SHORTCOMINGS OF INTERNATIONAL HUMAN RIGHTS LAW CONCERNING ELECTORAL HATE SPEECH: A MEXICAN CASE STUDY THROUGH THE LENS OF COMPARATIVE LAW

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ABSTRACT

When confronting hate speech in the context of elections, the key question is whether the main purpose of restricting electoral hate speech is to stave off anti-system extremists who reject democratic liberalism, or if restrictions on electoral hate speech should shape the confines of mainstream discourse as well. Courts around the world in the post-World War II (WWII) era have invoked international human rights treaties to justify restrictions on electoral hate speech that question "settled issues," such as democracy and racial equality. Within that context, this Note uses Mexico's electoral justice system as a case study for a new approach to electoral hate speech in which courts play a much more active role in guiding debates on highly contested social issues.

The analysis yields the conclusion that international human rights treaties are troublingly vague and consequently do not yield a definitive answer on whether Mexico's newfound approach is permissible under international law. Hence, this Note signals the need to clarify the balance struck by international human rights treaties between the right to freedom of expression and the necessity of proscribing electoral hate speech. Finally, some preliminary remedies concerning international treaties are suggested.

The analysis is based on recent decisions issued by the Superior Chamber of Mexico's Electoral Tribunal of the Federal Judiciary (TEPJF) that have not yet been subjected to serious scholarly analyses. In addition, it appears that no research has been published that uses Mexico's electoral hate speech jurisprudence to show how international human rights law does not yield clear answers to important questions regarding the permissibility of hate speech in the electoral sphere.

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I. INTRODUCTION

Joseph Goebbels, the leader of the Ministry of Public Illustration and Propaganda in Nazi Germany is said to have remarked that "[t]his will always remain one of the best jokes of democracy, that it gave its deadly enemies the means by which it was destroyed."[1] The ascendancy of Nazism in Germany during the Weimar Republic is often used as an example of how democracies that tolerate illiberal ideologies sow the seeds of their demise.[2] For this reason, in the decades following World

1. Samuel Issacharoff, *Fragile Democracies,* 120 HARV. L. REV. 1405, 1408 (2007).

2. *See, e.g.*, Alexander Tsesis, *Dignity and Speech: The Regulation of Hate Speech in a Democracy,* 42 WAKE FOREST L. REV. 497, 506 (2009) ("Permitting persons or organizations to spread ideology touting a system of discriminatory laws or enlisting vigilante group violence erodes democracy. So it was in the Weimar Republic . . . ."). *But see, e.g.*, Kennan Malik, *Freedom of Speech Was Too Hard Won to Be Cavalier Now About Censorship*, GUARDIAN (Jan. 30, 2022), https://www.theguardian.com/commentisfree/2022/jan/30/freedom-of-speech-hard-won-cavalier-now-about-censorship ("One of the deepest-held beliefs about the dangers of free speech is the Weimar myth: the belief that unrestrained freedom of speech allowed the Nazis to spread their poisonous ideas in 1920s

War II (WWII), even states that are otherwise supportive of free speech are often unwilling to tolerate political parties or candidates that reject certain fundamental norms.[3] Such rejection of fundamental norms is often termed "hate speech."[4] Yet, as this Note will show, restrictions on electoral hate speech need not be limited to the most extreme forms of racist and antidemocratic discourse.

While the conflict between hate speech and the right to freedom of expression is not exclusively restricted to electoral matters, it takes on heightened importance in this context. One of the principal aims of the right to freedom of expression is to ensure that the state does not restrict voters' ability to hear different viewpoints. Consequently, if there is one area in which restrictions to the right of freedom of expression should be heavily scrutinized, it is in the electoral arena. However, at the same time, the consequences of hate speech in the electoral arena are particularly acute for the groups that are affronted by such discourse. Elections create an environment ripe for agitation and even violence against vulnerable populations. Hence, perhaps restrictions on electoral hate speech may be more important than restrictions on hate speech in other contexts.

Similarly, if a political party with an ideology communicated through hate speech comes to power, vulnerable populations may be at risk of being targeted. Consequently, many democracies have established special protections against electoral hate speech. Such protections can be measures for the self-preservation of liberal democracy[5] amid the possibility that voters may elect a government that puts an end to liberalism or democracy.

This Note argues that the current international legal framework for dealing with conflicts between hate speech and the right to freedom of expression in the electoral context is troublingly vague and leads to potentially disparate results in different jurisdictions governed by the same treaties. International law is expressed through treaties and the documents issued by the organs that are tasked with advising on the

Germany and that restrictions on speech and the suppression of antisemitic propaganda would have stalled the rise of Hitler.").

3. *See, e.g.*, Grundgesetz [GG] [Basic Law], art. 21.2 (Ger.), translation at https://www.gesetze-im-internet.de/englisch_gg/index.html ("Parties that, by reason of their aims or the behaviour of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional.").

4. *See, e.g.*, Tsesis, *supra* note 2.

5. Liberal democracy is a system of government in which voters can choose their elected representatives through free and fair elections, but also shields certain civil liberties and/or fundamental rights from majoritarian impulses.

compliance of such treaties. Hence, this Note uses recent cases from Mexico's electoral justice system as a case study on how national courts may use international treaties to support a far more restrictive approach to the right to freedom of expression in the face of electoral hate speech, in comparison to courts in the post-WWII era.[6]

Before discussing how different jurisdictions have dealt with electoral hate speech, it is worth noting that the content of this Note may be less relevant to U.S. jurisprudence, in large part due to well-settled U.S. Supreme Court (SCOTUS) precedents. Following *Brandenburg v. Ohio,* what is often termed "hate speech" can only be restricted when it is "directed to inciting or producing imminent lawless action," and the speech "is likely to incite or produce such action."[7] This holding has been reaffirmed repeatedly in subsequent cases, with SCOTUS upholding the right to freedom of expression in cases involving cross-burning on Black-owned property and cheering near a soldier's funeral.[8] The United States has effectively neutralized any international obligation to restrict electoral hate speech by making reservations to the treaties it subscribes to ensure they do not compel contravention of *Brandenburg*.[9]

A. *Overview of the Role of Courts and Treaties in Policing Electoral Hate Speech*

In contrast to the United States, the conflict between the right to freedom of expression and restrictions on hate speech is far less settled in other jurisdictions. While most democracies recognize the right to freedom of expression on a constitutional level, the same constitutions or treaties subscribed to by those states recognize other rights, such as the

6. The article expands upon previous research on jurisprudence regarding hate speech and the right to freedom of expression in a general societal context, rather than just the electoral sphere. *See generally* MOSES LISKER, CRITERIOS JURISPRUDENCIALES SOBRE EL DISCURSO DE ODIO Y LA LIBERTAD DE EXPRESIÓN EN MÉXICO: ANÁLISIS DE DERECHO COMPARADO (2023).

7. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

8. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 396 (1992); Snyder v. Phelps, 562 U.S. 443 (2011).

9. *Cf.* International Covenant on Civil and Political Rights, Declarations and Reservations, Dec. 16, 1966, 999 U.N.T.S. 171 (providing a reservation stating "[t]hat article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States."); International Convention on the Elimination of All Forms of Racial Discrimination, Declarations and Reservations, Dec. 21, 1965, 660 U.N.T.S. 195 (providing a reservation stating "[t]he Constitution of the United States contains provisions for the protection of individual rights, such as the right of free speech, and nothing in the Convention shall be deemed to require or to authorize legislation or other action by the United States of America incompatible with the provisions of the Constitution of the United States of America.").

right to human dignity.[10] International treaties, subscribed by nearly all states, such as the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the International Covenant on Civil and Political Rights (ICCPR), impose on the contracting states the obligation to proscribe hate speech or discriminatory speech.[11] The ICCPR also guarantees the right to freedom of expression.[12] Meanwhile, other regional treaties such as the American Convention on Human Rights (ACHR) and the European Convention on Human Rights (ECHR) all affirm a right to freedom of expression but also obligate states to proscribe some forms of hate speech.[13]

These treaties will be discussed in greater length in Part IV. The treaties' vagueness leaves a lot of room for interpretation by both municipal and international courts. Thus, courts have drawn different dividing lines between expressive content that, while discomforting, must be permissible in a free society and expressive content that can (or must) be prohibited to protect the rights of the aggrieved parties. Comparative law offers an interesting lens through which one can see the different ways courts have sought to distinguish between permissible expression and impermissible hate speech.

In the context of elections, courts have drawn different dividing lines between permissible and impermissible hate speech. These lines may differ for matters outside the context of elections. For instance, in Mexico, a separate court system adjudicates electoral matters.[14] While the electoral justice system must follow the precedents that are established by Mexico's high court, it has ample leeway to adjudicate on electoral matters.[15] Thus, while Mexico's high court has largely been silent on hate speech,[16] Mexico's Electoral Tribunal of the Federal Judiciary

10. *See, e.g.*, Grundgesetz [GG] [Basic Law], arts. 1(1), 5 (Ger.) (the former article establishing the right to human dignity and the latter article the right to freedom of expression).

11. *See* International Convention on the Elimination of All Forms of Racial Discrimination art. 4, Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter ICERD]; International Covenant on Civil and Political Rights art. 20.2, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

12. ICCPR, *supra* note 11, art. 19.1.

13. *See* Organization of American States, American Convention on Human Rights "Pact of San Jose, Costa Rica" art. 13, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter ACHR]; Convention for the Protection of Human Rights and Fundamental Freedoms arts. 10, 13, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention on Human Rights].

14. *See* Constitución Política de los Estados Unidos Mexicanos, CPEUM, art. 99, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 08-10-2013.

15. *Id.*

16. Mexico's Supreme Court has only ruled twice on hate speech cases (none on electoral matters). The first case recognized hate speech as a limit to the right to freedom of expression. *See generally* Libertad de expresión. Actualización, características y alcances de los discursos del odio,

(TEPJF) has ruled on several cases involving hate speech (albeit sometimes tangentially).[17]

While courts have long adjudicated cases of electoral hate speech involving extremist ideologies and extreme manifestations of nationalism and racism, recent rulings from the Superior Chamber of the TEPJF suggest that Mexico may be heading toward unchartered territory in sanctioning speech that is not outside of the mainstream in the political arena. In 2021, the Superior Chamber of the TEPJF upheld a lower court ruling that sanctioned a political party for discriminatory speech in advertising against abortion.[18] In 2022, the same chamber upheld a lower court ruling that sanctioned a Mexican politician who made a series of statements on Twitter that indirectly rejected a fellow legislator's gender identity.[19] Thus, if other courts decided to take the Mexican approach, the hate speech paradigm in the electoral context that was previously applied to marginal forms of discourse may soon be expanded to include situations involving hotly contested political issues. Consequently, the recent decisions issued by the Superior Chamber of the TEPJF provide an interesting case study on how judicial involvement in hate speech policy may expand in the coming years.

B. *Background Assumptions on the Scope of "Hate Speech"*

This Note uses the term "hate speech" in a specific manner that may be distinct from its usage in other contexts. Many scholars have noted

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Primera Sala de la Suprema Corte de Justicia de la Nación [SCJN], Semanario Judicial de la Federación y su Gaceta, Déciema Época, Tomo I, Mayo de 2013, Tesis CL/2013 página 545 (Mex.). This holding was reaffirmed in the second case. *See generally* Discurso de Odio. La respuesta del sistema jurídico ante su expresión debe ser gradual en función de una pluralidad de circunstancias que deben ser ponderadas cuidadosamente por el legislador y por los jueces, Primera Sala de la SCJN, Semanario Judicial de la Federación y su Gaceta, Décima Época, Tomo I, Diciembre de 2019, Tesis CXVII/2019 página 325 (Mex.).

17. *See generally* Recursos de Revisión del Procedimiento Especial Sancionador, Sala Regional Especializada del Tribunal Electoral del Poder Judicial de la Federación [TEPJF], Secretaría General de Acuerdos Oficina de Actuaría, Décima Época, Tomo I, Septiembre de 2018, SUP-REP-611/2018 and SUP-REP-613/2018 (Mex.); *see also* Recurso de Reconsideración, Sala Regional del TEPJF correspondiente a la Cuarta Circunscripción Plurinominal, Décima Época, Tomo I, 2018, SUP-REC-1388/2018 (Mex.).

18. *See* Recurso de Revisión del Procedimiento Especial Sancionador, Sala Regional Especializada del TEPJF, Secretaría General de Acuerdos Oficina de Actuaría, Décima Época, Tomo I, Noviembre de 2021, SUP-REP-324/2021, página 70 (Mex.).

19. *See* Recurso de Revisión del Procedimiento Especial Sancionador, Sala Regional Especializada del TEPJF, Secretaría General de Acuerdos Oficina de Actuaría, Undécima Época, Tomo I, Junio de 2022, SUP-REP-252/2022, pagina 81 (Mex.) (the decision was partially revoked on a technicality that is beyond the scope of this article, but the reasoning of the decision as it relates to hate speech was left standing).

that the term "hate speech" can be difficult to define. Andrew Sellars compared the attitude toward the term "hate speech" to the attitude towards obscenity, epitomized in Justice Potter Stewart's phrase "I know it when I see it."[20] Scholars differ on whether hate speech must be directed towards a marginalized or disadvantaged group to qualify as such.[21] Scholars also differ on whether it suffices for the speech to indicate discriminatory ideas or if it must express support for violent acts against certain subjects.[22] Other scholars differ on whether the intention of the speaker is more relevant than the perception of the listeners in determining whether a given remark constitutes hate speech.[23]

Considering the above, this Note assumes that to qualify as hate speech, an expression must be directed towards a marginalized, vulnerable, or disadvantaged group. For this reason, a call for political violence in and of itself would not qualify as hate speech. Cases involving alleged electoral hate speech in support of an armed revolt are outside the scope of this Note (unless the discontent arises out of racial or religious tension).

Additionally, the term "hate speech" will be used interchangeably with the term "discriminatory speech" throughout the Note. The Note will analyze court decisions that reject the term "hate speech" in favor of the term "discriminatory speech." This may occur when a court considers that an expression communicated discriminatory ideas but does not incite violence against its subjects.[24] The purpose of not making this distinction in this article is to ensure that terminological differences between courts do not hinder the possibility of conducting a comparative law analysis. Courts using the term "hate speech" will often have the same idea as other courts referring to "discriminatory speech." If legal treatment is similar, the terminological difference may be of little relevance for purposes of this Note.

This Note seeks to present the shortcomings of international treaties in distinguishing between permissible expression and impermissible hate speech in the context of elections, using Mexico's development of a more stringent approach towards electoral hate speech as a case study. Part II compares the jurisprudence that has emerged from municipal and international courts relating to electoral hate speech in the

20. ANDREW SELLERS, BERKMAN KLEIN CTR., DEFINING HATE SPEECH 14 (2016).

21. *Id.* at 16 (comparison between Richard Delgado's position and that of Mari Matsuda).

22. *Id.* at 17 (comparison between Kenneth Ward's position and that of other academics).

23. *Id.* at 16 (comparison between Calvin Massey's position and that of other academics).

24. *See, e.g.*, Revisión del Procedimiento Especial Sancionador, SUP-REP-252/2022, at 46 (court making the distinction between the discriminatory speech used by the appellant and what it considered to be hate speech).

decades following WWII. Part III discusses the recent jurisprudence from the Superior Chamber of Mexico's TEPJF and how it departs from past electoral hate speech jurisprudence. Part IV discusses how the departure mentioned in Part III and its potential implications may at least in part be attributable to unclear directives from different sources of international law. Finally, Part V concludes with reflections on how existing international law may be reworked to establish a clear dividing line between provocative speech that must be permitted and hate speech that must (or can) be proscribed in the electoral context.

II. Sanctions for Electoral Hate Speech in the Post-WWII Era: A Comparative Analysis

The genesis of legislative provisions outlawing hate speech can be traced back to the 1930s,[25] a time when several European states simultaneously felt threatened by the rise of fascism and communism. Even their opponents, such as Goebbels, argued that democracy enabled fascists by providing them with a platform to spread their ideas. Advocates for democracy, such as legal philosopher Karl Loewenstein, also came to the same conclusion.[26] Loewenstein argued that democracy cannot compete with fascism as the former appeals to reason while fascism appeals to emotions.[27] He criticized the reluctance of the Weimar Republic in confronting Nazism in Germany during the twenties and early thirties. Loewenstein contrasted that submissive attitude with more proactive positions of other democratic regimes, which in his opinion, had used repression effectively to prevent the rise of fascism in their states.[28] Loewenstein called that stance "militant democracy."[29]

A. *Prohibition of Antisystem Political Parties*

After WWII, Loewenstein's arguments were taken up by democracies to justify the exclusion of subversive movements from the electoral process. With regard to the jurisprudential debate on the legitimacy of such actions, one early case in the post-WWII era comes from West Germany, where the Basic Law explicitly empowered the Federal

25. *See* Lene Johannessen, *Denmark: Racist Snakes in the Danish Paradise*, *in* Striking a Balance: Hate Speech, Freedom of Expression, and Non-Discrimination 140 (Sandra Colliver et al. eds., 1992) (discussing Denmark's passage of a hate speech law in 1939).

26. *See generally* Karl Loewenstein, *Militant Democracy and Fundamental Rights*, 31 Am. Pol. Sci. Rev. 417 (1937).

27. *Id.* at 428.

28. *See id.* at 426.

29. *Id.* at 417.

Constitutional Court (BVerfG, its German acronym) to decide when a party should be eliminated for opposing the "democratic order."[30] The BVerfG exercised this power for the first time in 1952 by abolishing the Socialist Reich Party.[31] In making this determination, the BVerfG observed that the close relationship between the former Nazi Party and the Socialist Reich Party was such that the latter could be considered a successor to the former.[32] The BVerfG also noted that the political program of the party rejected equal human dignity and that it was not committed to maintaining democracy if it came to power.[33] Additionally, the party had called for resolving "the Jewish question."[34] Thus, the Court abolished the Socialist Reich Party.[35]

An analysis of cases in which the European Court of Human Rights (hereafter referred to as the Strasbourg Court)[36] reviewed decisions by Turkish courts disqualifying political parties provides insight into the Strasbourg Court's approach to electoral hate speech. For many years, Turkey upheld a strict separation between religion and state[37] and considered opposition to such separation to be a threat to national unity.[38] Thus, throughout its history Turkey has banned political parties that were opposed to secularism.[39]

In 2003, the Strasbourg Court upheld the Turkish Constitutional Court's disqualification of the Welfare Party.[40] The Strasbourg Court affirmed that the standard for determining whether a political party should be dissolved requires determining whether the party presented an imminent risk to democracy, rendering dissolving the party necessary.[41] This required a two-prong test: determining whether (1) the

30. *See* Issacharoff, *supra* note 1, at 1455.

31. *Id.* at 1431.

32. *See* Frida Trönnberg, State Regulation of Anti-Democratic Parties: A Comparative Study of Germany, Spain and Sweden 31 (June 4, 2013) (Master thesis, Linköping University).

33. *See id.*

34. *Id.* at 30.

35. *Id.* at 31.

36. The ECHR abbreviation is used more often, but I am using the Strasbourg Court hereafter as ECHR is already used in this Note to describe the European Convention on Human Rights.

37. This separation has grown weaker in the years after President Tayyip Erdogan was elected Prime Minister in 2003. Interestingly, Erdogan's party is widely viewed as the successor to the Welfare Party, whose prohibition was reviewed by the Strasbourg Court.

38. *See* Issacharoff, *supra* note 1, at 1431.

39. *See id.*

40. EUR. CT. H.R., INFORMATION NOTE ON THE CASE-LAW OF THE COURT NO. 50: REFAH PARTISI (THE WELFARE PARTY) AND OTHERS V. TURKEY [GC] 1 (2003), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22002-5004%22]}.

41. *Id.* at 2.

expressive content leading to disqualification contravened the ECHR and (2) disqualification was a necessary response to the expressive content.

In *Refah Partisi (The Welfare Party) and Others v. Turkey*, the statements that led to the disqualification of the Welfare Party were issued by its chairman and vice-chairman.[42] The statements called for the adoption of a plurality of legal systems.[43] The applicable legal system would hinge on a person's religious affiliation.[44] Thus, Muslims would be governed by the private law rules in *Sharia* law.[45] Additionally, there was some ambiguity over whether the Welfare Party considered violence to be a legitimate means of achieving its objectives.[46] The Strasbourg Court determined that the chairman and vice-chairman's statements were incompatible with the ECHR, as "it would introduce a distinction between individuals based on religion."[47] Moreover, *Sharia* law was determined to be incompatible with the ECHR.[48]

Having found that the general secretary and vice secretary's statements were incompatible with the ECHR, the Strasbourg Court determined that the Turkish Constitutional Court had also established the necessity of the measure, the second part of the two-prong analysis. The Strasbourg court noted that an imminent risk could be deemed to exist as the Welfare Party conceivably could win the upcoming elections, thereby enabling it to implement its platform.[49] Finally, the statements in support of *Sharia* law could be imputed to the party.[50] Consequently, the Strasbourg Court considered that the Welfare Party's disqualification was necessary in a democratic society, reaffirming its maxim that courts do not have to refrain from acting until concrete steps are taken to undermine liberal democracy.[51]

It is worth noting that the Strasbourg Court has not always affirmed Turkish courts' electoral sanctions. In 2006, the Strasbourg Court overturned the Welfare Party chairman's criminal conviction for making the same statement that led the Strasbourg Court to consider the

42. *Id.* at 1.
43. *Id.* at 2.
44. *Id.*
45. *Id.* at 3.
46. *Id.*
47. *Id.* at 2.
48. *See id.*
49. *Id.*
50. *Id.*
51. *Id.* at 3.

party's disqualification permissible in *Refah Partisi*.[52] The Strasbourg Court considered that the sanction was imposed several years after the relevant statements, eliminating any reasonable claim of necessity to protect democracy.[53] The Strasbourg Court noted that the necessity threshold was higher because the sanction was a criminal conviction, as opposed to the disqualification of a political party.[54]

The next year, the Strasbourg Court also ruled that dissolving a political party that was widely considered to be a successor to the Welfare Party was a violation of the right to freedom of expression in Article 10 of the ECHR.[55] In *Silay v. Turkey*, the party in question had merely criticized Turkey's ban on women wearing burqas in public spaces.[56] It did not call for abolishing secularism.[57] The Strasbourg Court did not consider the successor party's statements to be illegitimate.[58] Clearly, the Strasbourg Court was affirming that its tolerance for the prohibition of political parties that rejected secularism outright did not extend to political parties that criticized particular policies in Turkey. In essence, the Strasbourg Court recognized the bounds of mainstream discourse which could not be restricted.

After having analyzed the clash between liberal democracy and religion in Turkey, it is worth analyzing how Israeli courts have dealt with the same clash. In the 1980s, Rabbi Meir Kahane founded Kach, a political party that sought the expulsion of Israel's Palestinian population.[59] Kahane regarded Israel's founding document to be "schizophrenic," arguing that it was impossible for Israel to simultaneously be Jewish and democratic.[60] Thus, according to Kahane, only Palestinians who agreed to live in Israel as foreigners should be allowed to stay.[61] As a result of Kahane's positions, in 1984, the Israel Central Elections Committee disqualified Kach from participating in the upcoming elections.[62]

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52. *See* IRENE MARÍA BRIONES MARTÍNEZ, EL DELITO DE ODIO POR RAZÓN DE RELIGIÓN Y DE CREENCIAS: LA EDUCACIÓN EN LA RELIGIÓN CONTRA EL TERRORISMO DE LA PALABRA Y DE LA VIOLENCIA 203–04 (2018).

53. *See id.* at 204.

54. *See id.*

55. *See id.* at 205.

56. *See id.*

57. *See id.*

58. *See id.* at 205–06.

59. Raphael Cohen-Almagor, *Disqualification of Lists in Israel (1948-1984): Retrospect and Appraisal*, 13 L. & PHIL. 43, 45 (1994).

60. See *id.* at 66.

61. *Id.*

62. *Id.* at 67.

However, Israel's Supreme Court overturned the disqualification, with Israeli Supreme Court President Meir Shamgar arguing that disqualification of a political party could only be a last resort.[63] Justice Aharon Barak objected to Shamgar's argument (while agreeing to overturn the disqualification), echoing the Strasbourg Court's position that the mere possibility of a political party threatening the democratic order was sufficient to justify disqualification.[64] Shamgar's position prevailed, which was mostly grounded in the fact that Israel's Basic Law at the time did not explicitly establish hate speech as grounds for disqualification of the political party in question.[65] Responding to the Israeli Supreme Court's decision, Israel's parliament modified the state's Basic Laws, establishing "incitement to racism" as grounds for disqualification.[66] Consequently, Kach was disqualified from participating in the 1988 parliamentary elections, and this sanction was upheld by Israel's Supreme Court, considering the modification to the Basic Laws.[67]

While this section has provided a broad array of examples of political parties opposed to liberal democracy which have been disqualified, electoral hate speech jurisprudence has also concerned itself with political parties and candidates which incite racial hatred. These political parties and candidates do not go as far as to challenge the liberal and democratic order in its entirety but nonetheless support racially discriminatory policies. Such instances of electoral hate speech are analyzed in the following section.

B. *Disqualifying Individuals Inciting Racial Hatred*

In cases involving the incitement of racial hatred, instead of disqualifying political parties, courts have responded by disqualifying the perpetrators from future elections.[68] Such a sanction was upheld by the now defunct European Commission of Human Rights (Commission) in *Glimmerveen and Hagenbeek v. The Netherlands*, decided in 1979.[69] In

63. *Id.* at 73.

64. *Id.* at 76.

65. *See* Issacharoff, *supra* note 1, at 1448–49.

66. AMI PEDAHZUR, THE ISRAELI RESPONSE TO JEWISH EXTREMISM AND VIOLENCE: DEFENDING DEMOCRACY 48 (Peter Lawler ed., 2002).

67. *Id.* at 52.

68. *See, e.g.*, Glimmerveen v. Netherlands, App. No. 8348/78 & 8406/78, 18 Eur. Comm'n H.R. Dec. & Rep. 187, 189 (1979).

69. *See id.* at 197.

this case, Dutch courts rejected the petition of two individuals to participate in an election where the individuals, in their capacity as party leaders, had been convicted for distributing a pamphlet that incited racism.[70] The pamphlet, addressed to only white Dutchmen, declared that if their party came to power, it would proceed to remove the Turks, Surinamese, and other immigrant workers.[71] The plaintiffs turned to the Commission and argued that the exclusion of their candidacy violated Article 10 of the ECHR.[72] The Commission rejected the plaintiffs' claim, invoking Article 17 of the ECHR, which stipulates that candidates cannot avail themselves of the rights and freedoms enshrined in the ECHR to undermine them.[73]

In this way, the Commission took up the concept of militant democracy, applying it to a case that perhaps could be considered less clear than the one resolved by Germany's BVerfG when it abolished the Socialist Reich Party. The BVerfG ruled that the foundations of the Socialist Reich Party were antagonistic to a liberal democracy. However, this is not so clear in *Glimmerveen and Hagenbeek*, in which the political party called for the implementation of racially discriminatory policies, but did not reject the liberal democratic order in its entirety. The wording of ECHR Article 17 appears more suitable for antisystem political parties as opposed to political parties with racist ideologies.

In a later case, the Strasbourg Court upheld the disqualification of a politician responsible for electoral hate speech, albeit without invoking Article 17 of the ECHR.[74] Daniel Féret, the leader of the National Front Party in Belgium, had been accused of spreading propaganda that called for the expulsion of immigrants to Belgium who were not of European origin to prevent the creation of "ethnic ghettos" and Belgium's Islamization.[75] Although Féret was a member of the Belgian parliament, he was impeached, after which a Belgian court sentenced him to an alternative sentence of 250 hours of social service in the immigration sector or a prison sentence of ten months.[76] Féret was also disqualified from participating in

70. *Id.* at 189.

71. *Id.* at 188.

72. *Id.* at 194.

73. *Id.* at 197.

74. *See* LISANNE GROEN & MARTIJN STRONKS, ENTANGLED RIGHTS OF FREEDOM: FREEDOM OF SPEECH, FREEDOM OF RELIGION AND THE NON-DISCRIMINATION PRINCIPLE IN THE DUTCH WILDERS CASE 90, 94 (2010).

75. *Id.* at 91.

76. *Id.*

Belgian parliamentary elections for ten years.[77] Féret appealed the ruling to the Strasbourg Court, which decided the case in 2009.[78]

Ultimately, the Strasbourg Court confirmed the sentence against Féret.[79] The Strasbourg Court recognized that courts must exercise greater scrutiny over hate speech sanctions imposed on public officials because officials are acting on behalf of the constituents who elected them.[80] The Strasbourg Court also considered that it was necessary to evaluate the greater harm the act of hate speech would cause when made by public officials because of their status.[81] Thus, Féret had a greater responsibility than an ordinary individual to refrain from engaging in speech that incites intolerance.[82] While Féret's remarks were afforded greater protection considering that they were made within the context of an election campaign, such protection does not absolve politicians from the responsibility of refraining from making racist remarks.[83] Thus, the Strasbourg Court concluded that Féret incited racism and that his disqualification and prison sentence (with an alternative of community service) were not disproportionate sanctions.[84]

The decision in *Féret* was a close one, as the vote in favor of upholding the sanction was four to three.[85] The three dissenting judges considered that only an emergency could justify restricting speech that takes place in the context of an election campaign.[86] Moreover, the dissenting judges protested that the definition of "hate speech" adopted by the majority was too broad.[87]

Apart from upholding a sanction on electoral hate speech, *Féret* shows how courts face a dilemma when proscribing electoral hate speech. Courts may simultaneously consider that the speech in question is likely to be more damaging to its subjects, and at the same time, must be afforded greater protection, considering the right to freedom of expression. Thus, a balancing test may render a higher or lower standard for electoral hate speech. Courts must make context-specific determinations in this regard, given that the potential damage the

77. *Id.*
78. *Id.* at 90 n.171.
79. *Id.* at 94.
80. *Id.* at 92.
81. *Id.* at 93.
82. *Id.*
83. *Id.*
84. *Id.* at 94.
85. *Id.*
86. *Id.*
87. *Id.* at 95.

speech may cause and its relationship to democratic deliberation are both at their peak. The Court in *Féret* appears to take the position that the sanctioned speech was not protected even considering the greater scrutiny afforded to restrictions on electoral speech. However, the concerns of the dissent were notable; the speech in *Féret* was a statement of opposition to migration.[88] It was far removed from the extreme circumstances that would render speech imminently dangerous, considering the absence of any incitement to violence. Thus, it is unclear what made this speech so insidious for the Court to consider that it was sanctionable, notwithstanding the heightened standard of scrutiny it acknowledged was applicable in *Feret*.

While also tied to racial hatred, the following case describes one of the most extreme sanctions that can be imposed on electoral hate speech; calling a new election. This sanction is particularly problematic from a democratic standpoint as it entails presuming the susceptibility of voters to electoral hate speech and depriving them of their choice of elected representatives on that basis.

C. *An Extraordinary Remedy: The Annulment of a Tainted Election*

India provides a case study for the sanctioning of electoral hate speech by annulling an election. In *Prabhoo v. Kunte,* the Indian Supreme Court confirmed a lower court's annulment of Ramesh Prabhoo's election to India's parliament, on account of a speech delivered by Indian nationalist politician Bal Thackeray at one of Prabhoo's campaign rallies.[89] In a campaign rally, Thackeray said, "You will find Hindu temples underneath if all the mosques are dug out. Anybody who stands against the Hindus should be showed or worshipped [sic] with shoes. A candidate by the name Prabhoo should be led to victory in the name of religion."[90]

For the Indian Supreme Court, the dispositive factor in this case was that Thackeray had made an appeal to vote for a candidate based on religion.[91] The Indian Supreme Court recognized that Thackeray's comments may have been permissible outside of the electoral context.[92] However, the right to freedom of expression would not shield the same comments if they were made in an election rally, owing to the imperative

88. *Id.* at 91.

89. *See* Issacharoff, *supra* note 1, at 1425.

90. *See id.* at 1423 (quoting Prabhoo v. Kunte, AIR 1996 SC 1113, 1118–19 (1995) (India)).

91. *Id.* at 1425 ("The court found that the statute prohibited any appeal to vote for or against a candidate based on his religion, regardless of whether the appeal was 'prejudicial to the public order.'").

92. *See id.* at 1426–27.

of maintaining the integrity of the democratic process and preventing the incitement of communal hatred.[93] In this manner, the Indian Supreme Court echoed the Strasbourg Court in *Féret* in recognizing that the right to freedom of expression offers less protection to hate speech in election campaigns as compared to hate speech in other contexts.[94]

The analysis of cases handed down by the Strasbourg Court and municipal courts in Germany, India, and Israel make it clear that courts have played a crucial role in defining when electoral hate speech is not protected by the right to freedom of expression. These courts ruled on cases involving extreme manifestations of racist sentiment as well as candidate statements and political platforms that opposed liberal democracy. When confronting parties opposed to liberal democracy, the BVerfG dissolved a political party with Nazi sympathies, and the Strasbourg Court affirmed the dissolution of the Turkish Welfare Party due to its adoption of a platform that contravened the ECHR's guarantee against discrimination.[95] Meanwhile, Israel's Supreme Court affirmed the disqualification of an extremist political party that rejected Israel's democratic character.[96] In *Féret* and *Glimmerveen and Hagenbeek*, the Strasbourg Court affirmed that the right to freedom of expression did not protect expressions of support for the removal of migrants based on their ethnicity.[97] Finally, the Indian Supreme Court signaled in *Prabhoo* that extreme forms of hate speech could merit not just the sanctioning of the politicians or political parties responsible, but the annulment of the elections won by a candidate who employed hate speech.[98]

III. Mexico's Electoral Justice System: A New Path Forward for Militant Democracy

Notwithstanding the broad array of jurisprudence regarding extreme forms of racism and threats to democracy, there appears to be less

93. *See id.* at 1427 ("The restriction is limited only to the appeal for votes to a candidate during the election period and not to the freedom of speech and expression in general. . . .").

94. Given that the election took place in 1987 and the case was not decided until 1996, Prabhoo served out the term for which he was elected. Thus, the only practical effect of the decisions was that Prabhoo would be ineligible to run again for parliament for six years. Yet, this does not alter the precedential weight of the decision.

95. *See* Trönnberg, *supra* note 32, at 417; Eur. Ct. H.R., *supra* note 40, at 1.

96. *See* Pedahzur, *supra* note 66.

97. *See* Lisanne Groen & Martijn Stronks, *supra* note 74, at 94; Glimmerveen v. Netherlands, App. No. 8348/78 & 8406/78, 18 Eur. Comm'n H.R. Dec. & Rep. 187, 189 (1979).

98. *See* Issacharoff, *supra* note 1, at 1425.

discussion of the kind of electoral hate speech that is more often associated with mainstream political parties. Such mainstream political parties may not question the principles of liberal democracy or explicitly espouse racist views, but they might engage in speech that inspires discrimination. For instance, political candidates in these mainstream parties may employ racial stereotypes or use racial slurs, while not calling outright for discrimination or violence against the targeted groups. Alternatively, these mainstream political parties may support policies that are not widely regarded as discriminatory by the public. For this reason, this part analyzes how the Superior Chamber of the TEPJF has approached cases in Mexico involving mainstream political parties. The case study in Mexico is illustrative because courts in other states have not yet dealt with cases of electoral hate speech outside the context of fringe political movements.

A. *The TEPJF Prior to the 2018 Elections: Testing the Waters*

Leading up to Mexico's 2018 general election, the Superior Chamber of the TEPJF ruled on two cases that foreshadowed its undertaking of a greater role in scrutinizing electoral hate speech.[99] SUP-REP-611/2018 involved an advertisement against then-presidential candidate Andrés Manuel López Obrador that allegedly promoted an ageist message regarding his fitness to serve as president.[100] *SUP-REC-1388/2018* involved the annulment of a local election in Mexico City because campaign materials included hate speech targeting the losing candidate.[101] In both cases, the Superior Chamber of the TEPJF overturned lower court decisions that sanctioned the allegedly discriminatory messages associated with the political campaigns, while leaving intact its authority to sanction electoral hate speech in future cases.

In deciding SUP-REP-611/2018, the Superior Chamber of the TEPJF overturned a fine imposed on Javier Lozano Alarcón, in his capacity as a spokesperson for former Secretary José Antonio Meade Kuribreña, an ultimately unsuccessful candidate in Mexico's 2018 presidential election.[102] Lozano had retweeted an advertisement that showed an individual

99. *See generally* Recursos de Revisión del Procedimiento Especial Sancionador, Sala Regional Especializada del TEPJF, Secretaría General de Acuerdos Oficina de Actuaría, Décima Época, Tomo I, Septiembre de 2018, SUP-REP-611/2018 and SUP-REP-613/2018 (Mex.).

100. *Id.*

101. *See* Recurso de Reconsideración, Sala Regional del TEPJF correspondiente a la Cuarta Circunscripción Plurinominal, Décima Época, Tomo I, 2018, SUP-REC-1388/2018 (Mex.).

102. *See* Recursos de Revisión del Procedimiento Especial Sancionador, SUP-REP-611/2018 and SUP-REP-613/2018.

with similar features to then-presidential candidate López Obrador.[103] In the advertisement, the López Obrador look-a-like was attempting to drive a car, finding himself at a loss to understand the car's modern technology.[104] His purported granddaughter in the video told her grandfather that he was no longer fit to drive the car.[105] The advertisement was followed by a voiceover that stated that "if someone was no longer in conditions, love him and respect him, but do not let him run a country."[106] Considering that López Obrador was the oldest politician in the race, the lower electoral court found that the advertisement implied that he was too old to be president.[107] The lower court considered the campaign message to discriminate against elderly people and consequently fined Lozano, among other sanctions.[108]

The Superior Chamber of the TEPJF overturned the sanctions against Lozano.[109] The Court based its decision on a technicality rather than controverting the basis of the lower court's decision.[110] The Superior Chamber of the TEPJF noted that Lozano had retweeted a message that had likely been authored by someone else.[111] Thus, it was not proven that Lozano's retweet was related to his role as the spokesperson for Meade, rather than a spontaneous expression of his opinion.[112] Still, the Court acknowledged that if Lozano *had* authored a campaign advertisement suggesting that López Obrador was too old to be president, such conduct would have been sanctionable.[113] Consequently, the TEPJF appeared to assert its authority to sanction discriminatory speech in the electoral context, even when it did not entail extreme forms discussed in the previous part (e.g., extreme racism and opposition to liberal democracy).

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103. *Id.* at 22–23.

104. *Id.* at 23–24.

105. *Id.*

106. *Id.* at 24.

107. *Id.*

108. *Id.* at 5.

109. *Id.* at 68–70 ("[N]o está acreditado que Javier Lozano Alarcón haya sido el autor original de la propaganda que difundió en la red social.").

110. *Id.*

111. *Id.* at 68–69.

112. *Id.* at 57, 68 ("[P]ara desvirtuar la presunción de espontaneidad, habría sido necesario demostrar que

Javier Lozano Alarcón es el autor del mensaje, que fue elaborado por él mismo, o bien, que fue quien lo mandó a elaborar, esto es, poner en relieve que en el caso que se examina, la difusión de la información de un tercero . . . .").

113. *Cf. id.* at 66–67 ("[T]ratándose del proceso electoral, todos los actores políticos deben abstenerse de generar propaganda o material que pudiera hacer referencia a algún tipo de discriminación . . . .").

The same year the decision in Lozano's case was handed down, the Superior Chamber of the TEPJF reviewed a lower court decision annulling an election where Manuel Negrete Arias was elected president of the borough of Coyoacán, Mexico City.[114] The lower court had annulled the election, concluding that Negrete Arias' main opposing candidate, María de Lourdes Rojo e Incháustegui, had been adversely affected by gender-related political violence.[115] The acts termed "political violence" included paraphernalia with nude pictures of Rojo from her time as an actress, captioned with statements that she had engaged in acts that "denigrate women and display a lack of family values."[116] Other advertisements suggested that Rojo's candidacy was the product of an affair with an influential federal legislator.[117] The lower court did not find Negrete responsible for any of the advertisements.[118] However, it considered that the advertisements' misogynistic undertones, and various threats of violence against Rojo, tainted Negrete's electoral victory, thus necessitating a new election.[119]

In resolving SUP-REC-1388/2018, the Superior Chamber of the TEPJF overturned the lower court decision annulling Negrete's electoral victory on technical grounds, while suggesting that gender-related political violence could be the basis for annulling an election.[120] The Superior Chamber of the TEPJF noted that because the margin for Negrete's lead over Rojo was greater than five percent, Rojo bore the burden of proof to show that a given electoral irregularity influenced the outcome of the election.[121] Rojo failed to show that absent gender-related political violence, she would have emerged victorious.[122] However, the Superior Chamber of the TEPJF found that Rojo had been a victim of gender-related political violence,[123] and the Court did

114. *See* Recurso de Reconsideración, Sala Regional del TEPJF correspondiente a la Cuarta Circunscripción Plurinominal, Décima Época, Tomo I, 2018, SUP-REC-1388/2018, página 49 (Mex.).

115. *See id.* at 3, 6.

116. *Id.* at 40 n.45.

117. *See id.* at 40 (referencing relationship with René Bejarano).

118. *See id.* at 41.

119. *See id.*

120. *See id.* ("[E]n el caso concreto no fue generalizada ni de la entidad suficiente para invalidar la elección.").

121. *See id.* at 48.

122. *See id.* ("En el caso concreto no queda razonablemente acreditada la determinancia o trascendencia al proceso electoral en su totalidad, si se toma en consideración que la diferencia entre primer y segundo lugar . . . por lo que la violación alegada no denota por sí misma una afectación al proceso electoral.").

123. *Id.* at 41.

not controvert the lower court's finding that some of the misogynistic campaign advertisements were a form of gender-related political violence. Thus, the Superior Chamber of the TEPJF suggested that electoral hate speech could be grounds for annulling future elections.

As noted in Part II, most courts around the world have not signaled the possibility of countering electoral hate speech through the annulment of elections. Thus, the Superior Chamber of the TEPJF, in suggesting that electoral hate speech can lead to the annulment of an election, asserted greater power to combat electoral hate speech. Of course, it is not unprecedented, as the Indian Supreme Court in *Prabhoo* also accepted annulment as a possible sanction for electoral hate speech.[124] However, the nature of the hate speech in SUP-REC-1388/2018 (employment of racial stereotypes)[125] was decidedly more moderate than the violent rhetoric that was employed in *Prabhoo* (in which a candidate used violent imagery).[126]

Ultimately, the Superior Chamber of the TEPJF confirmed the annulment of a mayoral election due to gender-based political violence in September 2021.[127] In this case, there had been fourteen signs posted near polling stations with misogynistic messages such as "women do not know how to govern" and that "it was time for men."[128] The separation between the winning and losing candidates was below the five percent threshold, unlike the 2018 case referenced above.[129]

B. *Regulating Discourse on Highly Contested Social Issues*

Having dealt with electoral cases in Mexico dealing with how political candidates criticize their rivals, it is worth delving into two other cases where the Superior Chamber of the TEPJF sanctioned arguably mainstream discourse. Both cases involve politicians and political parties advocating for public policy on highly contested social issues. The first decision, SUP-REP-324/2021, concerned publications opposing abortion, which were posted on various social media sites by a political party

124. *See* Issacharoff, *supra* note 1, at 1425.

125. *See* Recurso de Reconsideración, SUP-REC-1388/2018, at 40 n.45.

126. *See* Issacharoff, *supra* note 1, at 1423.

127. *See generally* Cuando la violencia determina el resultado: la nulidad de elección por violencia política de género, Sala Regional Ciudad de México del TEPJF, Tribunal Federal Electoral, Décima Época, Septiembre de 2021, SUP-REC-1861/2021 (Mex.).

128. *See id.* at 69.

129. *See id.*

participating in the 2021 midterm elections.[130] The second decision, SUP-REP-252/2022, arose from a complaint against a fellow representative by a transgender representative in Mexico's Congress, in which the latter accused the former of gender-related political violence in denying her identity as a woman.[131]

The first decision, SUP-REP-324/2021, arose from various social media and radio advertisements authored by the Solidarity Encounter Party. One of the advertisements that led to the complaint stated, "Let[']s protect life and punish whoever attempts to infringe it."[132] Another advertisement stated,

> [H]umanity has created a world in which almost anything is disposable. To use and throw out without any remorse, but even life? Life cannot be thrown away. Life should be respected, taken care of, and protected. Life is the most important right. In support of life and family, let us say no to abortion.[133]

Finally, one of the challenged advertisements stated that "Amid a culture of death, the Solidarity Encounter Party protects life."[134] The other advertisements that were part of the campaign were similar.[135] On April 23, 2021, a Mexican Congresswoman, along with other individuals, filed a complaint with the National Electoral Institute (INE) alleging that the advertisements constituted hate speech.[136]

The lawsuit was adjudicated by a specialized tribunal in Mexico's election courts that receives complaints about public campaign advertisements. The specialized tribunal ruled in the complainants' favor, arguing that while the challenged advertisements were not hate speech, they were discriminatory towards women, and consequently, not protected by the right to freedom of expression.[137] The specialized tribunal acknowledged that in Mexico, abortion can be prohibited and

130. *See* Recurso de Revisión del Procedimiento Especial Sancionador, Sala Regional Especializada del TEPJF, Secretaría General de Acuerdos Oficina de Actuaría, Décima Época, Tomo I, Noviembre de 2021, SUP-REP-324/2021, página 70 (Mex.).

131. *See generally* Recurso de Revisión del Procedimiento Especial Sancionador, Sala Regional Especializada del TEPJF, Secretaría General de Acuerdos Oficina de Actuaría, Undécima Época, Tomo I, Junio de 2022, SUP-REP-252/2022 (Mex.).

132. Recurso de Revisión del Procedimiento Especial Sancionador, SUP-REP-324/2021, at 2.

133. *Id.* at 3.

134. *Id.*

135. *See id.* at 2–3.

136. *Id.*

137. *See id.* at 4.

criminalized[138] in certain instances, and political parties are entitled to campaign against abortion.[139] However, the specialized tribunal also noted that abortion is not prohibited in every instance, and the challenged campaign advertisements did not appear to single out any permitted exception to abortion.[140] Moreover, the advertisements used provocative language to describe abortion, such as "disposing [of] something," "us[ing] and throw[ing] something out without remorse," and comparing abortion with a "cruel murder."[141] Thus, the advertisements tended to discriminate against women who obtained abortions.[142]

The specialized tribunal pointed to prior decisions by Mexico's highest court, the Supreme Court of Justice of the Nation, that had deemed the right to an abortion as essential to the right to self-determination, and noted that its prohibition (even when legally permissible) disproportionately burdens women.[143] On appeal, the Superior Chamber of the TEPJF confirmed the specialized tribunal's holding, but it departed from its reasoning to explain why the advertisements opposing abortion were impermissible.[144] The Superior Chamber of the TEPJF emphasized that even though abortion is not prohibited in every instance, a political party is entitled to advocate for legislative change that results in an unqualified ban on abortion, even if such legislation would be unconstitutional.[145] The Superior Chamber of the TEPJF recognized that the specialized tribunal was, in essence, excluding from the realm of public debate the possibility of banning abortion.[146]

Nonetheless, the Superior Chamber of the TEPJF determined that the advertisements used "unnecessary" imagery and language, rendering them hate speech. The Superior Chamber noted the charged rhetoric in how the advertisements demonized women who choose to have

138. By the time the case reached the Superior Chamber of the TEPJF, Mexico's high court had ruled that the criminalization of abortion during the first 12 weeks of pregnancy is unconstitutional. *See generally* SUPREMA CORTE DE JUSTICIA DE LA NACIÓN, DESPENALIZACIÓN DEL ABORTO (2021), https://www.scjn.gob.mx/derechos-humanos/sites/default/files/sentencias-emblematicas/resumen/2022-05/Resumen%20AI148-2017%20DGDH.pdf.

139. *See* Recurso de Revisión del Procedimiento Especial Sancionador, SUP-REP-324/2021, at 10.

140. *See id.* at 11–12.

141. *See id.* at 12.

142. *See id.*

143. *Id.* at 10–11.

144. *Id.* at 69.

145. *See id.* at 45.

146. *Id.* at 46.

an abortion.[147] Other advertisements, which contained images of crying women, presumably after having obtained an abortion, portray women as emotionally weak, furthering discriminatory stereotypes.[148]

The Superior Chamber of the TEPJF noted that this kind of discriminatory language and imagery was prohibited by Mexico's Constitution as well as by the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Belém do Pará Convention.[149] Furthermore, the Superior Chamber of the TEPJF indicated that the Social Encounter Party could have advocated for an unqualified abortion ban without using discriminatory stereotypes.[150] For instance, it could have used scientific studies that support its view on when life begins, employed arguments against specific exceptions to a ban on abortion, and advocated for sexual education campaigns.[151]

In contrast, one judge in the Superior Chamber of the TEPJF issued a dissenting opinion, arguing that the advertisements were protected by the right to freedom of expression.[152] The judge noted that while the challenged advertisements may be "bothersome" or "disturbing," they do not exceed the limits of permissible expression.[153] Additionally, he noted that the right to freedom of expression is particularly important in the context in which these advertisements were aired: a political campaign by a political party seeking to advance its ideological agenda.[154] Finally, the dissenting judge criticized the majority opinion for giving directives to the Solidarity Encounter Party about how it should promote its positions.[155] In this regard, the dissenting judge clearly recognized the distinction between the extreme form of hate speech that can be prohibited and provocative advertising that nonetheless must be permitted in a democratic society.

In 2022, in SUP-REP-252/2022, the Superior Chamber of the TEPJF once again appeared to favor a more restrictive approach to the right to freedom of expression. The case originated with a complaint filed against Mexican Congressman Gabriel Quadri de la Torre for gender-

147. *See id.* at 65.

148. *Cf. id.* at 67 ("[E]l promocional presenta a la mujer como una persona débil que afronta las situaciones, por ejemplo, a través del llanto.").

149. *Id.* at 58.

150. *Id.* at 68

151. *Id.*

152. *See id.* at 72.

153. *Id.* at 79.

154. *Id.* at 81.

155. *See id.* at 87.

related political violence.[156] The complaint pointed to various tweets that Quadri de la Torre posted in February of 2022.[157] Some of these tweets were directed at his colleague, Salma Luévano, a trans woman.[158] One of the tweets stated that "trans fascism is drawing its claws in Mexico's Congress."[159] Other tweets appeared to reject Luévano's gender identity. For example, one tweet argued that Mexico's Congress did not truly have gender parity and that women were taking the place of men "through the back door."[160] While the tweets did not explicitly refer to Luévano, the Superior Chamber of the TEPJF considered them to be unmistakable references.[161]

The Superior Chamber of the TEPJF upheld a lower court opinion that determined that Quadri de la Torre had engaged in gender-related violence through his tweets directed against Luévano.[162] The Superior Chamber of the TEPJF asserted jurisdiction, arguing that as an electoral tribunal, it was within its authority to rule on the permissibility of Quadri de la Torre's statements.[163] It noted that Quadri de la Torre was a public official, and he was commenting on the electoral rights and eligibility of another member of the Chamber of Deputies, bringing his remarks into the purview of the electoral justice system.[164] Furthermore, the remarks were not protected by Quadri de la Torre's parliamentary privilege—such privilege did not extend to tweets, even if they commenting on pending legislation or matters of public interest.[165]

On the substance of the dispute, the Superior Chamber of the TEPJF upheld the lower court's finding that Quadri de la Torre's remarks were not protected by the right to freedom of expression. The Superior Chamber of the TEPJF argued that a precondition of public debate is the recognition of the right of others to participate.[166] The Court noted

156. Recurso de Revisión del Procedimiento Especial Sancionador, Sala Regional Especializada del TEPJF, Secretaría General de Acuerdos Oficina de Actuaría, Undécima Época, Tomo I, Junio de 2022, SUP-REP-252/2022, página 5 (Mex.).

157. *See id.* at 12–19.

158. *See id.* at 19, 45.

159. *Id.* at 12.

160. *Id.* at 16.

161. *Cf. id.* at 45 ("Salma Luévano es diputada por MORENA y se autoadscribe como mujer trans … basta que la presunta víctima pueda ser identificable para que los mensajes resulten constitutivos de VPG en su contra.").

162. *See id.* at 81.

163. *See id.* at 32.

164. *See id.*

165. *See id.* at 52.

166. *Id.* at 59.

that Quadri de la Torre's remarks had the effect of ostracizing transgender individuals.[167] Additionally, the remarks denied Luévano's gender identity, which is protected by Mexico's Constitution.[168] In this regard, the Superior Chamber of the TEPJF cited reports from the Inter-American Commission on Human Rights and the United Nations Commission for the Elimination of Discrimination Against Women, noting that international treaties against gender violence protect transgender women.[169]

Two judges in Mexico's Superior Chamber of the TEPJF issued a dissenting opinion, arguing that Quadri de la Torre's remarks were protected by the right to freedom of expression. The dissenting opinion used the Rabat Plan of Action[170] as the starting point for the analysis, which establishes a high threshold for allowing restrictions for freedom of expression, taking into account: political and social context, the speaker's status, the intention to incite an audience against a given group, the form and content of the speech, the extent of its reach, and the probability that it could cause harm (particularly if the harm is imminent).[171] For the dissenting judges, Quadri de la Torre's remarks were issued in a context where freedom of expression was particularly important. The remarks were issued by a legislator advocating for legislation concerning transgender individuals.[172] Thus, the remarks, while offensive, were of the type that must be permitted in a democratic society.[173] The dissenting judges were particularly skeptical of restrictions on freedom of expression that would have the effect of prohibiting legislators from expressing their views on the drafting of laws and public policy.[174]

Compared to the Superior Chamber of the TEPJF's decision on the anti-abortion advertisements, the ruling against Quadri de la Torre gained more international attention. Quadri de la Torre retained

167. *See id.* at 48.

168. *See id.* at 66.

169. *Id.* at 22.

170. The Rabat Plan of Action is a report issued by the Office of the United Nations High Commissioner for Human Rights. While not binding, it has persuasive authority as soft law.

171. Recurso de Revisión del Procedimiento Especial Sancionador, SUP-REP-252/2022, at 94.

172. *Cf. id.* at 99 ("[D]ebemos recalcar que la referencia en algunos de estos mensajes sobre qué se legislará para impedir que hombres ocupen lugares en política que corresponden a mujeres por equidad de género, no podría considerarse como una mención marginal viniendo de alguien cuya facultad es precisamente la presentación de iniciativas y pertenece al órgano encargado de ello. . . .").

173. *See id.* at 102.

174. *See id.* at 103.

Alliance Defending Freedom's (ADF's) international division to represent him.[175] In a public statement issued in December 2022, the ADF stated that it intends to take Quadri de la Torre's case before the Inter-American Commission on Human Rights, arguing that the Superior Chamber breached Quadri de la Torre's right to freedom of expression, as guaranteed by the ACHR.[176] As of early February 2024, the outcome of this petition was not publicly known.

C. *Takeaways from TEPJF's Restrictive Approach to the Right to Freedom of Expression*

The Superior Chamber of the TEPJF has applied a highly restrictive approach to the right to freedom of expression in the face of discriminatory speech. As noted previously, courts around the world have sanctioned discriminatory speech and hate speech with monetary fines, disqualification of political parties, disqualification of candidates, and even the annulment of elections. However, SUP-REP-324/2021 and SUP-REP-252/2022 are notable in that they relate to controversial topics that constitute fault lines in many democracies around the world. On the other hand, the decisions covered in Part II largely concerned parties and candidates that promoted ideologies generally opposed to democracy. In other words, the decisions in Part II were concerned with anti-establishment political parties that opposed international norms of "settled issues" (such as the democratic order or racial equality).

The settled nature of debates on racial or ethnic superiority contrasts highly with the unsettled nature of the debate on abortion in Mexico. At the time the decision was issued, only two out of Mexico's thirty-two states had passed laws protecting the right to abortion on request during the first twelve weeks of pregnancy.[177] Moreover, many states that allowed abortions in the case of rape and when the mother's life is in danger imposed many restrictions that, in practice, amounted to a

175. *See* Press Release, ADF International, Mexican Congressman Tried & Convicted as a "Political Offender" Over Censored Tweets, Takes Fight for Free Speech to International Body (Dec. 19, 2022), https://adfinternational.org/news/petition-congressman-gabriel-quadri/#:~:text=Mexican%20Congressman%20Tried%20%26%20Convicted%20as,of%20Mexican%20Congressman%20Gabriel%20Quadri.

176. *Id.*

177. *See* Carrie N. Baker, *Mexican Supreme Court Decriminalizes Abortion Nationwide, Requires Federal Health Services to Offer Abortio*n, MS. MAGAZINE (Sept. 11, 2023), https://msmagazine.com/2023/09/11/mexico-supreme-court-abortion/ (addressing the legalization of abortion in Mexico City and Oaxaca).

prohibition.[178] Thus, when SUP-REP-324/2021 was decided, the possibility of prohibiting or restricting abortion, even in cases of rape, was unsettled in Mexico.

Yet, despite the unsettled nature of the debate on abortion in Mexico, the Superior Chamber of the TEPJF signaled its willingness to set the terms of the debate on abortion. While opponents of abortion are free to argue in favor of an unqualified prohibition on abortion if they so desire, they must steer clear of potentially inflammatory rhetoric. This is a consequence of the Superior Chamber of the TEPJF analyzing the speech contained in the abortion advertisements for its "necessity."[179]

It may be true that manifesting one's opposition to abortion through scientific studies and dispassionate arguments is less likely to stigmatize those who seek abortions. However, it has long been recognized that the speaker is the person who is in the best position to determine whether their need to convey their message requires employing charged rhetoric as opposed to civil discourse.[180] Thus, while the use of terms such as "baby killer" or "murder" in the context of an abortion debate may be inflammatory, courts that restrict their use are unmistakably putting their thumb on the scale on the side of those who support legalizing abortion. While one side of the debate may use inflammatory rhetoric to rally their supporters, the other side is forced to take a more guarded approach to avoid engaging in sanctionable behavior.

SUP-REP-252/2022 is also a reflection of a desire by the Superior Chamber of the TEPJF to set the terms of debates on transgender-related issues in Mexico. A poll in 2020 showed that 83.3% of Mexico's population agrees or somewhat agrees with the statement that transgender individuals should be protected from discrimination.[181] However, less than half support allowing transgender individuals to use bathrooms that correspond to the gender they identify with or allowing transgender individuals to adopt children.[182] It is worth noting that perhaps in contrast to

178. *See* Jo Tuckman, *Judges Uphold Abortion Rights in Mexico City*, GUARDIAN (Aug. 28, 2008), https://www.theguardian.com/world/2008/aug/29/mexico.humanrights.

179. *Cf.* Recurso de Revisión del Procedimiento Especial Sancionador, SUP-REP-252/2022, at 67 ("[Se utilizaron] expresiones e imágenes ofensivas u oprobiosas innecesarias.").

180. *Cf.* Francisca Pou Giménez, *Libertad de Expresión y Discurso Homofóbico en México: ¿Es Correcta la Teoría Constitucional de la Suprema Corte?*, 47 BOLETÍN MEXICANO DE DERECHO COMPARADO 598, 610 (2014) ("[E]valuar un discurso con el criterio de la pertinencia implica que el evaluador del mensaje presupone y conoce su finalidad, su objetivo, cuando quizá ese fin se perfila 'en el camino' de hablar . . .").

181. *See* WINSTON LUHUR ET AL., OPINIÓN PÚBLICA DE LOS DERECHOS DE PERSONAS TRANS EN MÉXICO 7 (2020) (displaying the outcome of the poll in Figure 2).

182. *See id.*

the debate on abortion, the jurisprudence coming from the Supreme Court of Justice of the Nation is far more settled in favor of transgender individuals than public opinion would suggest. In 2018, the High Court signaled that it was unconstitutional to require that transgender individuals seeking a change in the gender reflected in their birth certificate prove their identity through hormonal treatments or surgery.[183] Instead, the affirmation of one's identity is sufficient.[184] Hence, the rights of transgender individuals are more settled legally than in public opinion.

In sanctioning Quadri de la Torre for his remarks denying Luévano's female identity, the Superior Chamber of the TEPJF indicated that electoral officials may not be able to publicly deny the gender identity of transgender individuals. Some may contend that Quadri de la Torre was commenting on a fellow colleague's eligibility to serve, due to Mexico's gender equality laws for political candidates,[185] rendering this an isolated case with little value as precedent. However, recent decisions by lower courts also indicate that the principles behind this ruling could also be applied to political campaigns that advocate for the positions Quadri de la Torre expressed.[186] Hence, the position that gender is immutable, which was the backbone of Quadri de la Torre's criticism of Luévano, may no longer be a political view that can be expressed in the context of a political campaign.

Thus, the two most recent decisions from the Superior Chamber of the TEPJF signal an expanded role of electoral tribunals in combating discriminatory speech. Some of the cases reviewed from other states earlier in this Note suggested that electoral courts were willing to intervene amid extreme manifestations of hate speech. For example, the Supreme Court of India sanctioned violent rhetoric and invalidated a

183. *See* SUPREMA CORTE DE JUSTICIA DE LA NACIÓN, RECONOCIMIENTO DE LA IDENTIDAD DE GÉNERO DE LAS PERSONAS TRANS EN DOCUMENTOS OFICIALES 9–10 (2018), https://www.scjn.gob.mx/derechos-humanos/sites/default/files/sentencias-emblematicas/resumen/2020-12/Resumen%20AR1317-2017%20DGDH.pdf (summarizing the outcome of Amparo en Revisión 1317/2017).

184. *Cf. id.* at 7 ("La regulación y la implementación de esos procesos deben estar basadas únicamente en el consentimiento libre e informado del solicitante, esto es, deben descansar en el principio según el cual la identidad de género no se prueba.").

185. In Mexico, 50% of political candidates put forward by a political party must be female. In this context, Quadri de la Torre is arguing that Luévano should not count as a female for purposes of this requirement and that recognizing the identity of transgender individuals is a means for male politicians to take slots that belong to female candidates. For a description of Mexico's 2014 legal reform, *see generally* INSTITUTO ELECTORAL DEL ESTADO DE SINALOA, DE CUOTAS DE GÉNERO A MANDATO CONSTITUCIONAL A NIVEL FEDERAL 3 (2017).

186. The abortion advertisement case discussed above as well as the election annulment cases suggest that if Quadri de la Torre had made the same remarks while campaigning against Luévano, he would have been fined and had he won, his electoral victory may have been annulled.

candidate's election to India's parliament.[187] Similarly, the Strasbourg Court had largely restricted itself to invoking Article 17 of the ECHR to uphold sanctioning the most extreme political candidates that advocated for ethnic cleansing or the abolishment of democracy.[188] The decisions issued by the Superior Chamber of the TEPJF suggest that courts may also intervene and regulate discriminatory speech in less extreme contexts. Moreover, the intervention may entail setting the boundaries of ongoing political debates, rather than excluding marginal candidates and political platforms from the public sphere.

IV. The Limitations of International Law in Resolving the Electoral Hate Speech/Freedom of Expression Conundrum

The analysis of the decisions rendered by the Superior Chamber of the TEPJF lays the groundwork for Part IV of this Note, which discusses the limitations of the current international human rights law framework in dealing with the conflict between electoral hate speech and the right to freedom of expression. The Superior Chamber of the TEPJF as well as the dissenting judges used both "hard" and "soft" international law to provide support for their positions.[189] However, the Superior Chamber of the TEPJF's ability to use international law to support its decisions was limited by the lack of specificity in the international treaties to which Mexico is a party.

A. *Global Human Rights Treaties Struggling to Draw the Dividing Line Between Freedom of Expression and Hate Speech*

In determining which is the appropriate sanction for impermissible electoral hate speech, municipal courts find very little guidance from human rights treaties, such as the ICERD. Article 4(a) of the ICERD may be more specific than other treaties in specifying sanctions, as it imposes the obligation on states to "declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, [or] incitement to racial discrimination . . . ."[190] However, states have disputed the meaning of "offence punishable by law." The Committee on the Elimination of Racial Discrimination, which supervises compliance

187. *See* Issacharoff, supra note 1, at 1425.

188. *See, e.g.*, Glimmerveen v. Netherlands, App. No. 8348/78 & 8406/78, 18 Eur. Comm'n H.R. Dec. & Rep. 187, 197 (1979).

189. By "hard" international law I refer to the international treaties signed by Mexico while "soft" international law refers to sources which provide persuasive authority (e.g., the Rabat Plan of Action).

190. ICERD, *supra* note 11, art. 4(a).

with the ICERD, interprets this provision to require criminal sanctions.[191] But some states have affirmed that they are following the ICERD by establishing administrative penalties for racist speech.[192] Thus, whether international law requires criminal sanctions for racist speech appears to be an open question. Article 4(b) is clearer because, while also including the contested "punishable by law provision," it also imposes on states the obligation to "declare illegal and prohibit" organizations and propaganda that "promote and incite racial discrimination."[193] Thus, the ICERD supports the disqualification of political parties as a sanction for electoral hate speech.

Other international treaties have led to controversies regarding the scope of legislators' discretion to regulate hate speech. The ICCPR is a case in point. Article 19.2 of the ICCPR establishes that "[e]veryone shall have the right to freedom of expression . . . ." [194] Article 19.3 allows states to limit freedom of expression as needed to ensure "respect of the rights or reputations of others" as well as to protect national security, public order, public health, or public morals.[195] Meanwhile, Article 20.2 stipulates that "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."[196] Some commentators argue that Article 20.2 establishes the full extent of when states can regulate hate speech.[197] This margin of discretion may be relevant for electoral hate speech directed at vulnerable categories of individuals not mentioned in Article 20.2, such as women or transgender individuals. Consequently, the Superior Chamber of the TEPJF's way of dealing with discriminatory speech against women and transgender individuals would appear to be contrary to the ICCPR if Article 19.3 is not sufficiently broad. However, such commentators recognize that there could be exceptional cases where Article 19.3 allows (but, unlike Article 20.2, does not

191. *See* Karl Josef Partsch, *Racial Speech and Human Rights: Article 4 of the Convention on the Elimination of All Forms of Racial Discrimination*, *in* STRIKING A BALANCE: HATE SPEECH, FREEDOM OF EXPRESSION, AND NON-DISCRIMINATION 21, 28 (Sandra Colliver et al. eds., 1992).

192. *See id.*

193. *See* ICERD, *supra* note 11, art. 4(b).

194. ICCPR, *supra* note 11, art. 19.2.

195. *Id.* art. 19.3.

196. *Id.* art. 20.2.

197. *See* Toby Mendel, *Does International Law Provide for Consistent Rules on Hate Speech?*, *in* THE CONTENT AND CONTEXT OF HATE SPEECH: RETHINKING REGULATION AND RESPONSES 417, 420 (Michael Herz & Peter Molnar eds., 2012).

obligate) legislators to proscribe some forms of hate speech that Article 20.2 does not cover.[198]

B. *Regional Human Rights Treaties in Conflict with Global Human Rights Treaties*

Additionally, states may encounter regional human rights treaties that contradict the ICERD and the ICCPR in the balance between the right to freedom of expression and the obligation to prohibit hate speech. For the states in the Americas which have ratified it, the ACHR is controlling. Article 13.1 of the ACHR guarantees the right to freedom of expression.[199] Meanwhile, Article 13.5 of the ACHR stipulates that "advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar illegal action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law."[200] Similar to the ICERD, the ACHR's hate speech provision contains the ambiguous phrase "offenses punishable by law."[201] Still, the ACHR departs from the ICCPR and the ICERD in not obligating states to punish hate speech that incites discrimination.

The discrepancy between the ACHR and other international treaties is likely due to the United States seeking to ensure that the ACHR was consistent with SCOTUS's holding in *Brandenburg*.[202] However, Eduardo Bertoni and Julio Rivera, Jr. argued that Article 13.5 does not reproduce *Brandenburg*.[203] Article 13.5 imposes an obligation on states to punish hate speech that incites violence, even if such violence is not imminent or likely to occur (departing from *Brandenburg's* "imminent lawless action" test).[204] Other academics such as Ariel Kaufmann have tried to circumvent Article 13.5, arguing that the right to freedom of expression contains a positive obligation on the part of states to ensure that minority voices are heard.[205] Thus, considering that hate speech can have a silencing effect on women and minorities on social media

198. *See id.*

199. ACHR, *supra* note 13, art. 13.1.

200. *Id.* art. 13.5.

201. *Id.*

202. *See* Eduardo Bertoni & Julio Rivera Jr., *The American Convention on Human Rights: Regulation of Hate Speech and Similar Expression*, *in* THE CONTENT AND CONTEXT OF HATE SPEECH: RETHINKING REGULATION AND RESPONSES 499, 504 (Michael Herz & Peter Molnar eds., 2012).

203. *Id.* at 504 n.25.

204. *Id.* at 504.

205. *See* GUSTAVO ARIEL KAUFMANN, ODIUM DICTA: LIBERTAD DE EXPRESIÓN Y PROTECCIÓN DE GRUPOS DISCRIMINADOS EN INTERNET 196 (1st ed. 2015).

(by discouraging them from expressing their opinions), Kaufmann believes that the ACHR does allow states to restrict hate speech to counter such self-censorship.[206] Kaufmann's analysis potentially adopts a broader understanding of the ACHR's guarantee of freedom of expression than its drafters intended.[207]

As a result of the contradicting treaties, municipal courts in the Americas presiding over electoral hate speech cases may be forced to choose between compliance with the ACHR and compliance with other human rights treaties. For example, in a situation involving electoral hate speech that discriminates against a racial group but does not incite physical violence against it, the ICERD and the ICCPR will require states to penalize such speech. Meanwhile, the ACHR will consider such speech to be protected by the right to freedom of expression (because, as mentioned previously, Article 13.5 only covers incitement to violence).

Unlike the ACHR, the ECHR, binding on European signatories, does not mention hate speech explicitly, which perhaps enables a broader array of restrictions on electoral hate speech, either under Article 10.2 or Article 17.[208] Article 10.1 of the ECHR guarantees the right to freedom of expression.[209] Meanwhile, Article 10.2 of the ECHR contains provisions that are potentially applicable to electoral hate speech, as it allows restrictions on the right to freedom of expression when necessary to protect the rights and reputation of others.[210] Article 17 of the ECHR is broader in affirming that "[n]othing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."[211] The ECHR is broader than the ICERD and ICCPR because it does not contain a closed category of vulnerable groups whose protection merits restrictions on the right to freedom of expression.

Much like the other treaties, the ECHR also leaves open many questions, including some that could lead to collisions with other human rights treaties. Interestingly, there does not appear to be a clear dividing

206. *See id.*

207. The U.S. would have likely objected to an understanding of the right to freedom of expression that entailed a positive obligation on the part of States, considering the prevailing State Action Doctrine in U.S. jurisprudence.

208. European Convention on Human Rights, *supra* note 13, arts. 10.2, 17.

209. *Id.* art. 10.1.

210. *Id.* art. 10.2.

211. *Id.* art. 17.

line between the applicability of Article 10.2 and Article 17 of the ECHR. As mentioned previously, Article 17 of the ECHR is most obviously applicable in the case of disqualification of political parties. It allows restrictions on electoral speech not just due to incitement to discrimination (like the ICCPR) but also when a political platform supports the destruction of other rights and freedoms contained in the ECHR.[212] Similarly, Article 10.2 of the ECHR may also apply to electoral hate speech when Article 17 of the ECHR applies, and it is also relatively broad in comparison to the ICERD and ICCPR. One consequence of applying Article 17 of the ECHR instead of Article 10.2 of the ECHR is that if the former is deemed to apply, no balancing test is necessary; the restriction on freedom of expression is permissible.[213] On the other hand, Article 10.2 of the ECHR may implicate balancing different public policy objectives.[214] Notwithstanding the differences, the Strasbourg Court, the body that has the final say in interpreting the ECHR, has not signaled any criteria for distinguishing Article 10.2 cases from Article 17 cases.[215]

While the ECHR does not directly require proscribing hate speech, there is still potential for restrictions on hate speech which, while compliant with the ECHR, contravene international human rights agreements that to a greater extent prioritize the right to freedom of expression. The Strasbourg Court may determine that a sanction of electoral hate speech fulfills the conditions of Article 10.2 and Article 17 of the ECHR. However, that sanction of electoral hate speech may still contravene the ICERD, ICCPR, or other international human rights treaties that mention hate speech explicitly and circumscribe the extent to which it can limit the right to freedom of expression. Moreover, the conflict is more likely to arise if Article 17 of the ECHR is invoked and the restriction on freedom of expression is not subjected to a proportionality test, as an analysis of a restriction on the right to freedom of expression under any other treaty will almost certainly require such balancing.

Regarding electoral hate speech that connotes sex discrimination, the CEDAW and the Belém do Pará Convention contain a few

212. *Id.*

213. *See* Rafael Alcácer Guira, *Libertad de Expresión, Negación del Holocausto y Defensa de la Democracia: Incongruencias Valorativas en la Jurisprudencia del TEDH*, 33 REVISTA ESPAñOLA DE DERECHO CONSTITUCIONAL 309, 324 (2013) (discussing the distinction between Article 10.2 and Article 17, as well as its implications).

214. *See id.*

215. *Cf. id.* at 324–25 (Alcácer criticizes the Strasbourg Court for excessively invoking Article 17 even when it is not necessarily applicable, to avoid the proportionality test Article 10 would require).

provisions that support an obligation to proscribe hate speech. Article 5(a) of the CEDAW imposes an obligation on states to take appropriate measures "to achieving the elimination of prejudices and customs and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."[216] Article 8(b) of the Belém do Pará Convention, ratified by most states in the American continent, contains a similar provision.[217] Additionally, Article 6(b) of the Belém do Pará Convention recognizes the right for "women to be valued and educated free of stereotyped patterns of behavior . . . ."[218]

Neither the CEDAW nor the Belém do Pará Convention specify whether limiting freedom of expression in the electoral context is permissible to combat sex discrimination. Nevertheless, as previously mentioned, the Superior Chamber of the TEPJF grounded its decision sanctioning anti-abortion election advertisements (SUP-REP-324/2021) on Mexico's obligations under both the CEDAW and the Belém do Pará Convention, finding that both impose obligations on Mexico to take a proactive role in eliminating gender-based stereotypes.[219] While restricting electoral hate speech directed at women may eliminate prejudices that adversely affect women, Article 5(a) of the CEDAW does not explicitly require that route.[220] However, if the restriction of electoral hate speech is the only way to eliminate societal prejudices towards women, the CEDAW and Belém do Pará Convention arguably require it. Yet, such a requirement may lead to a collision with other treaties such as the ACHR, which would protect such speech under Article 13.1, unless it incited violence or other lawless action against women.

C. *The TEPJF's Cursory Analysis of the Conflicting Human Rights Treaties*

Given the contradictions in international human rights treaties, it is unsurprising that the Superior Chamber of the TEPJF (including its dissenting opinions) has largely used international human rights law as background support rather than engaging with specific provisions.

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216. Convention on the Elimination of All Forms of Discrimination Against Women art. 5.a, Dec. 18, 1979, 1249 U.N.T.S. 13 (1980) [hereinafter CEDAW].

217. Organization of American States, Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (Convention of Belém do Pará) art. 8, *adopted* June 9, 1994, 1438 U.N.T.S. 63.

218. *Id.* art. 6.b.

219. *See* Recurso de Revisión del Procedimiento Especial Sancionador, Sala Regional Especializada del TEPJF, Secretaría General de Acuerdos Oficina de Actuaría, Décima Época, Tomo I, Noviembre de 2021, SUP-REP-324/2021, página 58–59 (Mex.).

220. *See* CEDAW, *supra* note 216 (no explicit mention of restricting speech).

That is, the treaties are cited by the Superior Chamber of the TEPJF but are not part of the legal reasoning leading to the conclusion, instead merely serving as "filler." The decision in which the anti-abortion advertisements were sanctioned is a case in point. The Court only mentioned Article 13 of the ACHR twice. The first time was to support the broad proposition that international law protects the right to freedom of expression.[221] The second time Article 13 of the ACHR is mentioned is towards the end of the decision, merely to cite Article 13.5.[222] However, the opinion does not explain why the ACHR would allow restricting the anti-abortion advertisements considering that they do not constitute incitement to violence or advocacy of national, religious, or racial hatred. Meanwhile, the text of the provisions of the CEDAW that allegedly obligated the sanctioning of abortion advertisements was transcribed only in a footnote and never analyzed.[223] Similarly, the dissenting opinion objecting to the sanctioning of the abortion advertisements scarcely made use of international human rights treaties to support its position.[224]

Other decisions by the Superior Chamber of the TEPJF make even scarcer mention of international human rights law. The opinion overturning the sanctioning of Lozano did not mention the right to freedom of expression under international law.[225] In the case sanctioning Quadri de la Torre, the majority opinion's only notable use of international human rights law was to support its position regarding the relationship between transphobia and gender-related political violence.[226] Only the dissenting opinion analyzed international human rights law regarding the right to freedom of expression; in particular, the dissent used the Rabat Plan of Action to identify the language as hate speech.[227] Interestingly, the Rabat Plan of Action only sets forth elements that should be taken into consideration before determining whether a given expression should be proscribed as impermissible hate

221. *See* Recurso de Revisión del Procedimiento Especial Sancionador, SUP-REP-324/2021, at 19–20.

222. *See id.* at 67.

223. *See id.* at 57 n.92.

224. *See id.* at 72–88.

225. *See* Recursos de Revisión del Procedimiento Especial Sancionador, Sala Regional Especializada del TEPJF, Secretaría General de Acuerdos Oficina de Actuaría, Décima Época, Tomo I, Septiembre de 2018, SUP-REP-611/2018 and SUP-REP-613/2018 (Mex.)

226. *See* Recurso de Revisión del Procedimiento Especial Sancionador, Sala Regional Especializada del TEPJF, Secretaría General de Acuerdos Oficina de Actuaría, Undécima Época, Tomo I, Junio de 2022, SUP-REP-252/2022, página 22 (Mex.).

227. *See id.* at 94.

speech.[228] It does not make any specific reference to the implications of hate speech in the context of elections or remarks by elected officials.[229] Thus, it would appear as if the Rabat Plan of Action was not determinative of the conclusions reached by the dissenting judge.

For the Superior Chamber of the TEPJF, the decision to give such cursory treatment to international human rights law is particularly striking given the preeminent role international human rights treaties play in Mexico's legal system. Following a constitutional reform in 2011, international human rights treaties were integrated into the body of constitutional laws.[230] When provisions in international human rights treaties collide with provisions in Mexico's constitution, the provisions that provide the greatest protection to the individual prevail, unless the provisions in Mexico's constitution expressly restrict the scope of the right in question.[231] Thus, in the case of Mexico, the vague analysis of international human rights treaties cannot be explained by the preeminence of municipal law over international law.

V. Final Reflections

The analysis in the preceding pages yields the inevitable conclusion that much work is needed in clarifying the balance struck in international human rights law between the right to freedom of expression and the prerogative (or obligation) to sanction hate speech in the electoral context. As discussed in Part IV, the ICERD, ICCPR, CEDAW, ACHR, and ECHR all appear to suggest different dividing lines between uncomfortable speech that must be permitted and hate speech that can or must be sanctioned. While this problem may apply to all forms of hate speech, it is particularly problematic in the electoral context, where both the instrumental aims of the right to freedom of expression and the potential damage of hate speech are at their climax.

While amending international human rights treaties would be difficult and is unlikely, to the extent that the committees supervising compliance with various international human rights treaties can reach a consensus regarding electoral hate speech, they would come a long way in providing much-needed clarity. Some states, like the United States, are unlikely to take heed of the determinations of these committees

228. *See id.*

229. *Id.*

230. *See* SCJN determina que las normas sobre derechos humanos contenidas en tratados internacionales tienen rango constitucional, Pleno de la SCJN, Semanario Judicial de la Federación y su Gaceta, Décima Época, Tomo I, Septiembre de 2013, Tesis 293/2011, página 65 (Mex.).

231. *See id.*

due to the preeminence of municipal law over international human rights law in their legal systems. On the other hand, other states, like Mexico, which have integrated international human rights law into their legal systems at a constitutional level, are likely to take notice. However, absent any change, it is reasonable to expect that states will continue to use international human rights instruments to justify taking widely divergent paths on electoral hate speech.

For much of the latter half of the twentieth century, the existence of international human rights treaties with different approaches to hate speech was less problematic in the electoral context as courts only invoked the hate speech provisions to sanction political parties and ideologies on the extreme ends of the political spectrum. It is for this reason that this Note used Mexico's electoral justice system as a case study for how restrictions on electoral hate speech can be applied not just to ideologies on the extreme ends of the political system, but also to hotly contested social issues (e.g., abortion and policies respecting transgender rights). Regardless of one's view on the desirability of this expanded role for courts in controversies involving electoral hate speech, it is clear that the drafters of the ICERD, ICCPR, CEDAW, Belém do Pará Convention, ACHR, and ECHR did not foresee such use of hate speech exceptions to the right to freedom of expression. Thus, if international law is to guide the resolution of electoral hate speech controversies, international institutions charged with advising on compliance with human rights treaties may want to settle a few of the questions raised in this Note.

One of the most important questions that is still unsettled is if electoral hate speech is only impermissible when it amounts to incitement to violence (the ACHR's position) or if the threshold for prohibition should be lower (e.g., ICERD, ICCPR). Evidently, the advantage of an incitement to violence standard is that it is much easier to implement than, for instance, an incitement to discrimination standard. Over the past few centuries, practices and beliefs that were once commonly held have been recognized to be discriminatory (e.g., subordination of women, slavery, segregation). Given that this is an ongoing process, different societies around the world are certainly immersed in a debate on some of those practices and beliefs at the present time.[232] Thus, it will

232. *See* Jeremy Waldron, *Hate Speech and Political Legitimacy*, *in* THE CONTENT AND CONTEXT OF HATE SPEECH 329, 337 (Michael Herz & Peter Molnar eds., 2012) (arguing that the purpose of hate speech laws is to avoid creating the mistaken impression that the rights of certain minority groups are still a matter of public debate when in reality such debate is over). *But see* Stephen Holmes, *Waldron, Machiavelli, and Hate Speech*, *in* THE CONTENT AND CONTEXT OF HATE SPEECH 345, 350 (Michael Herz & Peter Molnar eds., 2012) (arguing that it is hard to determine when a debate is truly settled).

be much more difficult to reach a consensus on what constitutes incitement to discrimination than what constitutes incitement to violence. A decision that determines that a given expression incites discrimination will doubtlessly have a political judgment attached to it. On the other hand, identifying incitement to violence may involve a more objective exercise in which courts look for "fighting words" or veiled threats.

A different but somewhat related question involves the specification of categories of vulnerable groups covered by electoral hate speech laws. Some international treaties, such as the ICERD, understandably address only specific categories of vulnerable groups because they were negotiated to protect those vulnerable groups. However, other treaties, such as the ICCPR, which have a much broader scope, also mention only a limited category of vulnerable groups. For instance, the ICCPR and ACHR do not mention gender-related hatred or discrimination in their hate speech provisions. This omission leaves courts, such as the Superior Chamber of the TEPJF, at a loss as they seek to reconcile the much broader provisions against hate speech in their national legislation with international treaties under which such speech is protected by the right to freedom of expression. This problem is accentuated with other groups, such as the elderly, who have no international treaty recognizing their vulnerability.[233]

While the ideal solution may be a new treaty with a hate speech provision that uses a term that does not cover a closed category of vulnerable groups, it is understandable why this solution might generate opposition. Democratic deliberation often leads to the recognition of new vulnerable groups. Thus, in the context of electoral hate speech, an open category of vulnerable groups may allow courts to put their thumb on the scale, picking sides in highly contested social issues. However, even if this is true, a solution may need to be found for states that choose to limit electoral hate speech directed against a broader category of groups than those covered in current international agreements, lest the authority of such international agreements become irrelevant in the face of social pressure.

Finally, a different controversy that needs to be resolved relates to the appropriate sanction for electoral hate speech. Article 4(b) of the ICERD appears to endorse the disqualification of political parties that endorse racial discrimination as an obligatory sanction.[234] However,

233. The Convention on the Rights of Older Persons is yet to be adopted. *See* Claudia Mahler, *Report of the Independent Expert on the Enjoyment of All Human Rights by Older Persons*, ¶ 39, U.N. Doc. A/HRC/48/53 (Aug. 4, 2021).

234. *See* ICERD, *supra* note 11, art. 4(b).

other treaties are much more silent on this matter. Specifically, international organizations that supervise compliance with the ICCPR may want to scrutinize whether the annulment of an election is an appropriate response to electoral hate speech. This Note analyzed several decisions from the Superior Chamber of the TEPJF that appeared to support this possibility, as well as the Indian Supreme Court decision in *Prabhoo*.[235] Yet, overturning an election's result conflicts with democratic principles.

Ultimately, the overarching question that needs to be answered is whether the main purpose of restricting electoral hate speech is to stave off anti-establishment extremists who reject the democratic liberal consensus. If electoral hate speech jurisprudence is directed to serve that end, the relevant international institutions may want to make clear that the Superior Chamber of the TEPJF's approach to electoral hate speech is not consistent with the right to freedom of expression. However, if instead, international institutions recognize that electoral hate speech jurisprudence can also be a progressive force that shapes democratic deliberation over unsettled issues, the Superior Chamber of the TEPJF's increasingly assertive approach may soon be replicated by other states.

235. *See* Issacharoff, supra note 1, at 1425.