INTERNATIONAL FREE SPEECH: HOW GUATEMALA'S FEMICIDE LAW IS USED TO RESTRICT THE FREE FLOW OF INFORMATION

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INTRODUCTION

The misuse of a law predicated on the protection of a vulnerable group can result in the degradation of democratic ideals. The government in Guatemala has repeatedly misused the femicide law that it passed in 2008, which was meant to protect women from acts of violence and from consistently falling victim to a cycle of violence that often leads to their

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death.[1] While attempting to reflect a functioning democracy, the Guatemalan government exposes its true colors through unchecked corruption by public officials and its country's leaders.[2] Most recently, Guatemala has undermined democratic ideals by allowing female public officials to file legal claims using the femicide law to attack journalists and the press in response to critiques of their work as public officials.[3] Despite the clear purpose of the femicide law, the lawsuits filed by female public officials attempt to set a new standard that protects women in powerful positions of government and diverts legal protection and attention from vulnerable women in life-threatening situations.[4] Female public officials in Guatemala claim that they have suffered psychological violence from press publications which should warrant legal protections under the femicide law according to their lawsuits.[5]

In the United States, citizens enjoy an array of fundamental rights and constitutional protections, including the right to freedom of speech.[6] Unlike citizens from many Latin American countries, individuals in the United States enjoy a high level of protection of their right to free speech and to express their opinions and beliefs.[7] To determine protected and unprotected free speech in the United States, courts interpret different tests that have evolved over time.[8] In contrast, not all Latin American governments protect the freedom of speech in practice. To determine what constitutes protected speech, many countries in Latin America use legal standards provided by

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[1] Decreto 22-2008 del Congreso de la Republica de Guatemala*, Ley Contra el Femicidio y otras Formas de Violencia Contra la Mujer* [Decree 22-2008 of Congress of the Republic of Guatemala (Law Against Femicide and other Forms of Violence Against Women)] (2008), https://www.oas.org/dil/esp/ley_contra_el_femicidio_y_otras_formas_de_violencia_contra_la_mujer_guatemala.pdf.

[2] Ana María Méndez Dardón & Héctor Silva Avalos, *Press Freedom Under Siege In Central America*, WOLA ADVOCACY FOR HUMAN RIGHTS IN AMERICA (Aug. 24, 2022), https://www.wola.org/2022/08/press-freedom-under-siege-in-central-america/.

[3] Henry Pocasangre, *Rechazan uso de Ley de Femicidio para bloquear libertad de expresión*, REPÚBLICA (May 10, 2019), https://republica.gt/guatemala/2019-5-10-20-46-14-rechazan-uso-de-ley-de-femicidio-para-bloquear-libertad-de-expresion. *See also* Méndez Dardón & Avalos, *supra* note 2.

[4] Editorial, *Perversa manipulación de Ley contra Femicidio*, PRENSALIBRE (May 20, 2022), https://www.prensalibre.com/opinion/editorial/erversa-manipulacion-de-ley-contra-femicidio/. *See also* Douglas Cuevas, Otra funcionaria se escuda en la ley contra el femicidio para evitar la fiscalización de la prensa, PRENSALIBRE (Dec. 20, 2021), https://www.prensalibre.com/guatemala/justicia/otra-funcionaria-se-escuda-en-la-ley-contra-el-femicidio-para-evitar-la-fiscalizacion-de-la-prensa/.

[5] Cuevas, *supra* note 4.

[6] Jean-Marie Kamatali, *The U.S. First Amendment versus Freedom of Expression in Other Liberal Democracies and How Each Influenced the Development of International Law on Hate Speech*, 36 OHIO N. UNIV. L. REV. 721, 722 (2010).

[7] Kamatali, *supra* note 6, at 721.

[8] Kamatali, *supra* note 6, at 722.

international human rights law, including the Inter-American Human Rights system, which is composed of the American Convention of Human Rights (ACHR) and the Inter-American Court of Human Rights (IACtHR).[9] Other international bodies and courts that resemble the Inter-American system are the European Convention on Human Rights (ECHR) and the European Court of Human Rights (ECtHR).[10]

Free speech, however, carries lesser protections when the speech rises to the level of hate speech.[11] A scholar describes hate speech as "an expressive act that communicates intense or passionate dislike of individuals or groups, based on ascriptive identity factors of those persons."[12] The United Nations recognizes that hate speech attacks people based on their religion, ethnicity, nationality, race, or gender.[13]

The ACHR describes hate speech as:

> Speech designed to intimidate, oppress or incite hatred or violence against a person or group based on their race, religion, nationality, gender, sexual orientation, disability or other group characteristic.[14]

While hate speech in modern U.S. culture is:

> A term of art in legal and political theory that is used to refer to verbal conduct – and other symbolic, communicative action – which willfully expresses intense antipathy towards some group or towards an individual on the basis of membership in some group or where the groups in question are usually those distinguished by ethnicity, religion, or sexual orientation.[15]

Although there are different definitions of what constitutes hate speech, there are similarities within the meanings that connotes a definition of hate speech as any communication(s) by an individual against another individual or group that denigrates or attacks their identity and beliefs.

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[9] Inter-American Human Rights System, INTERNATIONAL JUSTICE RESOURCE CENTER, https://ijrcenter.org/regional/inter-american-system/ (last visited June, 9 2024).

[10] European Convention on Human Rights, Nov. 4, 1950, Eur. Ct. H.R. https://www.echr.coe.int/documents/d/echr/convention_eng. *See also* Amaya Ubeda de Torres, *Freedom of Expression under the European Convention on Human Rights: A Comparison With the Inter-American System of Protection of Human Rights*, 10 HUM. RTS. BRIEF, (2003), https://digitalcommons.wcl.Am..edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1401&context=hrbrief.

[11] Lucas Swaine, *Does Hate Speech Violate Freedom of Thought?*, 29 VA. J. SOC. POL'Y & L. 1, 5 (2022).

[12] *Id*. at 5.

[13] *Id.* at 6.

[14] *Chapter VII: Hate Speech and the American Convention on Human* Rights, OFF. OF THE SPECIAL RAPPORTEURSHIP FOR FREEDOM OF EXPRESSION FOR THE INTER-AM. COMM'N H. R., https://www.oas.org/en/iachr/expression/showarticle.asp?artID=443&lID=1 (last visited Jan. 19, 2024).

[15] Robert Mark Simpson, *Dignity, Harm, and Hate Speech*, 32 L. & PHIL. 701, 701 (2013).

In Guatemala, the government implemented a femicide law to address a broader purpose that was meant to stop crimes of violence against women and ameliorate an ongoing problem of unresolved crimes against women that resulted in their death.[16] Although sometimes it may be appropriate to employ femicide laws to stop hate speech, Guatemala has gone far beyond that. The femicide law became part of a pattern among government officials, who use it as a shield to protect themselves from society holding them accountable in their official capacity as government representatives. Further, these government officials used the femicide law to achieve criminal prosecution of journalists who attempted to reveal unethical or corrupt actions by government officials.[17] Guatemala used the femicide law as a double edge sword by attempting to apply the law for an unintended purpose, and lost sight of the group of women that need protection.

The femicide law in Guatemala prevents violence against women in political, economic, social, cultural, and familial environments in the private and public spheres.[18] On a broader international level for the eradication of violence against women, many Latin American countries signed the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, also known as the Convention of Belém do Pará.[19] The purpose of the Convention is to protect women from gender-based violence, including violence against their integrity and psychological well-being.[20] Guatemala was among the Latin American countries that adopted this convention, which helped introduce the crime of femicide into its law.[21]Though the government in Guatemala passed a femicide law to address rampant rates of violence and gender-based killings against women, the law has gained traction in recent years to attack freedom of speech and to criminally charge journalists and newspaper outlets that published articles about prominent female public officials.[22] This is dangerous in a country that

[16] Decreto 22-2008 del Congreso de la Republica de Guatemala*, supra* note 1.

[17] Elsa Coronado & Kimberly Rocío López, *Periodismo y violencia contra la mujer: cuando el agravio es la fiscalización*, PLAZA PÚBLICA (June 14, 2022), https://www.plazapublica.com.gt/content/periodismo-y-violencia-contra-la-mujer-cuando-el-agravio-es-la-fiscalizacion-0. *See also* Editorial, *supra* note 4.

[18] Decreto 22-2008 del Congreso de la Republica de Guatemala*, supra* note 1.

[19] Organization of American States, Inter-American Convention on the Punishment and Eradication of Violence Against Women "Convention of Belem do Para", June 9, 1994, O.A.S.T.S., https://www.oas.org/juridico/english/treaties/a-61.html.

[20] *Id.*

[21] *Id.*

[22] María Inés Taracena, *Guatemala's War on Truth*, THE NATION (Aug. 23, 2022), https://www.thenation.com/article/world/guatemala-journalist-arrest/.

already suffers from high impunity rates in the deaths of women and journalists.[23]

In recent years, however, female public officials have misused the femicide law in Guatemala to file legal claims against journalists and newspaper outlets that publish articles exposing their involvement in corrupt government actions.[24] When these prominent and powerful female public officials find the publications offensive, they claim a need for legal protection by alleging they suffered psychological violence protected under the femicide law.[25] The femicide law also protects women from acts of psychological violence.[26] By validating such claims under the femicide law, the law and the Convention lose their purpose. While it is appropriate for Guatemala's femicide law to protect women from hate speech that rises to a deliberate denigration of an individual because of her gender, speech that does not reach that threshold should not be blocked under Guatemala's law or the Convention of Belém do Pará (The Convention). The Convention and Guatemala's law were not intended to undercut free speech but rather to protect women from acts of hatred. International human rights law clearly protects journalists who criticize the conduct of prominent women, and international law distinguishes free speech from speech that amounts to a deliberate denigration of an individual.

The courts in Guatemala have reviewed several cases where public officials used the femicide law as a vehicle to restrict freedom of speech and criminally charge journalists for criticizing female government officials while exposing government corruption. For example, a judge granted the protections of a restraining order in favor of relatives of a former public official who claimed they suffered psychological violence under the femicide law due to a newspaper publication;[27] however, the same judge dismissed the case almost three months later, stating that the alleged victims were inevitably exposed to public criticism because of their familial relationship to a public official.[28] Despite eventually dismissing the case, the judge originally and immediately granted protections to the former public official who filed the lawsuit, allowing the public official to impede the press for three months.[29]

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[23] *Guatemala: Events of 2021*, HUMAN RIGHTS WATCH, https://www.hrw.org/world-report/2022/country-chapters/guatemala (last visited June 9. 2024).

[24] Coronado & López, *supra* note 17.

[25] *Id.*

[26] Decreto 22-2008 del Congreso de la Republica de Guatemala*, supra* note 1.

[27] *Levantan censura en contra de periodistas*, ARTICULO 35 (2022), https://articulo35.com/a-1-3/.

[28] *Id.*

[29] ARTICULO 35, *supra* note 27.

This paper explains how the misuse of femicide law in Guatemala contributes to a larger problem of free speech restrictions in certain Latin American countries. Additionally, this paper discusses how the femicide law and the Convention of Belém do Pará were meant to address a humanitarian crisis, not undercut free speech. Further, it describes how international authorities provide protection for journalists who engage in critiques of public officials at the expense of their safety and welfare. The last part of this article attempts to demonstrate that international authority provides case law that supports a much-needed distinction between free speech and hate speech that requires a more careful analysis when the government imposes criminal sanctions against journalists, and those sanctions, in any event, should be plausible, necessary, and proportionate.

I. THE CONVENTION AND GUATEMALA'S FEMICIDE LAW WERE NOT INTENDED TO UNDERCUT FREE SPEECH BUT TO PROTECT WOMEN FROM ACTS OF HATRED

In their claims, female public officials are using the femicide law as a sword to thwart the legal system while limiting legal protections for vulnerable women who suffer from violence in their everyday lives and often make up the impunity rates in Guatemala.[30] In their claims, these government officials assert that journalists attack them because they are women and they suffer psychological violence from these publications, which contain gender-based hate speech.[31] Despite their efforts to apply the femicide law as a sword instead of a shield, female public officials through these lawsuits try to avoid public scrutiny of their actions as government officials. The government and the court system prioritize many of these legal claims, thus, it is important to delve into the intended purpose of the femicide law and the Convention of Belém do Pará, which protect women on a larger scale. The protections provided by the Convention of Belém do Pará intended to protect women from gender-based violence, including violence

[30] ORGANIZATION OF AMERICAN STATES & MESECVI, GENERAL RECOMMENDATION OF THE COMMITTEE OF EXPERTS OF THE MESECVI: MISSING WOMEN AND GIRLS IN THE HEMISPHERE (NO. 2), (2018), http://www.oas.org/en/mesecvi/docs/RecomendacionMujeresDesaparecidas-EN.pdf?utm_source=Red+de+Jovenes&utm_campaign=eef162411c-EMAIL_CAMPAIGN_2019_08_08_06_31_COPY_41&utm_medium=email&utm_term=0_af8adfbacb-eef162411c-160267701.

[31] Paola Nalvarte, *Canciller de Guatemala usa una ley de protección a mujeres para lograr que jueza calle críticas de un periodista*, TEXAS MOODY. (July 18, 2018), https://latamjournalismreview.org/es/articles/canciller-de-guatemala-usa-una-ley-de-proteccion-a-mujeres-para-lograr-que-jueza-calle-criticas-de-un-periodista/.

that affects their integrity and psychological well-being.[32] As the first international treaty on violence against women, the Convention recognized violence against women as a human rights violation.[33] The Convention defines violence against women as any act or behavior that causes death, injury, or physical, sexual or psychological suffering in public and private spheres and is committed based on the gender of the victim.[34] Under Article 4 of the Convention, women have the right to freedom, and rights provided by international human rights law, including the right to live a life free of violence, a right to respect and protect a woman's physical, mental, and moral integrity, and right to have equal access to government positions in her country and have decision-making power.[35] Guatemala is among several countries that ratified the Convention and that committed to adhering to the obligations to prevent, punish, and eradicate violence against women.[36] To address violence against women in a country with one of the highest rates in the world of femicide – gender-motivated murders of women – Guatemala introduced the femicide law into their legislation.[37]

Similar to what the Convention aimed to achieve, the femicide law in Guatemala aims to prevent gender-based killings and eradicate psychological and emotional violence against women.[38] The law lists several circumstances in Article 7 that demonstrate when an individual commits violence against women in the private or public sphere that amounts to physical, sexual, or psychological violence.[39] A perpetrator commits violence against a woman if they take advantage of their familial, intimate, or work relationship and if it is derived from armed conflict, mutilation of the female body, and acts of misogyny.[40] The law differs in the levels of punishment that a perpetrator receives for engaging in violence against a woman. If the violence inflicted on a woman is physical or sexual, the perpetrator faces a five to twelve years prison sentence.[41] On the other hand, if the violence inflicted on a woman is psychological, the term of imprisonment is five to eight years.[42] Additionally, the femicide law created resources for victims of violence, including immediate access to legal

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[32] Organization of American States, *supra* note 19, at 1-2.

[33] Organization of American States & MESECVI, *supra* note 30, at 3.

[34] *Id*.

[35] Decreto 22-2008 del Congreso de la Republica de Guatemala*, supra* note 1, at 1, 4.

[36] Inter-American Convention on the Punishment and Eradication of Violence Against Women, *supra* note 19.

[37] Hector Ruiz, *No Justice for Guatemalan Women: An Update Twenty Years After Guatemala's First Violence Against Women Law*, 29 HASTINGS WOMEN'S L. J. 101, 102.

[38] Decreto 22-2008 del Congreso de la Republica de Guatemala*, supra* note 1, at Article 3.

[39] *Id.* at Article 7.

[40] *Id.*

[41] *Id.*

[42] *Id.*

assistance and separate courts to directly address claims of femicide and violence against women.[43] The Convention and the femicide law in Guatemala are intended to protect vulnerable groups of women who suffer violence that stems from and perpetuates inequalities among men and women.

Public officials and their family members who benefit from their positions of power and are subject to good-faith investigations on government corruption are hardly the groups of vulnerable women that the Convention and the law of femicide intended to protect from violence in the private or public sphere. Female public officials enjoy positions of power that allow their legal claims to receive immediate attention and protection under the femicide law.[44] In contrast, the government does not investigate the genuine claims of thousands of women who lack government resources.[45] Moreover, the courts and judges that grant restraining orders to protect female public officials contribute to the misapplication of the femicide law. That sets a dangerous precedent.

While the Convention and the femicide law intend to protect women against psychological violence, the claims filed by women public officials in Guatemala under the femicide law carry an ulterior motive that places a gag on journalists. Powerful women can have cognizable claims under the femicide law, but the ones being asserted by many female public officials do not satisfy the requisite standard.[46] Instead, as discussed below, they are wielding the law to stop any investigations into their wrongful activities. In their claims, female public officials request significant protections against future publications and even request extending of protections to their family members. [47] Although the Convention and the femicide law intended to protect women from violence, public officials are using the femicide law in a disingenuous way and for political purposes.

The former Guatemalan vice president, Roxana Baldetti, was the first female public official to use the femicide law as a sword to censor free speech and scrutinize journalists and newspapers for engaging in critiques of public officials.[48] Baldetti filed a lawsuit against a well-known journalist and owner of the newspaper outlet *elPeriódico*, Jose Zamora when he

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[43] *Id.* at Article 13, 15.

[44] Editorial, *supra* note 4.

[45] *Id.*

[46] *Id.*

[47] Coronado & López, *supra* note 17.

[48] Comm. to Protect Journalists*, Guatemalan Official Files Criminal Suit Against 3 Journalists Under Violence Against Women Law*, CPJ: COMM. TO PROTECT JOURNALISTS (May 18, 2022, 3:34PM), https://cpj.org/2022/05/guatemalan-official-files-criminal-suit-against-3-journalists-under-violence-against-women-law/.

publicly denounced her corrupt actions as a public official.[49] Others soon followed. In another lawsuit filed by Sandra Jovel, the former Guatemalan Minister of Foreign Affairs, she alleged psychological violence suffered from a publication by Zamora that criticized her complacency and failure to act against unjust U.S. policies that separated families at the U.S.-Mexico border.[50] Jovel's lawsuit successfully secured a restraining order for three months against Zamora and *elPeriódico* that restricted them from publishing anything about her and staying away from Jovel's home and workplace.[51] As another example, the daughter of Guatemala's highest court president, Corte de Constitucionalidad, filed a lawsuit against a newspaper under the femicide law for psychological violence.[52] The judge initially granted her protection under the law.[53] The legal claim was ultimately deemed insufficient under the femicide law because a familial or employment relationship did not exist between the public official and the newspaper she was suing.[54] Protections afforded to women public officials like Jovel are inconsistent with the femicide law's purpose: to address Guatemala's high rate of impunity in the disappearances and deaths of women, girls, and journalists.

Rather than using the femicide law as a vehicle to suppress free speech in a country that suffers from a lack of accountability and high impunity rates, Guatemalan public officials should dedicate legislative efforts and financial support to protect vulnerable groups of women. The Convention of Belém do Pará and the femicide law in Guatemala stem from public outcries by international human rights bodies asking that parties to the Convention effectively address and implement solutions not only to punish violent acts against women but to prevent the violence from reaching fatal consequences. The Convention and Guatemala's femicide law were not intended to undercut free speech but to protect women from acts of hatred because of their gender.

II. INTERNATIONAL LAW DISTINGUISHES FREE SPEECH FROM SPEECH THAT DENIGRATES AN INDIVIDUAL

While female public officials in Guatemala aim to get their legal claims adjudicated under the femicide law by stating that they suffered

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[49] *Id.*

[50] Comm. to Protect Journalists*, Guatemalan Minister Uses Law Preventing Violence Against Women to Silence Critical Journalists*, CPJ: COMM. TO PROTECT JOURNALISTS (July 25, 2018, 5:55PM), https://cpj.org/2018/07/guatemalan-minister-uses-law-preventing-violence-a/.

[51] *Id.*

[52] *Id*.

[53] Coronado & Lopez, *supra* note 17.

[54] *Id.*

psychological violence from press publications, it is important to draw a line between free speech and speech that denigrates an individual. It is important to distinguish free speech from hate speech and how courts interpret free speech in many Latin American countries compared to U.S. case law. Journalists who are at the receiving end of these harmful lawsuits by female public officials benefit from this distinction. The distinction protects free speech in publications that inform the public of mismanagement and corrupt actions by public officials. Although several bodies of international law call for the protection of women from violence as a human right, those same bodies do not require that protection at the cost of free speech restrictions.

Many - if not all – claims filed by different female public officials who are misusing the femicide law state that they were victims of psychological violence because of journalists' published content. Judges' granting of restraining orders for these claims further infringes on newspaper outlets' and journalists' freedom of expression. The content of the publications nearly approaches an argument of hate speech by female public officials against journalists. At the same time, they disguise it as suffering psychological violence under the femicide law. Therefore, not only is the distinction between free speech and speech that denigrates an individual an important one, but emphasis is necessary for the analytical framework established by the Inter-American Court of Human Rights, the European Court of Human Rights, and U.S. case law.

The ACHR states that under Article 13, everyone has the right to freedom of thought and expression, including the freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.[55] Further, the IACtHR ruled that any restrictions imposed on freedom of expression are required to show:

i) A compelling government interest;
ii) The means taken to be the least restrictive of the options available;
iii) The restriction is proportionate, and closely tailored to the accomplishment;
iv) The restriction is of a legitimate government objective.[56]

European support for restrictions on freedom of speech and expression is found in the EU Charter of Fundamental Rights, the ECHR, and the ECtHR. Article 11 of the Charter states that "everyone has the right to

[55] Organization of American States, American Convention on Human Rights art. 13, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

[56] Compulsory Membership In An Association Prescribed By Law For The Practice Of Journalism (Arts. 13 And 29 American Convention On Human Rights), Advisory Opinion Oc-5/85, Inter-Am. Ct. H.R. (ser A) ¶ 39 (Nov. 13, 1985).

freedom of expression… [t]his right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."[57] Article 10 of the ECHR states a similar provision for freedom of expression.[58] Further, the ECtHR adopted a 3-part test to conform with Article 10 of the ECHR. In a joint statement with the United Nations' Special Rapporteur and the Organization for Security and Cooperation in Europe (OSCE), the Council of Europe's Representative on Freedom of the Media noted that laws governing hate speech, given their interference with freedom of expression,[59] should be (i) prescribed by law, (ii) pursue a legitimate aim, and (iii) necessary in a democratic society.[60]

Speech that amounts to hate speech lacks protection in both the Inter-American and European systems. Under Article 13, paragraph 5 of the American Convention, "any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar 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."[61] The Special Rapporteurship on Freedom of Expression states that the ACHR could use the principles set out by the International Criminal Tribunal for Rwanda (ICTR) as guideposts to interpret a ban on hate speech under Article 13(5) of the American Convention. The principles outlined by the ICTR, European courts, and the United Nations include three elements: 1) the intent of the language, 2) the context of the expression, and 3) causation.[62] Moreover, the ICTR described that it is important to analyze the purpose behind a material's transmission and stated that if the "material's transmission was of a bona-fide nature—used for historical research or to convey news or information, for example—it was not found to constitute incitement."[63]

The European system illustrates the three elements in practice through case law. The Inter-American court system can use the three elements to draw an appropriate line that makes a distinction between free speech and hate speech that amounts to a deliberate denigration of an individual because of their gender or other minority status. An analysis of several Turkish cases in the European courts, for example, in *Surek v. Turkey (No. 1)*, the court

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[57] 2000 O.J. (C 364) 1.

[58] Convention for the Protection of Human Rights, art. 10, Nov. 4, 1950, CETS No. 213, 213 U.N.T.S. 222.

[59] Simpson, *supra* note 15 at 702.

[60] Joint Declaration on Freedom of Expression and Gender Justice, Org. for Sec. and Co-operation in Europe, May 3, 2022 at 3.

[61] American Convention on Human Rights, *supra* note 55, at 24.

[62] *Id.*

[63] *Id.*

interpreted the element of intent in a newspaper publication of "letters to the editor decrying the Turkish authorities' actions in the troubled southeast of Turkey" that called the authorities a murder gang.[64] The court held that the newspaper was responsible for publishing letters from its readers that contained harmful language because it helped "fuel bloody revenge by stirring up base emotions and hardening already embedded prejudices."[65] Further, the court also noted that while interference with the right to freedom of expression by the government is not allowed for information that merely shocks or offends, this case exceeded that standard because it involved hate speech and a glorification of violence.[66] Judicial support for the intent element demonstrates the need for a holistic view of the language in the expression. The language itself is important to determine where the expression falls.[67]

The ECtHR interprets the second element, the context of the expression, in *Zana v. Turkey*. In *Zana*, a former mayor of the Turkish town of Diyarkabir, told journalists, from the prison in which he was sentenced, that he supported the 'national liberation movement' of the Kurdistan Workers' Party (PKK) but did not support massacres.[68] The court considered the context in which the statement was made to determine the individual's right to freedom of expression and the restrictions. According to the court, the restrictions were legitimate based on national security and public safety grounds due to the 'serious disturbances' taking place in southeast Turkey.[69] The expression's context was interpreted during a climate of violence where such statements could be restricted by the government, given their potential to incite more violence in society. Ultimately, the Court:

> [F]actored in contexts such as the role of political expression or criticism of the government, in which there is room for more protection, and the issue of national security, in which the Court has said there a 'wider margin of [appreciation]' for authorities to restrict freedom of expression.[70]

Finally, the ECtHR interprets the causation element to consider the likely impact of the expression, recognizing that causation in this context

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[64] Sürek v. Turkey (No. 1), App. No. 26682/95, Eur. Ct. H.R. ¶11 (1999); *Zana v. Turkey*, GLOB. FREEDOM OF EXPRESSION COLUM. UNIV. (July 8, 1999), https://globalfreedomofexpression.columbia.edu/cases/zana-v-turkey/.

[65] Sürek App. No. 16682/95, ¶1.

[66] *Id* ¶62.

[67] *Id.*

[68] Zana v. Turkey, App. No. 18954/91, Eur. Ct. H.R. ¶12 (1997). *See also Zana v. Turkey*, GLOB. FREEDOM OF EXPRESSION COLUM. UNIV. (July 8, 1999), https://globalfreedomofexpression.columbia.edu/cases/zana-v-turkey/.

[69] *Id*.

[70] Special Rapporteurship for Freedom of Expression, *supra* note 14, ¶42.

might be relatively indirect. Although protections for freedom of expression afforded by the ECHR are similar to those in the ACHR, the European approach to hate speech fails to provide adequate protection for political speech on controversial issues, including criticism of public officials and government institutions.[71] The definition of what speech constitutes hate speech differs in a case-by-case analysis by the ECtHR.

Additional European case law further distinguishes between free speech and unprotected hate speech. In *Atamanchuk v. Russia*, the court stated that:

> [I]nciting hatred does not necessarily involve an explicit call for an act of violence, or other criminal acts. Attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for the authorities to favour combating xenophobic or otherwise discriminatory speech in the face of freedom of expression exercised in an irresponsible manner.[72]

The court directly addressed what speech amounts to hate speech in *Lilliendahl v. Iceland*, where it held that hate speech falls into two categories.[73] Hate speech, according to the court, falls under either (i) the gravest forms of hate speech or (ii) less grave forms of hate speech.[74] The court included calls for violence, insults, ridicule, and slander as situations when the government can restrict an individual's freedom of expression.[75] Lastly, the court held that "determining whether speech constitutes hate speech is based on an assessment of the content of the expression and the manner of its delivery."[76]

Another form of hate speech interpreted by the European courts is the prohibition of symbols that amount to hate speech. For example, in *Vajnai v. Hungary*, "the applicant had been convicted for wearing a five-pointed red star, which, according to the Government, symbolized a one-party dictatorship."[77] The court held that the individual's right to freedom of expression was violated and considered the country's shift from a communist government to a democracy to emphasize how far-removed the blanket prohibition of the symbol is from a pressing social need to restrict

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[71] Jacob Mchangama & Natlie Alkiviadou, *Hate Speech and the European Court of Human Rights: Whatever Happened to the Right to Offend, Shock or Disturb?*, HUM. RTS. L. REV., 1008, 1010 (2021) (citing Atamanchuk v. Russia, App. No. 4493/11, ¶2 (February 11, 2020), https://hudoc.echr.coe.int/eng?i=002-12721).

[72] *Id*. at 1015. *See also* Atamanchuk v. Russia, App. No. 4493/11, ¶ 2 (February 11, 2020), https://hudoc.echr.coe.int/eng?i=002-12721.

[73] Mchangama & Alkiviadou, *supra* note 71, at 1017 (citing Lillendahl v. Iceland, App. No. 29297/18, ¶ 33 (May 12, 2020), https://hudoc.echr.coe.int/fre?i=001-203199.).

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] Vajnai v. Hungary, App. No. 33629/06, ¶ 51-54 (October 8, 2008), https://hudoc.echr.coe.int/eng?i=001-87404.

this type of speech. In its decision, the court considered the effects of the country's long history under communist rule on its citizens; however, the court could not consider these sentiments alone to limit the right to freedom of expression.[78] In a different approach, compare the court's decision in *Vajnai* to a similar case in U.S. jurisprudence, *R.A.V. v. City of St. Paul,* interpreting symbols as hate speech.[79] *R.A.V. is* distinguishable from European case law because the First Amendment protects content based speech in the U.S., which otherwise European Courts would restrict.

It is important to make this distinction because the foundation of the First Amendment is to prevent the government from restricting free speech based on its content.[80] Regarding hate speech, U.S. courts take a content or point-of-view-based approach. In *R.A.V*., the Supreme Court declared unconstitutional Minnesota's Bias-Motivated Crime Ordinance prohibiting displays of symbols that a person knows or has reason to know arouses anger, alarm, or resentment in others based on race, color, creed, religion, or gender, including symbols such as a burning cross or a Nazi swastika.[81] In today's society, it is difficult to believe that engaging in the act of cross-burning on an African American homeowner's property would fall under the umbrella of protected speech. The Supreme Court stated that this form of speech often amounts to the fighting words doctrine, which was not a category of speech protected by the First Amendment.[82] Fighting words are those which, by their very utterance, inflict injury or tend to incite an immediate breach of the peace.[83] Although the speech in *R.A.V.* was unprotected, the Supreme Court stated that the First Amendment limits the government's ability to draw content-based distinctions.[84] Despite what racial implications the burning of the cross may have symbolized, the government generally cannot regulate speech based on hostility or favoritism towards the underlying message expressed.[85]

The Inter-American and European court systems take on a case-by-case human rights approach. The U.S. also has a case-by-case approach, but instead of being human rights focused, has established several tests to determine what constitutes protected and unprotected speech, including the bad tendency test, the clear and present danger test, and the imminent lawless

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[78] *Id.*

[79] *Compare* Vajnai, *supra* note 77, *with* R.A.V. v. City of St. Paul, 505 U.S. 377, 377 (1992).

[80] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1186 (6th ed. 2020).

[81] *See* R.A.V., *supra* note 79, at 377.

[82] *Id.*

[83] *See* Thomas Kleven, *Free Speech and the Struggle for Power*, 9 N.Y.L. SCH. J. HUM. RTS. 315, 347 (1992).

[84] *Id.*; *accord* ERWIN CHEMERINSKY, CONST. LAW; PRINCIPLES AND POLICIES 1056 (Richard A Epstein et al. eds., 6th ed. 2020).

[85] *See* CHEMERINSKY, *supra* note 84, at 1057.

action test.[86] Despite the evolution of its legal standard, "the United States remained consistent in refusing to distinguish protected from unprotected speech on the basis of the point of view espoused."[87]

III. INTERNATIONAL HUMAN RIGHTS LAW PROTECTS JOURNALISTS ENGAGING IN CRITIQUES OF THE CONDUCT OF PROMINENT WOMEN

International law supports freedom of expression when journalists critique female public officials. The ACHR and the ECHR have similar articles that protect freedom of expression for all individuals. Under Article 13 of the ACHR, everyone has the right and freedom of thought and expression. This right includes the freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.[88] Further, Article 13 states that although freedom of expression is not subject to prior censorship, it should be limited to meet the following: i) it must be provided for by law; ii) it must be directed at attaining a legitimate purpose and be suitable for such; iii) it must be necessary; iv) it must be proportional.[89]

Journalists in Latin America have long faced the consequences of reporting on government corruption and exposing actions by public officials that affect society's welfare. Freedom of information access, one of the aspects of expression, allows individuals to scrutinize the state acts.[90] Guatemala is an example of a country that exercises oppressive measures against journalists to censor the free flow of information. In Guatemala, like many countries in Latin America, the government's corruption and actions by public officials have rippling effects on its citizens. Moreover, the use of criminal laws against journalists creates a chilling effect on democratic values and rights to free speech. Further, these criminal laws limit the public's access to information, and the right to a life free from violence and oppression. They threaten the safety of journalists and their families. In Latin America, many journalists experience backlash and repercussions for exposing corrupt maneuvers by public officials that results in living their lives in exile.

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[86] Kamatali, *supra* note 6, at 722.

[87] *Id.*

[88] American Convention on Human Rights, *supra* note 55, at 148.

[89] Global Freedom of Expression, *Uson Ramirez v. Venezuela,* GLOB. FREEDOM OF EXPRESSION COLUM. UNIV (Nov. 20, 2009), https://globalfreedomofexpression.columbia.edu/cases/uson-ramirez-v-venezuela/.

[90] *See* Viviana Krsticevic, *How Inter-Am. Hum. Rts. Litig. Brings Free Speech to the Americas*, 4 SW. J.L. & TRADE AM. 2019, 210 (1997).

Judicial decisions by the IACtHR provide support for the right to limit the freedom of expression and restrict this right in a more subtle manner, instead of restricting speech directly. For example, in *Kimel v. Argentina*, the Court upheld protections for a journalist's right to freedom of expression after the government charged him criminally with defamation.[91] In *Kimel*, a journalist published a book where he criticized the conduct of a criminal judge who was in charge of investigating a massacre.[92] The Argentinian government criminally charged and convicted the journalist for the crime of false imputation of a publicly actionable crime (*calumnia*) and the crime of defamation (*injuria)*.[93] Due to harsh and often disproportionate criminal charges against journalists who publish opinions or information guidelines, the criminal charges must comport to guidelines by the IACtHR.

The test established in *Kimel* to determine appropriate free speech restrictions should similarly apply to determine what constitutes hate speech against female public officials and free speech by journalists in Guatemala. In *Kimel*, the Inter-American Court followed a standard three-part test to determine if the limitation and interference with the right to freedom of expression were permissible under the ACHR.[94] The test consists of: i) the limitation or restriction must be established by law; ii) it must seek to achieve a legitimate purpose and be suitable for attaining this end; iii) it must be necessary to achieve its purpose.[95] In applying the test, the Court held that the State satisfied the first part of the test because the crime of *injuria* and *calumnia* existed in Argentina's criminal law.[96] Further, the Court recognized the protections provided in Articles 11 and 13 of the ACHR, which include the protection of an individual's honor and reputation.[97] Nonetheless, the Court determined that the government's punishment against the journalist was unnecessary and disproportionate, and violated his right to freedom of expression.[98] To determine the proportionality of the punishment against the expression by the journalist, the Court stated that it was necessary to analyze the following elements: i) the degree of impairment of the rights at stake, establishing whether the extent of such impairment was serious, limited, or moderate; ii) the relevance of the satisfaction of the

[91] Kimel v. Argentina, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 177, 18 (May 2, 2008).

[92] *Id.* at 22. *See also* Special Rapporteurship for Freedom of Expression, *supra* note 14.

[93] Kimel*, supra* note 91, at 43. *See also* Global Freedom of Expression, *Kimel v. Argentia*, GLOB. FREEDOM OF EXPRESSION COLUM. UNIV (May 2, 2008), https://globalfreedomofexpression.columbia.edu/cases/kimel-v-argentina/.

[94] Kimel, *supra* note 91, at 56.

[95] *Id.* at 59-80.

[96] *Id.* at 67.

[97] *Id.* at 71.

[98] *Id.* at 78-80.

opposing right, and iii) whether the satisfaction of the latter justifies the restriction of the former.[99]

In applying a similar test to distinguish between hate speech and free speech, courts should look to the context in which the person made the expression, including whether the person is a government official. In their capacity as public officials, the government has a responsibility to protect the rights of their citizens and contribute to the welfare of society rather than using the laws in a state's criminal system against its citizens simply because public officials dislike critiques about their work and actions while in a position of power. The *Kimel* court discussed the content of the expression in the context of critiquing a public official and stated that expressions concerning the suitability of an individual for occupying public office or the acts carried out by public officials in the exercise of their duties enjoy a greater degree of protection.[100] As the Court in *Kimel* states, "in the democratic debate involving public interest matters, protection is extended not only to harmless expressions but also to expressions that shock, irritate or disturb public officials."[101] While the Inter-American court system follows strict guidelines to protect freedom of speech, it also established an important test in *Kimel* that serves to reel in disproportionate and unnecessary criminal sanctions against journalists who exercise their right to free speech. It is important for the Inter-American human rights system to recognize and impose precedential guidelines on Latin American governments that continue to criminalize free speech and disguise critiques of public officials under the pnishment of hate speech.

In Latin America, "[c]riminal libel law and its close relative, the insult law, are the most frequently utilized to attack the press."[102] More importantly, "criminalization of speech is the most serious problem that the media faces, [including] the large number of legal provisions regulating the media, the broad and ambiguous definitions contained therein, and the lack of legal defenses."[103] Despite previous reports that analyze the deterring effects of criminal laws that punish journalists for publications, including the ramifications they face legally and personally, "[c]riminal libel is most egregious when the criminal complaint is presented by public officials against media defendants."[104] While many existing criminal laws in Latin America reflect an oppressive government against its citizens, several countries have abolished insult or disrespect laws (*desacato*) from their

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[99] *Id.* at 84.
[100] *Id.* at 86.
[101] *Id.* at 88.
[102] Jairo E. Lanao, *Legal Challenges to Freedom of the Press in the Americas*, 56 U. MIAMI L. REV. 347, 348 (2002).
[103] *Id.* at 356.
[104] *Id*. at 361.

criminal system. Countries like Chile, Paraguay, Costa Rica, and Peru have abolished *desacato* laws[105] to comport with Article 13 of the ACHR. According to the Special Rapporteurship:

> [I]t is necessary to decriminalize speech that criticizes state officials, public figures, or, in general, matters of public interest; the foregoing is so because of the paralyzing effect or the possibility of self-censorship caused by the mere existence of laws that provide criminal penalties for those who exercise the right to freedom of expression in such a context.[106]

In 2006, the Guatemalan Constitutional Court declared *desacato* [disrespect], provisions that criminalize free speech for the critique of public officials to be unconstitutional.[107] In its ruling, the court reasoned that their role as public officials subjects them to public scrutiny, and disrespect laws are an attack on the freedom of expression and limit the right to information for the public.[108] The court found support for its ruling in favor of the right to freedom of expression in U.S. case law, citing *New York Times v. Sullivan*: "debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[109] The elimination of *desacato* laws by several Latin American countries is a step in the right direction to eliminate the oppressive culture that allows the government and public officials to use the laws in place as a sword to protect themselves against public criticism. However, the lawsuits filed by public officials under Guatemala's femicide law are essentially being used to work around this ruling and to manipulate the law in their favor to avoid scrutiny of their actions.

Public officials carry important roles used to strike balance in a democratic society. Many of the court decisions rendered by the Inter-American court system repeat verbatim that freedom of expression is an important cornerstone of a democratic government. Despite many Latin American governments rooted in authoritarian regime policies, international human rights law has placed a significant responsibility on these

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[105] Oliver Spencer, *Index on Censorship: Global Snapshot*, (May 1, 2009), https://journals.sagepub.com/doi/pdf/10.1080/03064220902938803.

[106] Special Rapporteurship for Freedom of Expression, *supra* note 14, at 22, https://www.oas.org/en/iachr/expression/showarticle.asp?artID=310&lID=1#_ednref19.

[107] Comm. to Protect Journalists, *In Guatemala, a Welcome Decision to Strike Down 'Disrespect' Laws*, COMM. TO PROTECT JOURNALISTS (Feb. 3, 2006, 12:00 PM), https://cpj.org/2006/02/in-guatemala-a-.

[108] Global Freedom of Expression, *Action Challenging the Constitutionality of the Offense of Crim. Defamation in Guat.*, GLOB. FREEDOM OF EXPRESSION COLUM. UNIV. (Feb. 1, 2006), https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2016/04/Judgment-1122-2005.pdf.; *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 254 (1992).

[109] N.Y. Times Co., 376 U.S. at 270.

governments to continue advocating for change regarding basic human rights. Like the Inter-American court system, support for journalists that engage in critiques of public officials, including female public officials, can be found in the ECHR and the ECtHR. The ECHR describes journalists as "watchdogs" of democracy who have a duty to disseminate information and not to overstep certain bounds by harming their reputation and infringing on the rights of others or disclosing confidential information.[110]

The ECtHR in *Cumpana and Mazdre v. Romania,* ruled that there was a violation of Article 10, freedom of expression, of the ECHR.[111] In *Cumpana*, two journalists published an article in a local newspaper that exposed the corrupt government activities of two public officials, a former deputy mayor and a female judge.[112] The government convicted the journalists for insult and defamation, and sentenced them to serve a 14-month prison sentence.[113] The Court held that it must "exercise the utmost caution where the measures taken or sanctions imposed by the national authorities are such as to dissuade the press from taking part in the discussion of matters of legitimate public concern."[114] Further, the court stated that it is imperative to analyze the chilling effect that disproportionate criminal sanctions have on the media and society.[115]

International human rights laws are designed to protect the right to freedom of expression, including the dissemination of information by journalists regarding government actions. If the government interferes with media and journalistic reports by prohibiting its purpose in society to inform the public of any wrongdoings by the government, then public officials receive leeway to remove any checks on their power and carelessly trample democratic values.

As is clear from the above, courts around the world recognize that the right to free speech is necessary to protect journalists for the important work they do in exposing corruption in governments. Guatemala is one of the countries that has acknowledged this right. However, female public officials in Guatemala are undermining this step forward by utilizing a law for the protection of women to criminalize speech by investigative journalists. The thrust of the femicide law is to protect women from the varying sorts of

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[110] Ubeda de Torres, *supra* note 10, at 8.

[111] Cumpana and Mazare v. Rom., 15 Eur. Ct. H.R. (2004). App. No. 33348/96, at 19 (Dec. 17, 2004), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-67816%22]}.

[112] *Id.* at 115; *see also* Global Freedom of Expression, *Cumpana and Mazare v. Rom*, (Dec. 17, 2004), https://globalfreedomofexpression.columbia.edu/cases/case-cumpana-mazare-v-romania/.

[113] Cumpana and Mazare v. Rom., 15 Eur. Ct. H.R. (2004). App. No. 33348/96, ¶ 37 (Dec. 17, 2004), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-67816%22]}.

[114] *Id.* at111.

[115] *Id.* at 114.

violence they suffer from in Guatemala. Not to stifle free speech or to prevent journalism. By perverting the law in this way, female public officials undermine their credibility, the femicide law, its purpose, and ultimately, democracy.

CONCLUSION

It is not enough that current international case law and international human rights conventions insist on the protection of violence against women, girls, children, and minorities in the face of alarming impunity rates in Latin American countries. Although the Inter-American Convention on Human Rights and European Convention on Human Rights provide appropriate guidelines to protect freedom of expression and international case law provides legal standards to determine what distinguishes free speech from hate speech, Guatemala's public officials have ignored this distinction. Instead, they weaponized Guatemala's efforts to eradicate violence against women for their own personal needs to censor investigations about their wrongdoings. Public officials who are misusing the femicide law that Guatemala adopted and implemented as another mechanism to address the impunity rates of missing and murdered women in the country, are contributing to the problem and not the solution. As leaders of the country, Guatemalan public officials should represent the interests of society and should promote and protect citizens' interests through the appropriate use of the laws and its judicial system.

Moreover, the adoption of the Convention of Belém do Pará is to address violence against women in vulnerable circumstances that often result in a woman's disappearance or murder. With respect to impunity rates, many Latin American countries also have high impunity rates for violence against journalists. Therefore, public officials should focus on using the laws as a shield to protect citizens and not as a sword to attack members of society because they disagree with critiques of their questionable work.

Guatemala must reexamine the provisions in the Convention and recognize the misuse of the femicide law by public officials who are often immediately and unjustly granted protections by the courts. Guatemala should not undermine or misapply the protections under the Convention to censor free speech. International law protects journalists who are exercising their right to freedom of expression and aims to prevent unlawful criminal charges against them as well. Additionally, the misapplication of the femicide law should not be used by public officials to inhibit the free flow of information.