



SPANISH CONSTITUTIONAL COURT
Cabinet of the President
Press Office

INFORMATION NOTE No. 66/2015

THE TC REFUSES TO GRANT CONSTITUTIONAL PROTECTION TO TWO PERSONS FOUND GUILTY OF BURNING A PICTURE OF THE KING AND QUEEN IN GERONA

The Plenary Meeting of the Constitutional Court (TC) has refused to grant constitutional protection to Jaume Roura Capellera and Enric Stern Taulats who, in 2008, were convicted by the Spanish National Court as the authors of a criminal offence against the Crown. The appeal for constitutional protection was brought both against the first instance resolution delivered by the Central Criminal Court, and against the decision of the Plenary Meeting of the Criminal Chamber of the Spanish National Court, which upheld the conviction. The reporting judge, Juan Antonio Xiol, has announced his particular dissenting vote, as well as Judge Encarnación Roca and the Vice President, Adela Asúa. The latter's opinion has been endorsed by Judge Fernando Valdés Dal-Ré.

According to the description of proven facts in the challenged judgments, on 13 September 2007, at the end of a demonstration protesting against the visit of the King and Queen to Gerona, the appellants, who had covered their face, broke into a subsequent meeting and burnt an official picture of King Juan Carlos and Queen Sofía, after placing it upside down. They were convicted to serve 15 months' imprisonment for these facts (this punishment was later replaced with a fine), on the grounds of a criminal offence against the Crown. In their appeal, they claimed that their freedom of expression (Art. 20.1.a)) was breached in relation to their ideological freedom (Art. 16.1 CE).

The judgment explains that, based on consolidated case-law, the Constitution protects the freedom of expression as "*a guarantee for "the formation and existence of a free public opinion"*". Consequently, this right includes the freedom of criticism "*even if it is tasteless and may disturb, worry or disgust to whom it is addressed*", as well as the spreading of ideas that "*conflict with, run contrary to or disturb the State or any part of its population*". Nevertheless, the freedom of expression also has its limits. The Constitution "*does not recognise an alleged right to insult*" and, consequently, the case-law has excluded from constitutional protection "*all clearly slanderous expressions or which are unrelated to the ideas and opinions presented, or which are unnecessary to present these*". The European Court of Human Rights (ECHR) believes it necessary to "*sanction and even prevent all forms of expression that spread, incite, encourage or justify intolerance-based hatred*".

In light of this doctrine, the Court has examined whether burning a picture of the King and Queen "*is a criminally irreproachable conduct due to constituting a legitimate exercise of the freedom of expression*" or whether, on the contrary, "*said conduct is intrinsically slanderous and degrading, exceeding the constitutional bounds*" of this right.

First of all, the judgment explains that the Criminal Code grants reinforced legal protection to the Crown "*in the same way as other State Institutions, in order to defend the Constitutional Order*"; this is why a crime of offence against the Crown is not included in the Chapter on crimes against honour (Title XI Criminal Code) but amongst crimes committed against the Constitution (Title XXI). However, this protection under criminal law "*does not mean that the King, as the State's senior representative and a symbol of its unity, should be*

excluded from criticism, particularly by those who are legitimately against the constitutional structures of the State, including the monarchy”.

In this case, destroying an official portrait “*bears inevitable and marked symbolism*”. Whether it falls within the right of freedom of expression, or is classified as an act inciting to violence or hatred towards the Crown and the King depends, according to the Court, “*on the context of the circumstances of the case*”.

The sections of the proven facts in the challenged judgments describe how the appellants, with their face covered, set fire to a picture of the King and Queen that they had previously placed upside down in the main square of the city of Gerona. The scene, according to the Court, sends a message of hate against the Monarchy. The foregoing is reinforced by the fact that the plaintiffs acted “*in a premeditated manner*” at the end of a prior demonstration, held to protest against the official visit of the King and Queen to the city, “*the legitimacy of which is not in question*”, says the Court. “*The photograph was not instantaneously set alight in the context of the demonstration and further to a criticism on the State’s constitutional model*” but, rather, “*is the fruit of previously designed activity aimed at showing a greater level of hostility against the Crown as an institution*”.

The Plenary Meeting has also taken into account the absence of any “*expression, speech, message or opinion suggesting a censure or politically articulated challenge against the Monarch or the King and Queen; they simply acted with the purpose of inciting exclusion, using a gloomy mis-en-scène with violent connotations*”; these circumstances “*significantly*” distinguish this case from the matter settled by the ECHR in March 2011 (Otegui vs. Spain), where the appellant was an elected representative who “*expressed his opinion on a matter subject to public debate*”.

All of this led the Court to affirm that the facts are “*beyond the bounds of a legitimate exercise of the right*” of freedom of expression (Art. 20.1.a) CE).

Finally, the Plenary Meeting disagrees that the challenged judgments infringe the right of ideological freedom, as “*a reproach in criminal law (...) is not based on the appellants’ ideological positioning*” but is addressed “*exclusively, to the incitement to hatred and exclusion of a section of the population, through an act involving official portraits of the King and Queen*”. “*Under Spanish law*”, it explains, “*there is no prohibition or limitation on the constitution of political parties that reflect republican or secessionist ideas, or their public expression, as evidenced by the demonstration*” held right before the punished acts. It adds that “*although there is no evidence of incidents of a public order, the destructive connotation inherent to the burning of a picture of the King and Queen is clear and, consequently, this action could have encouraged a violent reaction amongst those present, incompatible with a peaceful social climate, reducing the trust placed in democratic institutions*”, or “*could have triggered a feeling of disdain or even hatred against the King and Queen and the institution they represent*”, exposing them to “*a possible risk of violence*”.

In his particular vote, the Reporting Judge, Juan Antonio Xiol, states that protection should have been granted due to a breach of the right of freedom of expression. In his opinion, the judgement “*trivializes the idea of hatred*” given that, he explains, ECHR case-law has interpreted this as a message inciting violence for “*ethnic, religious, national, racial or sexual preference (...)*” reasons. In this specific case, the conduct of the applicants for protection “*did not entail, despite their hostility towards the monarchy as an institution, the spreading of incitement to violence against the Crown or the King and Queen, nor did it threaten them in any way*”; rather, “*it was merely an act of rejection*” that did not “*per se, justify any restriction on the exercise of the freedom of expression by imposing a criminal sanction*”.

The Judge Encarnación Roca considers that the judgement's arguments should have taken into account "*as a basic starting point*" the right to ideological freedom, without "*absorbing it*" into the freedom of expression, which would have led to a different ruling. She affirms that the only limit imposed by the Constitution on ideological freedom is the need to "*maintain the public order*" which, according to the case-law, discloses "*not only the relevance of these rights of freedom as a fundamental component of any democratic coexistence (Art. 1.1 CE)*", but also the exceptional nature of this exclusive limit on the exercise of such right. In this specific case, the Judge points out, the burning of a portrait constitutes a symbolic manifestation of anti-monarchy ideas, carried out at the end of a demonstration held to protest against the visit of the King and Queen, where no disturbances arose.

The Vice President of the Court, Adela Asúa, whose particular vote was endorsed by Judge Fernando Valdés, considers that protection should have been granted on the grounds of a breach of the freedom of ideology and expression, as the conduct for which the plaintiffs were punished "*is part of a broad scope of protection guaranteed by the Constitution in relation to the exercise of said freedoms*". She explains that, in the case of a manifestation of opinions on political or institutional matters, the freedom of expression should only be overlooked if the message incites to violence or involves "*a hate speech*"; in her opinion, the foregoing may not be inferred from a reading of the facts proven in the challenged resolutions. On the other hand, she considers that the judgment has failed to provide a response to the plaintiffs, who were punished for a crime of offence against the Crown, rather than incitement to hatred.

Madrid, 31 July 2015