



INFORMATIVE NOTE No. 31/2017

THE CONSTITUTIONAL COURT GRANTS PROTECTION TO A MEMBER OF THE MILITARY PUNISHED WITH ONE MONTH'S ARREST FOR THE CONTENT OF AN E-MAIL

Chamber Two of the Constitutional Court has upheld the *amparo* appeal filed by a member of the military against punishment of one month and three days' arrest, ordered as a consequence of circulating, by e-mail, a message that was partly considered insubordinate and based on false statements. The judgment considers that the sentence triggering the sanction is protected by the freedom of expression- as it involves a value judgment, with no informative content, and is consequently not bound by a constitutional requirement of veracity- and does not contain any disrespectful or degrading expressions exceeding the scope of protection derived from Art. 20.1.a) of the Spanish Constitution (*Constitución Española* – "CE"). Pedro González-Trevijano acted as Reporting Judge in the resolution.

The facts giving rise to this *amparo* appeal took place as a result of the appellant's circulation, in his position as provincial delegate of the Unified Association of the Spanish Military (AUME, by its Spanish acronym), of an e-mail where, amongst other points, he affirms, with regards to a female colleague, delegate of women's affairs, that "*they are making her life more difficult due to association activities*". The claimant was sanctioned as the author of a serious offence, consisting of "*making insubordinate claims, petitions or representations, or based on false statements*". This sanction was ordered by the Chief General of the Fighting Air Squad and was consequently endorsed by the Chief of Staff of the Air Force, by the Central Military Court and by the Supreme Court.

In this appeal, the plaintiff considers that the resolutions challenged infringe the principle of legality in sanctioning matters (Art. 25.1 of the Spanish Constitution), because the expression triggering the sanction was a value judgment and, as such, could not amount to a false statement in the terms foreseen in the Act on the Disciplinary Regime applied to the Armed Forces.

First of all, the Court analysed the nature of the message and concluded that it had two parts: the first, clearly informative part, scheduled a place and time to convene the next meeting; and a second part, evidencing his support to two association colleagues, to include the female delegate for women's affairs. It is in this second paragraph where a sentence is included leading to the sanction: "*they are making her life more difficult due to association activities*". In this regard, the Chamber considers that it is complementing the support given by the appellant to his female colleague, as it clarifies the reason why she deserves to be backed up by the association.

The judgment considers that the disputed sentence should be appraised from

the point of view of the right to freedom of expression (Art. 20.1.a CE), rather than the right to information, *“as certain aspects of the circular (...) naturally suggest that said sentence is nothing but a value judgment devoid of any informative purpose”*. It will therefore be analysed as part of the freedom of expression, subject to the variations established by constitutional doctrine for military staff.

As explained by the Chamber, both constitutional doctrine and the case-law laid down by the European Court of Human Rights (ECHR) consider that the specific features of military status have led to establishing, on the freedom of expression of the Armed Forces, a *“legitimate”* limit that is *“specifically justified as a guarantee of the necessary discipline”*.

In particular, constitutional doctrine has indicated that, in military matters, the scope of protection of the right to freedom of expression will exclude *“any value judgments, representations or opinions of a critical nature made in an inconsiderate or offensive manner towards persons, authorities or institutions or, where appropriate, which lack the restraint or moderation required in the circumstances”*.

In this case, and after dismissing the need for veracity as the matter involves a value judgment, the analysed sentence (*“making her life more difficult due to association activities”*) suggests that the plaintiff *“merely announced that the activity carried out by the female delegate for women’s affairs had provoked adverse reactions against her”*, without specifying what such reactions apparently consisted of or who was responsible for them. Although the sentence makes a criticism of persons who are necessarily in the military, *“it does not contain any disrespectful or degrading expressions”*.

Furthermore, the paragraph to which the sentence belongs shows *“an evident intent to show solidarity towards two members of the AUME”*, particularly considering that it is made by a manager in said association, i.e. the plaintiff.

Further to the foregoing, the Court has declared that the content of the e-mail sent by the appellant is protected by the right to freedom of expression (Art. 20.1.a CE) and has overruled the challenged resolutions.

Madrid, 16 May 2017.