elections, when the judges gave an 11-hour livestreamed reading of their judgment.

Increasingly, more strategic reforms may be required. In **Arizona** in 2019, the Supreme Court of Arizona established the Task Force on Countering Disinformation by Administrative Order No. 2019-114<sup>70</sup> to study and

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<sup>68</sup> National Center for State Courts. (2023). [Disinformation and the courts](#).

<sup>69</sup> Consortium for Elections and Political Process Strengthening. (2021). [Countering Disinformation Guide](#)

<sup>70</sup> Supreme Court of the State of Arizona. (2019). [In the Matter of Establishment of the Task Force on Countering Disinformation, Administrative Order No. 2019-114](#)



make recommendations related to disinformation and misleading campaigns targeting the U.S. and Arizona justice systems. Key recommendations on communications included:

- That every court establish and maintain a court-specific website or web page to provide accurate information and access to justice 24 hours a day, seven days a week, through local or statewide resources.
- That every court establish and maintain at least one social media account, such as Facebook, Twitter (now known as X), Instagram, or YouTube, to keep the public and media informed about court events and notify the community quickly and efficiently in emergencies, and to serve as a tool to counteract disinformation promptly, provide accurate information, and help the public better understand court policies and procedures.
- Incorporating information from the resources in [the Task Force] report into an online and print mini-guide for judiciaries to use to recognize misinformation and disinformation directed at the judiciary.<sup>71</sup>

Ahead of the February 2022 presidential elections in **Costa Rica**, the Supreme Electoral Court – acting both as an EMB and an adjudication body – made an agreement with Facebook to establish a direct channel of communication to enable election magistrates to download content and request that posts containing disinformation be removed.<sup>72</sup> Social networks were monitored; based on a series of indicators that had been jointly built, content could be downloaded, preserved as evidence, and removed in real time. Quick access to evidence relating to content which can affect the integrity of the election and violate rules of electoral propaganda is crucial to allow arbiters and judges to rule in a timely manner.

Similarly, in preparation for the 2022 elections, **Brazil's** Tribunal Superior Eleitoral (TSE) (Superior Electoral Court) established the Electoral Justice Permanent Program on Countering Disinformation, which developed a strong disinformation strategy ahead of the country's 2022 elections. The initiative revolved around three axes<sup>73</sup> that contain a significant number of innovative initiatives. These include training for internal and external audiences on disinformation, enhancing cooperation with the media, partnering with Federal Police and federal prosecutors, encouraging dialogue with political parties, and supporting the mental health of TSE members who deal with disinformation.<sup>74</sup> The initiative seems to have been a success, given that the elections were contentious but the courts could push back robustly and sanction former President Bolsonaro in the face of a significant disinformation and intimidation campaign.

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<sup>71</sup> [Supreme Court State of Arizona: Task Force on Countering Disinformation Report and Recommendations October 1, 2020](#)

<sup>72</sup> Freedom House. (2022, December 23). [Amid rising digital repression, Costa Rica serves as a model in Central America](#).

<sup>73</sup> The three axes focused on 1) Inform: Dissemination of Quality information; 2) Enable: Media Literacy and Training; and 3) Respond: Identification and Containment of Disinformation. See [Brazil's Electoral Justice Permanent Program on Countering Disinformation - Strategic Plan - Elections 2022](#)

<sup>74</sup> Tribunal Superior Eleitoral. (2022). [Brazil's Electoral Justice Permanent Program on Countering Disinformation: Strategic Plan Elections 2022](#)

## B. Break Judicial Isolation: Share Lessons Learned and Build Communities of Practice

One method for judiciaries to quickly improve strategic planning is to share good practices and lessons learned among themselves. This can often be difficult. In 2019, the European Commission for the Efficiency of Justice noted that:

“The judicial culture is traditionally marked by a certain isolation of the judge, who is responsible for the decision because of the independence and impartiality of the judiciary. This isolation now appears harmful in that, taken to extremes, it leads to a fixed or even outdated justice, distinct from the world around it. To combat this isolation and ensure the quality of justice dispensed, it seems essential to set up practical tools for sharing and disseminating knowledge in order to encourage and nourish judges in their reflection.”<sup>75</sup>

As the emerging case law and discussion in this paper demonstrates, perhaps nowhere is such collaboration more necessary than in issues of disinformation and elections. Several nascent bodies exist in this area. The Global Network on Electoral Justice, founded in 2017, provides a global platform for sharing information among judges, legal experts, and practitioners. During the 2022 elections in Brazil, members of the network traveled to Brasilia to observe the process, offer support, and share good practices on deterring and addressing violations. Recently, several regional bodies in Europe, Africa, and the Pacific region have been established to share good practices. In a seminar in May 2023, the Africa Electoral Justice Network discussed the challenges and impact of disinformation on elections. The network brought together EMBs, election judges, and civil society organizations to discuss these threats and how to remedy them, notably through utmost transparency in the election dispute resolution process. More recently, the Global Network on Electoral Justice, together with the [French Constitutional Council](#), gathered election judges and commissioners from all regions to discuss regulations on social media and recent jurisprudence, sharing the criteria judges use when assessing manipulative and harmful content during elections. These are positive trends that will ultimately build more resilient judiciaries. Knowledge exchange throughout electoral cycles will be critical to ensuring strong and robust institutions and avoiding the pitfall of preparing for these issues only a few months before elections take place.

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<sup>75</sup> European Commission for the Efficiency of Justice. (2019). *Guidelines to improve the judge's skills and competences, strengthen knowledge sharing and collaboration, and move beyond a culture of judicial isolation*.

## Conclusion and Recommendations

The selected case law presented in this paper demonstrates that courts and individual judges are increasingly being asked to rule on issues of incendiary and misleading content relating to elections, as well as being caught up in direct attacks under wider disinformation campaigns. At the institutional level, attacks on the judiciary aim to undermine public trust in the election process.

Reforms are needed. Court administration reform can often be complex, requiring new ways of working, budgets, information technology capacity, and court officers. Nevertheless, as the threat to judiciaries from disinformation campaigns grows, it will become increasingly vital for courts to be able to institute strategic reform plans to respond to emerging threats and train judges, magistrates, and judicial officers to address these threats.

The case law analysis has also shown that, despite the absence of internationally recognized definitions of disinformation, the courts have been able to assess the evidence brought before them and balance protecting free speech rights with potential harm to public interest during elections.

Nevertheless, caution is needed. As the analysis above sets out, many countries *have* passed legislation imposing various restrictions on freedom of speech around elections. In an era of democratic backsliding and rising autocracy, it is likely that such tendencies could increase. Lawyers have become more involved in disinformation attacks around electoral processes both in and out of the courtroom. Protecting the space for citizens to enjoy their freedoms of expression and to participate in free and fair elections will likely be a continuing theme that many judiciaries will need to examine.

Based on our analysis of selected cases, we make the following five recommendations for judiciaries and EMBs:



## **Institutional reforms are required to protect both the judiciary as an institution and individual judges from attacks.**

Courts should review their institutional frameworks to identify the necessary reforms for them to adopt strategies, design and train judges and staff, develop information technology tools to counter disinformation campaigns, and provide direct support to judges as individuals. The Brazilian **Inform, Enable, Respond** strategy presents a useful framework for courts to consider when designing their approaches. We recommend that courts share lessons on reform approaches and gather evidence about the effectiveness and impact of such reforms.



## **Current legal frameworks have enabled the courts to respond to disinformation campaigns brought before them.**

Judges should continue to compile case law and share the approaches and criteria they use to balance citizens' rights. Legal professionals and academics can also assist with comparative case law analysis. Such an approach can help develop clearer jurisprudence for use at the national level.



## **Courts should look at the growing number of procedures or policies implemented at home and around the world to enable them to rule quickly on cases of disinformation to maintain public trust in the electoral process.**

Courts can engage in peer-to-peer exchange by joining practitioners' networks or connecting with election judges in their countries or regions to share their experience countering disinformation in elections. Courts should also consult with relevant national institutions, including EMBs, other independent bodies (e.g., human rights commissions, media regulation agencies), the police, and cyber bureaus about challenges with disinformation and measures taken. Such measures can include initiating dialogue with civil society organizations to increase understanding of the role of courts or modernizing the judiciary's function by holding public hearings to enhance trust.



## **Lawyers should understand their professional ethics and obligations and be held accountable in frivolous lawsuits.**

Legal professionals should review their codes of conduct or ethics rules and draw lessons from recent jurisprudence and sanctions imposed against litigants and lawyers. Courts, EMBs, and other relevant stakeholders should engage with lawyers, candidates, and parties prior to the elections to bring awareness of potential sanctions and impacts on the elections and conduct training on ethics rules.



## **Election judges and magistrates should engage in dialogue with social media platforms ahead of elections to create direct communication.**

It is crucial to enhance cooperation to quickly access evidence and remove harmful content if the adjudication bodies find it to be in violation of election laws or rules, as experienced in Costa Rica.



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